

# The Basics of Special Needs Trusts



DENISE FIKE, CEO

FIRST MARYLAND DISABILITY TRUST, INC.

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- All
- Bankruptcy
- Debt Collection
- Deed Transfer
- Estates
- Expungement
- Family
- Foreclosure/Tax Sale
- Landlord-Tenant
- Tax
- Other Category

   

### Single Mom Can't Afford A Large Payment

Client is being sued by her former landlord for \$4146.59. She admits she owes some but not all of the debt and is hoping to reduce the amount she has to pay. Court date set for 7/20/18 at 1:30pm.

**Location:** Baltimore County  
**Ref. #:** 18-0138741  
**Case Type:** Debt Collection

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### I Admit To The Debt, But Can We Negotiate A Settlement.

Client is being sued for \$933.00 for failing to make payments towards a debt. Client agrees that she owes the debt. There are no judgments entered in the case. Client has paid approximately \$300 toward the debt and would like to work out a settlement for the remaining. Affidavit Judgment Hearing: 7/23/18 at 1:00PM. Trial: 8/3/18 at 9:00AM.

**Location:** Washington  
**Ref. #:** 18-0138685  
**Case Type:** Debt Collection

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### You Have Left Me No Other Choice But To File For Rent Escrow.

Client wishes to initiate a rent escrow case after nothing has been done to make repairs. Client has lived in the property since October 2016 and problems in the unit began in December 2017. To date LL, has not tried to resolve the mold issue, flooding, falling attic stairs, and the hole in the ceiling.

**Location:** Baltimore County  
**Ref. #:** 18-0138671  
**Case Type:** Landlord-Tenant

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### Landlord Requests The Move, Now Refusing My Security Deposit.

Client filed suit against her previous Landlord for the return of her security deposit and three times the amount. Client only lived in the property for 3

### Looking Towards A Fresh Start

Client seeks help with expunging her criminal record.

### Here's To New Beginnings!

Client seeks to go over her criminal record with a volunteer and to have the eligible cases removed from her record.



# MVLS Clients and Special Needs Trusts

- Many of our clients have disabilities or have family members who have disabilities
- Approximately 30% of our clients self-report as having a disability
- We offer estate planning services as a way to help families transfer intergenerational wealth, particularly families of color
- Many families who come to us ask about how to best plan for a special needs family member



**FIRST MARYLAND**  
**Disability Trust**

**MVLS**  
May 24, 2023

# First Maryland Disability Trust, Inc.

## *MISSION STATEMENT*

It is the mission of the First Maryland Disability Trust, Inc. to enhance the quality of life, autonomy and dignity of Marylanders with disabilities by offering cost effective trust services to protect, manage and use trust assets for our beneficiaries while preserving their eligibility for public and private benefits.

- First Maryland Disability Trust, Inc., a Maryland Corporation, is a Non-Profit with IRS 501(c)(3) status.

# Areas to focus on . . .

## Benefits

- What are they and intersection with SNT's

## Special Needs Trusts

- First Party, Third Party, Pooled

## Guardianship

## Litigation

## ABLE accounts





# Public Benefits – What are They?

- Help from the government for basic needs like
  - Health care
  - Housing
  - Food
  - Cash
- Federal, state or local government
- Means tested v. Entitlement

BENEFITS



# Means Tested v. Entitlement

## MEANS TESTED BENEFITS

### Title XVI

- Social Security Supplemental Income (SSI) Medicaid/Medical Assistance (MA)
  - Waiver Programs
  - Long Term Care
- Food Stamps (SNAP)
- Subsidized housing (HUD)

## ENTITLEMENT BENEFITS

### Title II

- SSA – retirement
- Social Security Disability Income (SSDI)
- Disabled Adult Benefits
- Medicare



# OBRA 93

The Omnibus Budget Reconciliation Act of 1993 (OBRA 93) created exceptions to general rule that assets of an individual placed in trust are counted for determining eligibility for Medicaid and defined certain “Safe Harbor” trusts.

