

# QUINNIPIAC PROBATE LAW JOURNAL

---

---

VOLUME 32

2018

ISSUE 1

---

---

## DISABLING THE FUNDS OF THE DISABLED: HOW THE “SOLE BENEFIT” RULE FRUSTRATES THE ADMINISTRATION AND PURPOSE OF SUPPLEMENTAL NEEDS TRUSTS

ELIZABETH A. WEIKEL\*

*“[S]implicity is the most deceitful mistress that ever betrayed man.”*

-Henry Adams<sup>1</sup>

Floyd Brown was charged with murder in 1993.<sup>2</sup> Found incompetent to stand trial, he was sentenced to a psychiatric institution.<sup>3</sup> In 2007, after fourteen years of confinement, he was exonerated.<sup>4</sup> The appellate judge held that the lone piece of evidence, an elaborate six-page confession, was entirely too sophisticated for Mr. Brown to have dictated.<sup>5</sup> Mr. Brown is intellectually disabled; he has an IQ of less than sixty and the mental capacity of a seven-year-old child.<sup>6</sup>

Following his release, Mr. Brown was awarded approximately nine million dollars for his wrongful confinement.<sup>7</sup> The net settlement was put into a supplemental needs trust (“SNT”),<sup>8</sup> a special kind of trust available for people

---

\* Quinnipiac University School of Law, J.D., May 2019; University of Connecticut, B.A. The author would like to thank her fiancé, Gregory M. Weaver, Jr., and her parents, Susan J. Weikel and Anthony M. Weikel, for their unwavering support and encouragement. The author would also like to thank the Staff and Editorial Board for their assistance in editing this Note, in particular Andrew B.F. Carnabuci, Quinnipiac University School of Law, J.D., May 2018.

<sup>1</sup> HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS: AN AUTOBIOGRAPHY* 441 (Houghton Mifflin, 1918).

<sup>2</sup> Elizabeth Leland & Bruce Henderson, *Wrongfully Held, Floyd Brown Won Millions, But His Money is Locked Up*, *THE CHARLOTTE OBSERVER* (Mar. 29, 2015, 08:22 AM), <https://www.charlotteobserver.com/news/local/crime/article16528667.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Leland & Henderson, *supra* note 2.

<sup>8</sup> *Id.*

with disabilities which allows the beneficiary to exclude the trust corpus from asset calculation when applying or recertifying for means-tested government programs.<sup>9</sup> The trust was meant to enhance his quality of life.<sup>10</sup> Yet, with millions of dollars accruing interest, Mr. Brown's simple request for a bouquet of flowers for his mother's grave was denied, and he was living below the poverty line.<sup>11</sup>

Why? Because the flowers and other items Mr. Brown requested were not strictly for his benefit.<sup>12</sup> According to the Social Security Administration's ("SSA") interpretation of the statutory language, which established SNTs, the trust must be established for the "sole benefit" of the beneficiary.<sup>13</sup> Likewise, until very recently, the SSA required that all trust disbursements be made for the "sole benefit" of the beneficiary.<sup>14</sup> On April 30, 2018, the SSA relaxed its interpretation of the "sole benefit" rule in limited circumstances: trust disbursements made to third-parties for certain goods or services may now be for the "primary benefit" of the beneficiary.<sup>15</sup> However, outside of this limited exception, any other disbursement that violates this stringent rule ensures that the beneficiary will lose eligibility for essential government benefit programs, including Medicaid and Supplemental Security Income ("SSI").<sup>16</sup> Although Mr. Brown had millions of dollars, losing eligibility for public benefits meant the trust would likely be expended in a short time to provide medical care and necessities, and to repay state and federal programs for previous expenditures related to his cost of care.<sup>17</sup>

---

<sup>9</sup> See 42 U.S.C. § 1382b(e)(5) (2018); 42 U.S.C. § 1396p(d)(4)(A), (C) (2018); POMS SI 01120.203A; POMS SI 01120.203.B.1; Stuart D. Zimring, Et Al., *Fundamentals of Special Needs Trusts*, § 1.02 (2018) ("Special needs trusts (SNTs) are trusts that protect a fund of money for the beneficiary who is disabled while maintaining eligibility for public benefits.").

<sup>10</sup> See Leland & Henderson, *supra* note 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> POMS SI 01120.203.B.6; POMS SI 01120.201F.1.

