

## FEATURE ARTICLE

### *Pooled Special Needs Trusts for Clients Receiving Public Benefits*

by **Carol S. Battaglia**  
Column Editor: **Kerry Hoxie**

*Carol Battaglia has been in private practice as an estate planning practitioner for over 17 years. She frequently assists trial lawyers in establishing court-created special needs trusts, designing structured settlements and implementing other strategies to receive an injured party's settlement funds while maintaining eligibility for government assistance benefits. Ms. Battaglia is a member of the Estate Planning, Probate, and Trust Section of the San Diego County Bar Association, the Estate Planning Council of San Diego, and the Southern California member of the Special Needs Alliance, a national network of lawyers dedicated to Disability and Public Benefits Law, and works with the Special Needs Trust Foundation of San Diego. She may be reached by email at: [carol@carolbattagliaw.com](mailto:carol@carolbattagliaw.com).*

If you have a client who receives “needs based” public benefits such as Supplemental Security Income (“SSI”), Medi-Cal or Section 8 housing, he or she will likely benefit from using the Special Needs Trust Foundation (“SNTF”) of San Diego. When these clients receive a personal injury settlement, a worker’s compensation settlement, an inheritance, or a retroactive Social Security lump sum payment, they can establish a self-settled pooled special needs trust through the SNTF, often without a court petition.

A pooled trust consists of a master trust document and an individual joinder agreement which is signed by the beneficiary or his or her legal representative. A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trustee pools these accounts. Statutorily, pooled special needs trusts are created under 42 U.S.C. § 1396p (d)(4)(C) and are commonly referred to as “d4C trusts”.

#### **Background of SNTF**

The SNTF is a non-profit organization made up of approximately 10 local agencies who serve the disabled. It has been in existence since 1989, but it has only been accepting first-party or self-settled special needs trusts since 2006. This type of trust occurs when the funds actually belong to the beneficiary, such as in a personal injury law suit. Since 2006, the SNTF already has received more than \$2 million in trust for the benefit of 35+ beneficiaries -- so this pooled trust is clearly filling an unmet need for San Diego County.

#### **Ordinary Special Needs Trust**

The ordinary special needs trust is established by a parent, grandparent, legal representative or the court for an individual who is under 65 years of age with his or her own funds and for his or her own benefit. The trust has to specify that when the trust terminates (usually at death), all amounts remaining in the trust, up to an amount equal to the total medical assistance paid out on behalf of the individual, is repaid to Medi-Cal. The trust is usually established through a court proceeding and is under continued court supervision, which can be expensive and can cause delays in distributions. Furthermore, surprisingly, a competent individual can’t establish his or her own special needs trust.

If the individual does not have a parent or a grandparent, then the trust must be established using a power of attorney which gives the agent the authority to petition the court to establish the special needs trust.

### **How a Pooled Special Needs Trust is Different**

A pooled special needs trust doesn't avoid the Medi-Cal payback provision, but there are some important differences:

1. The trust can be established by the individual, if he or she is competent.
2. No court proceeding is required if the individual is competent.
3. It can be used for a person who is over 65 years of age.
4. It avoids the expense of court-supervision and bonding.
5. It can and often should be used for smaller settlements (less than \$150,000) because the administrative costs are lower, but the funds are professionally managed.

### **When Attorney Should Consider a Pooled Special Needs Trust**

Whenever an attorney has or will be receiving litigation proceeds for a client who wants to remain eligible for public benefits, or become eligible in the future, and he or she should consider using a pooled special needs trust if **any** of the following situations also exists:

1. The client is competent.
2. The settlement is less than \$150,000.
3. The client is competent, the settlement is more than \$150,000.
4. The money is already in your trust account (so time is of the essence) and the client is competent..
5. Your client is over 65 years old.

### **What Are Special Needs?**

"Special needs" is a very broad category and can vary significantly from one beneficiary to another. In general, the term refers to the requisites for maintaining a beneficiary's health, safety and well being when, in the discretion of the Trustee, such requisites are not provided by any public agency. Examples of special needs can include basic living needs such as clothing, dental care, medical care, custodial care, support services, and similar care not provided by public benefits programs. A special needs trust can even provide for a beneficiary's food and shelter costs under the right circumstances. This type of trust doesn't count as an asset in determining the individual's eligibility for public benefits because title is held in the name of the Trustee and the beneficiary does not have the right to demand distributions.

### **Procedure for Joining the SNTF**

The beneficiary or legal representative must consult with an attorney before joining the SNTF. This is to insure that the beneficiary is aware of all the alternatives to a special needs trust, to explain the pooled special needs trust, to assist in filling out the joinder agreement and to present it to the Board of Directors of the SNTF; and, finally, to report the establishment of the special needs trust to the appropriate governmental agencies.

The minimum amount to fund a trust is \$5,000. However, unless there are special circumstances, it isn't cost effective to fund it with less than \$35,000 to \$40,000. If the client is receiving less than that, then a "spend down" of the funds is usually a better alternative.

Once the joinder agreement is filled out, the Board of Directors must vote to accept the agreement. After it is accepted, a representative from the Board and the Administrative Assistant meet with the beneficiary and the family to discuss how the funds will be used. Many of the beneficiaries' bills will be set up to be paid monthly. Requests for distributions of less than \$500 can be approved by the Administrative Assistant. Requests for distributions of more than \$500 are approved by a majority vote of the Board which can be accomplished quickly via the Internet.

More information about the SNTF, as well as a list of attorneys who are familiar with the SNTF, can be found at the website: [www.specialneedstrustfoundation-sandiego.com](http://www.specialneedstrustfoundation-sandiego.com)

There is a one time joinder fee of \$1,000. The administrative fees are approximately 1.5% per year or a minimum of \$1,500, paid in monthly installments. Additional fees may apply in certain situations such as if there is a paid caretaker, if social work services are necessary, or if preparation of a tax return is required. The SNTF invests the funds through Smith-Barney and their investment policy can be viewed at the website.

## **CONCLUSION**

The SNTF is a good resource for plaintiff's attorneys who have clients that need to protect their public benefits and at the same time establish a trust that is professionally managed by an organization that understands their client's special needs. Additional information regarding the SNTF can be found in its website (see above), or by contacting Leslie Autry, Administrative Assistant for SNTF at (619)201-2672, or Carol S. Battaglia at (858)689-0613 or email: [carol@carolbattaglia.com](mailto:carol@carolbattaglia.com).