Authorized under :

- Social Security Act 42 U.S.C. §1396p (d)(4)(a) and (d)(4)(c)
- Maryland Regulation COMAR 10.09.24.08-2B(6)(b) and (c)

The same protections were extended to Supplemental Security Income under Foster Care Independence Act of 1999, effective January 1, 2000.

# Did you know...

- Maryland encourages the use of SNT's!
- MD Ann Code, E&T §14.5-1002(b)
  - It is the policy of the State to encourage the use of a special needs trust or supplemental needs trust by an individual of any age with disabilities to preserve funds to provide for the needs of the individual not met by public benefits and to enhance quality of life.

# Types of Trusts

## First Party Trust

- Beneficiary's own funds
- Stand Alone Trust [(d)(4)(A)]
- Pooled SNT [(d)(4)(C)]
- Medicare Set Asides (“MSA”)
- Revocable Trusts
- (C)(2)(b)(iii) and (iv) (exception to “beneficiary’s” own funds – but a payback account)

## Third Party Trust

- Everyone else's funds
- Testamentary trusts
- Maryland Discretionary Trust Act
- Pooled Third Party SNT



# First Party (d)(4)(A)

- Trust is created by using assets belonging to the individual / beneficiary of the trust.
  - Funds could come from a personal injury settlement, medical malpractice, product liability, inheritance, etc.
- The trust must be funded before the beneficiary is 65 years old.
- Beneficiary must be considered disabled.
- Upon the beneficiary's death, Medicaid must be reimbursed prior to funds being distributed per the Grantor's wishes.
- Established by Beneficiary, Parent, Grandparent, Legal Guardian, Court

# First Party Pooled (d)(4)(C)

- Trust is created by using assets belonging to the individual / beneficiary of the trust.
  - Funds could come from a personal injury settlement, medical malpractice, product liability, inheritance, etc.
- The trust can be funded before **or** after age 65.
- Beneficiary must be considered disabled.
- Upon the beneficiary's death, funds can be left with the Non-Profit Trustee or Medicaid can be reimbursed. Any remaining funds are disbursed per Grantor's wishes.
- Established by Beneficiary, Parent, Grandparent, Legal Guardian, Grantor signs Joinder Agreement
- **MUST** be managed (owned) by a Non-profit organization.

# Third Party Trusts

- Can be stand-alone or pooled
- Grantor/Settlor chooses Trustee, beneficiary, remaindermen
- Can be established by anyone
- Typically created as part of an estate plan
- Can be funded with assets from an estate, life insurance, retirement accounts, real property, etc.
- Revocable or Irrevocable
- Third Party Pooled Trust has master trust agreement; Grantor signs Joinder Agreement



# Let's Break It Down

Trust Classification	Source of Funds	Who Establishes	Distribution Upon Death
<b>Third Party Individual &amp; Pooled</b>	Anyone except beneficiary	Anyone except beneficiary	Grantor's wishes
<b>First Party (d)(4)(A)</b>	Disabled beneficiary's funds before age 65	Beneficiary, Parent, Grandparent, Guardian, Court	Medicaid payback; then Grantor's wishes re remainder beneficiaries
<b>First Party Pooled Trust (d)(4)(c)</b>	Disabled beneficiary's funds Can be over 65	Beneficiary, parent, grandparent, Guardian, Court	Non-profit Trustee; <i>or</i> , Medicaid payback; then Grantors wishes re remainder beneficiaries

# Guardianship of Property

- In some states is referred to as conservatorship.
- Legal process that's utilized when a person can no longer make or communicate safe/sound decisions about his/her person and/or property or is likely to be susceptible to fraud or undue influence.
- Estates and Trusts Article §13-214(d)
  - Guardian can transfer property of a disabled person or minor to a special needs trust provided the trustee is subject to the court's jurisdiction, is bonded and files annual accounts.
  - Alternatively, the guardian can transfer to a pooled asset special needs trust provided it has been approved by the attorney general of the state where the minor or disabled persons resides.