<sup>14</sup> Under the former POMS interpretations, all trust disbursements were required to be made for the "sole benefit" of the beneficiary; any disbursement which provided even an incidental benefit to another was prohibited:

[POMS] SI 01120.203B.2., and sub-paragraph e. echoes the requirements for special needs trusts as follows . . . the individual trust account must be established for the sole benefit of the disabled individual . . . this exception does not apply if the trust account: provides a benefit to any other individual or entity during the disabled individual's life time . . .

John Staunton, Esq., *Special Needs Trusts and the Sole Benefit Rule*, NAT'L C. OF PROB. JUDGES 1, 7 (Nov. 2014), <http://www.centersweb.com/wp-content/uploads/2014/05/SNTs-and-the-Sole-Benefit-Rule-NCPJ-11.13.14.pdf>.

<sup>15</sup> POMS SI 01120.201F.3.a.

<sup>16</sup> POMS SI 01120.203B.6. ("[A]ny provisions will result in disqualification from the special needs trust exception if they: provide benefits to other individuals or entities during the disabled individual's lifetime . . .").

<sup>17</sup> "If the government determines that someone has the assets to meet their own needs, they will become indelible for benefits until they spend down their assets. Sometimes the government can even come in and take away assets to reimburse itself for benefits that were provided in the past." Gerald Winters, *Special Needs Trusts Help Prevent a Horrible Situation*, GERALD WINTERS, P.C. (Oct. 31, 2016),

## I. Introduction

An SNT, also referred to as a special needs trust, is a unique type of trust which allows persons with disabilities to remain eligible for means-tested government benefits by sheltering excess resources in the trust.<sup>18</sup> To qualify, the beneficiary must have a disability as defined by section 1614(a)(3) of the Social Security Act,<sup>19</sup> the trust must be irrevocable, it must be established for the benefit of the individual beneficiary, it must be settled before the beneficiary turns sixty-five-years-old, and it must contain a payback provision which entitles the state Medicaid Program to receive the remainder of the funds upon the beneficiary's death.<sup>20</sup> If the trust meets the above requirements, it will not count as a resource when determining or recalculating eligibility for federal or state public benefit programs such as SSI and Medicaid.<sup>21</sup>

Persons with disabilities frequently rely upon public benefit programs due to their inability to obtain gainful employment because of "severe physical or mental impairments."<sup>22</sup> To qualify for public benefits, an individual must fall within strict resource limits.<sup>23</sup> The purpose of an SNT is to allow disabled beneficiaries to shelter excess resources in the trust which can then be used to supplement their quality of life, without disqualifying them from eligibility for public benefits.<sup>24</sup> Disbursements from the trust for goods and services, such as a home computer or massage therapy, which do not displace means-tested government programs, are generally allowed.<sup>25</sup> Disbursements for necessities, such as food or shelter, are generally not allowed because these expenditures supplant the beneficiary's need for public benefits.<sup>26</sup> Further, the statutory language which created SNTs requires that the trusts be established "for the

---

<https://wintersfirm.com/blog/special-needs-trusts-help-prevent-horrible-situation/>.

<sup>18</sup> Zimring et al., *supra* note 9 ("Special needs trusts (SNTs) are trusts that protect a fund of money for the beneficiary who is disabled while maintaining eligibility for public benefits."). See 42 U.S.C. § 1382b(e)(5); 42 U.S.C. § 1396p(d)(4)(A), (C).

<sup>19</sup> See 42 U.S.C. § 1396p(d)(4)(A), (C); POMS SI 01120.203B.4.

<sup>20</sup> See POMS SI 01120.203B.1; Valerie J. Bogart, Esq. et al., *Supplemental Needs Trusts: Impact on Medicaid and Other Public Benefits*, NYLAG 1, 7 (2018), <http://www.wnyc.com/health/afile/44/9/>.

<sup>21</sup> See POMS SI 01120.203A. See generally Joseph A. Rosenberg, *Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in a Public Interest*, 10 B.U. PUB. INT. L. J. 91 (2000) (discussing the development of SNTs and how they supplement public benefit programs); Jan P. Myskowski, *Special Needs Trusts in the Era of the Uniform Trust Code*, 46 N.H. B. J. 16 (2005) (discussing, in part, SNT distributions and possible conflicts with public benefits).

<sup>22</sup> See Bogart et al., *supra* note 20, at 9.

<sup>23</sup> See generally *Introduction to the Supplemental Security Income (SSI) Program*, CENTER ON BUDGET AND POLICY PRIORITIES, <https://www.cbpp.org/research/introduction-to-the-supplemental-security-income-ssi-program> (last visited Oct. 27, 2018) (providing a brief history and overview of who qualifies for means-tested benefits); *infra* Section III. B (discussing, in part, resource limits for SSI and Medicaid eligibility).

<sup>24</sup> "The SNT is designed to enhance a beneficiary's quality of life through the purchase of additional goods and services that are not covered or adequately provided by SSI and Medicaid." Rosenberg, *supra* note 21, at 94-95.

<sup>25</sup> See POMS SI 01120.201I.1.c; *Spotlight on Trusts*, U.S. SOC. SECURITY ADMIN., <https://www.ssa.gov/ssi/spotlights/spot-trusts.htm> (last visited Oct. 27, 2018).

<sup>26</sup> See POMS SI 01120.201I.1.a-c.

benefit” of the individual.<sup>27</sup> This simplified overview leads one to believe that determining whether a disbursement will affect a beneficiary’s continued eligibility for means-tested programs is relatively objective and straightforward. Nonetheless, the SSA’s interpretation of the statutory language serves to frustrate the both the administration and purpose of SNTs.

The SSA interprets the “for the benefit” language to mean that most SNT disbursements must be strictly “for the *sole* benefit” of a beneficiary.<sup>28</sup> “[A]ny provisions will result in disqualification from the special needs trust exception if . . . [the disbursement] provide[s] benefits to other individuals or entities during the disabled individual’s lifetime . . . .”<sup>29</sup> Although the SSA has recently allowed certain disbursements—such as payments to third-parties for certain goods and services—if the same is for the “primary benefit” of the beneficiary, the SSA’s interpretation, referred to as the “sole benefit” rule, still controls most disbursements and the administration of SNTs in general.<sup>30</sup>

The fundamental flaw with the “sole benefit” rule<sup>31</sup> is that it is too rigid and violates the purpose of SNTs. These trusts were created to allow the beneficiary to shelter resources so that the trust corpus could be used to “improve a beneficiary’s quality of life while still protecting that beneficiary’s ability to access governmental resources such as Medicaid and Social Security.”<sup>32</sup> Compared to the general population, persons with disabilities require more assistance from others to participate in activities of daily life.<sup>33</sup> For many, this assistance comes from family members or friends.<sup>34</sup> In almost any

<sup>27</sup> See 42 U.S.C. § 1396p(d)(4)(A); 42 U.S.C. § 1396p(d)(4)(C)(iii).

<sup>28</sup> “Under the special needs trust exception, the trust must be established and used for the benefit of the disabled individual. SSA has interpreted this provision to require that the trust be for the *sole* benefit of the individual . . . .” POMS SI 01120.203B.6 (emphasis added).

<sup>29</sup> *Id.*

<sup>30</sup> As direct support for this proposition, the SSA offers the following explanation of the sole benefit rule:

Consider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual’s life. Do not consider a trust that allows for the trust corpus or income to be paid to, or for the benefit of, a beneficiary other than the SSI applicant or recipient as a trust established for the sole benefit of the applicant or recipient, except as provided in SI 01120.201F.3. and SI 01120.201F.4. in this section.

POMS SI 01120.201F.1.

<sup>31</sup> See generally *id.* (defining the “sole benefit” rule).

<sup>32</sup> *In re Estate of Skinner*, 804 S.E. 2d 449, 462 (N.C. 2017) (Morgan, J., dissenting).

<sup>33</sup> See generally *Disability and Health*, WORLD HEALTH ORG. (Jan. 16, 2018), <http://www.who.int/news-room/fact-sheets/detail/disability-and-health> (discussing the greater, unmet needs for additional healthcare within the disabled community).

<sup>34</sup> Many family members and friends assist loved ones, providing the care needed:

[a]bout [forty-four] million Americans provide [thirty-seven] billion hours of unpaid, “informal” care each year for adult family members and friends with chronic illnesses or conditions that prevent them from handling daily activities such as bathing, managing medications or preparing meals on their own. Family caregivers, particularly women, provide over seventy-five percent of caregiving support in the United States.

*Caregiving*, FAMILY CAREGIVER ALLIANCE, <https://www.caregiver.org/caregiving> (last visited Oct. 27,

given situation, a trust disbursement may incidentally “benefit” someone other than the beneficiary, especially when the beneficiary is surrounded by caregivers and relies upon them for frequent assistance. Yet, many requests for disbursements that would improve a beneficiary’s quality of life are denied by the trustee because to allow the same would violate the “sole benefit” rule.<sup>35</sup> The refusal to disburse funds for items intended to improve a beneficiary’s quality of life defeats the purpose of the SNT carve-out created by Congress.