# Relationship of Guardianship to PSNT- Things to Consider

- Once funds have been transferred by Guardian to the SNT, funds are no longer a part of the guardianship estate.
- Under trust law, the SNT is a separate legal entity and is not an “alter ego” of the beneficiary.
- Courts must take affirmative action to bring pooled special needs trust Trustee under court jurisdiction in accordance with Title 10 rules.

# Intersection of Guardianship and Public Benefits

- Guardians need to know when their wards are on means tested public benefits and which public benefits they are on.
- If a Guardian of the Property is appointed for a disabled person who is on means tested public benefits, they need to ensure that the Ward's assets/income are less than \$2,000 at the end of every month. They can do this by spending down the assets or by transferring the funds to a First Party Pooled Special Needs Trust.
- In Maryland Guardians can transfer funds of a person over age 65 to a pooled SNT so the person can qualify for Medicaid long term care.
- Not all states permit transfers over age 65

# CINA/Foster Care

- Children in foster care may be eligible for SSI benefits if they are considered disabled (usually a developmental delay, cognitive disorder or congenital/genetic condition).
- Children may also be eligible for SSDI survivor benefits if a parent is deceased.
- Usually the local DSS is Representative Payee.

# CINA/Foster Care

- Effective October 1, 2018 the Maryland Department of Health and Human Services issued a new Policy for protecting the resources of children in foster care.
- As the Representative Payee, the local DSS may use:
  - 100% of the benefits for a foster child under age 14
  - 60% for foster children aged 14 or 15
  - 20 % for children aged 16 or 17
  - 0% for children 18 and over
- Those benefits not used for the child's care may be placed in a pooled special needs trust to ensure the child does not lose eligibility for their means tested benefits.

# Litigation



- Medicare Set Aside Arrangements (MSA)
  - Dates to the Medicare Secondary Payment Act of 1986
  - A financial agreement that allocates a portion of a settlement to pay for future medical expenses related to the injury
  - Most frequently used in Worker's Compensation cases with the Center for Medicare & Medicaid (CMS) having created governing regulations
  - No formal guidelines for personal injury cases
  - Can be established with a lump sum or using a "structured settlement" annuity to provide payments over time

# Workers' Compensation & MSAs

- If Claimant is on means tested public benefits, MSA monies are counted assets & could therefore affect eligibility
- If a WCC settlement meets specific criteria an MSA is likely necessary
  - Claimant is currently on Medicare & the settlement is greater than \$25k or
  - Claimant is likely to begin Medicare **within 30 months**, settlement is greater than \$250k and Claimant is likely to require future treatment related to sustained injuries/illness.
  - See Workers Compensation Medicare Set Aside Reference Guide produced by CMS
- 1<sup>st</sup> Party SNT could be established for the settlement monies with MSA incorporated within the SNT



# Structured Settlements & SNTs

- Typically a structured settlement & an SNT work in tandem.
  - Payment from a structured settlement can go directly into an SNT
- If the beneficiary of the settlement is expected to “graduate” from the use of public benefits, the option to receive the structured settlement without an SNT is available.
  - Option to delay settlement payment until the beneficiary is no longer using public benefits is often available
- Should the beneficiary not “graduate” from public benefits & settlement payment is received before the beneficiary turns 65 (except for pooled trusts in MD) an SNT can be created & funded with that money.
  - It is possible that public benefits could be temporarily terminated

# Structured Settlements

- Structured settlements can work well for younger beneficiaries.
- SSA considers assignment by Court Order to SNT to be irrevocable
- Payments are income tax free
- Payments can be scheduled.
  - Start once beneficiary reaches age of maturity.
  - Payments can be monthly, quarterly, 1x/year, or even every 3-5 years.
  - Be sure to do financial analysis