To alleviate these concerns, the SSA’s current interpretation of the established “for the benefit” requirement for first-party supplemental needs trust disbursements should be amended from the “sole benefit” rule to a less stringent “predominant purpose” test.<sup>36</sup> Under this revised rule, the funds could be used for reasonable distributions to enhance the beneficiary’s quality of life even if the disbursements were to incidentally benefit someone other than the beneficiary. Indeed, the SSA has recently issued an “explanation” of the “sole benefit” rule which cautions against applying the rule so strictly as to “prevent any collateral benefit to anyone else” when evaluating third-party payments.<sup>37</sup> However, many trustees remain wary of using the trust in a manner which provides even an inconsequential benefit to another since this practice area is rife with inconsistency.<sup>38</sup> The “predominant purpose” test is more consistent with the realities faced by persons with disabilities as well as the underlying policy behind the creation of SNTs. The test would also facilitate easier trust administration by eliminating confusion as to what degree of “collateral benefit” is acceptable and which surpasses the rule’s limitations by applying objective factors to evaluate whether the disbursement is for “predominate purpose” of enhancing the beneficiary’s quality of life.<sup>39</sup>

This end could be accomplished by changing the “sole benefit” rule contained within the policy manual relied upon by the SSA, the Program Operations Manual System, or POMS,<sup>40</sup> to a “predominant purpose” test. Currently, POMS guidelines are not binding on courts; however, “courts have long relied on agency interpretations regarding SSI and Medicaid.”<sup>41</sup> Due to this reliance, trustees must comply with the POMS to avoid disqualifying the beneficiary from eligibility for SSI and Medicaid.<sup>42</sup> Consequently, SNT trustees

---

2018).

<sup>35</sup> See generally *In re Estate of Skinner*, 787 S.E. 2d 440, 449 (N.C. Ct. App. 2016), (providing a scathing commentary on the application of the “sole benefit” rule to disallow an incidental benefit to another), *rev’d* 804 S.E. 2d 449 (N.C. 2017).

<sup>36</sup> See *infra* Section VI for a discussion of the parameters of the “predominant purpose test.”

<sup>37</sup> POMS SI 01120.201F.3.a.

<sup>38</sup> “Perhaps the most challenging aspect of first party trust practice is the lack of clear and credible guidance in the area of administration, leaving the trustee unsure of the criteria being used to measure its conduct.” Edward V. Wilcenski, *Establishment and Administration of First Party Supplemental Needs Trusts: The Framework for an Improved Approach*, 28 NYSBA ELDER & SPECIAL NEEDS L.J. 5, 10 (2018), <https://www.mid-hudsonlaw.com/wp-content/uploads/2018/01/ElderLawJournalWinter18.pdf>.

<sup>39</sup> See *infra* Section VI for a discussion of the parameters of the “predominant purpose” test.

<sup>40</sup> Staunton, *supra* note 14, at 4.

<sup>41</sup> *Id.* (citing *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)).

<sup>42</sup> See generally Staunton, *supra* note 14 (discussing the “sole benefit” rule as it relates to the

must obey the arbitrary and rigid “sole benefit” rule. If the rule were to be revoked and replaced with a “predominant purpose” test, a distribution which incidentally benefited someone else would be allowed so long as the “predominant purpose” of the disbursement was to enhance the beneficiary’s quality of life. Although very recent guidance has suggested that some collateral benefit is allowed in first-party SNT trust distributions to third-parties, a full revocation and replacement of the rule would significantly diminish confusion, increase consistency, and ease trust administration.

## **II. Applications of the “Sole Benefit” Rule<sup>43</sup>**

The following two hypothetical situations illustrate how the SSA’s “sole benefit” rule severely inhibits the ability of disabled beneficiaries to utilize their trusts in a manner consistent with the purpose of SNTs.

### **A. Disney World**

A thirty-year-old autistic woman is awarded damages from a personal injury lawsuit. She is dependent upon her family and does not have the ability to obtain gainful employment. To maintain eligibility for SSI and Medicaid, which provide for her basic needs, the funds are put into a pooled first-party SNT administered by a non-profit organization.