# Family Law

- Alimony
  - If the spouse with disabilities is unable to work and is on needs tested public benefits, support payments such as alimony should be paid pursuant to court order to a first party SNT, either a (d)(4)(a) or (d)(4)(c) trust.
  - Alimony is not income for purposes of Medicaid if paid to an SNT
- Property Settlements
  - If the disabled spouse can't manage assets or because of being on means tested benefits can't be over-resourced, a spouse can establish a first party SNT
  - Best not to include house which is exempt asset
  - Best not to include retirement assets

# Family Law

- Child Support
  - Child support is considered “unearned” income for purposes of SSI eligibility POM SI 00830.420
  - Child support affects the amounts of SSI a child can receive
  - Can avoid affect on SSI by irrevocably assigning support payments to first party SNT
- Adult Child Support
  - Parents have a duty to support a destitute adult child
    - Defined as an adult child who has no means of subsistence and cannot be self supporting due to mental or physical infirmity. Family Law Article §13-101
  - Funds can be sheltered and the child’s eligibility for means tested benefits preserved by making payments directly to a first party SNT

# ABLE ACT

Achieving a Better Life Experience Act  
H.R. 647 – ABLE ACT of 2013 (113<sup>th</sup> Congress)  
Became Law December 19, 2014

Maryland ABLE Act was signed into law by Governor Hogan  
April 12, 2016

## ABLE - A 529A Plan for Persons with disabilities

- *MUST BE eligible for or receiving SSI or SSDI benefits (Social Security Disability under Title II of the Social Security Act) OR be certified by a doctor as having severe physical, intellectual disability or blindness*
- *AGE RESTRICTION: Onset of the qualifying disability must occur before the beneficiary turns age 26*
- Serves as a “savings plan” for persons with disabilities
- Only select institutions are plan administrators
- Can be managed by person with disabilities
- Only 1 account per person
- Regulated by IRS

## ABLE –con't

- Can be opened by:
  - Disabled person, Agent under a Power of Attorney, legal guardian, spouse, parent, sibling, grandparent or Representative Payee
- Contributions:
  - Cannot exceed the annual gift tax exclusion –\$17,000.00 per year for 2023
  - ABLE to Work contribution \$13,590.00 for 2023 (restrictions is participating in retirement/pension etc)
  - Contributions in MD can be tax deductible
  - Contributions treated as a complete gift for tax purposes
  - Total Contributions are capped at limit established by each state for its 529 plan Maryland is currently capped at \$500,000.00

# ABLE – cont.

- Does NOT affect Medicaid eligibility
- Up to \$100,000.00 before Social Security benefits are suspended (not cut off permanently). Once under \$100K then SSI/SSDI resumes and no reapplication process
- Withdrawals must be for qualified expenses or subject to income tax and 10% penalty – possible state income tax as well
- Withdrawals must be for supplemental needs not supplant medical assistance, social security or other government benefits received.
- Effective in 2018 Medicaid payback not required in MD



# Sources

- Special Needs Alliance
  - <https://www.specialneedsalliance.org>
- Academy of Special Needs Planners
  - <https://www.specialneedsanswers.com>
- Maryland ABLE ACT
  - <https://marylandable.org>

# THANK YOU



FIRST MARYLAND  
**Disability Trust**

Denise W. Fike, CEO  
First Maryland Disability Trust, Inc.  
1400 Front Ave., Ste. 303  
Lutherville, MD  
[dfike@firstmdtrust.org](mailto:dfike@firstmdtrust.org)  
Ph.: 410-296-4408

Visit FMDT: [www.firstmdtrust.org](http://www.firstmdtrust.org)

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- - May 18 – *[Overdoes Prevention Sites as a Method of Exploitation and Violence Prevention](#)*
- - May 22 – *[MVLS/MSATP Liens & Levies: What IRS and Maryland Comptroller Can and Cannot Do](#)*

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