The beneficiary has had a life-long fascination with all things Disney. She enjoys watching Disney movies ad nauseam and can recite dialogue verbatim. Her room is decorated with Disney characters, and she listens to Disney music to calm herself when she is upset. Her dream has always been to go on a Disney World vacation, but her family has never had the money to take her. Now, her family hopes the trust may be used to make her dream a reality. However, due to her disability, she requires a companion to accompany her. Her primary care physician has even provided a note to this effect. The beneficiary’s family requests that the trust pay for the cost of both her and her sister to go, and submits the note from her physician as supporting documentation.

The request is ultimately denied as this disbursement is not for her “sole benefit.” The trustee explains that the specific nature of the request would exceed the parameters of the “sole benefit” rule, even in light of recent changes. The trustee is concerned that upon the State’s review of the trust for Medicaid recertification, the expenditure, particularly the Disney World park tickets, would be characterized as providing a significant benefit to the beneficiary’s sister and not simply a necessary expense for the beneficiary’s enjoyment.

The trustee then goes on to qualify that other disbursements, which do not violate the SSA’s “sole benefit” rule, are generally allowed. For example, the beneficiary could request that the trust purchase a television or computer for her

---

administration of SNTs).

<sup>43</sup> This section presents a hypothetical application of the “sole benefit” rule created from a compilation of personal anecdotes from the author’s past experiences.

personal use or pay bills for items unrelated to her rent or utilities, such as a cell phone or internet bill. Alternatively, the trustee suggests that if the beneficiary preferred, she could take a beach vacation and the trust would pay for the cost of her and her sister's travel and lodging.

The beneficiary's family is frustrated and feels deceived by the attorney who assisted them with the trust application. The family thought this trust was established to afford the beneficiary a better quality of life. Without the trust to cover the cost of the park tickets, approximately one hundred and eighty-five dollars per day for one adult,<sup>44</sup> the beneficiary cannot take the vacation, as her sister is unable to afford her portion of the park tickets. The beneficiary does not want a beach vacation; her dream has always been to experience Disney World. The family does not understand why the trust will pay for other things people could still use or benefit from, such as a television or internet service, but not the park tickets. They are further frustrated by the arbitrary distinction between the trustee's explanation that paying for airfare and hotel lodging will not violate the "sole benefit" rule whereas paying for the park tickets will.<sup>45</sup>

### B. Family Home

A thirteen-year-old, severely-intellectually-disabled young man is awarded damages in a medical malpractice settlement related to injuries he sustained at birth. Due to the young man's age, together with his receipt of public benefits, the court orders that the funds be placed in an SNT, which will be administered by his mother as his natural guardian. After receiving permission from the court, the mother uses the trust to purchase a family home for the boy, where his mother and younger sibling also reside.<sup>46</sup>

Shortly thereafter, the mother submits the court ordered accounting to the trust, and is surprised when the Guardian Ad Litem ("GAL") objects to her and the beneficiary's sibling residing in the home as being in violation of the "sole benefit" rule. The GAL's position is that because the trust was used to purchase the home, the home should be used only for the beneficiary. The GAL asserts that the beneficiary's mother must pay rent for her and her other child to reside in the home.<sup>47</sup>

---

<sup>44</sup> *Walt Disney World Ticket Prices*, DIS <http://www.wdwinfo.com/disney-world/ticket-prices.htm#tickettypes> (last visited Sep. 25, 2018).

<sup>45</sup> See POMS SI 01120.201F.3.b. On April 30, 2018, the SSA relaxed its prohibition against payments for third-party travel expenses. *Id.* The Administration will now allow the trust to pay for travel expenses of certain caregivers or family members when the same is necessary due to the beneficiary's age or disability. *Id.* Previously, the Administration allowed such disbursements only when the trip was necessary for medical treatment. *Id.* Even now with recent changes, the payments are limited to food, travel, and lodging. *Id.*

<sup>46</sup> See POMS SI 01120.201F.3.a. On April 30, 2018, the SSA published new guidance interpreting the "sole benefit" rule, which specifically states that disabled beneficiaries may reside with family members without violating the "sole benefit" rule. *Id.* "[I]f the trust buys a house for the beneficiary to live in, that does not mean that no one else can live there . . ." *Id.*

<sup>47</sup> The beneficiary's family members who reside in a home owned by the SNT should be aware of the "sole benefit" rule. "Trustee[s] should consider requiring such family members to contribute their share of

Due to the severe and profound nature of his disabilities, the beneficiary requires constant supervision. Accordingly, his mother has taken on this role and has not worked outside of the home since his birth. Now, due to the GAL's objections, the mother must use the trust to pay caretakers (above the respite care available through Medicaid)<sup>48</sup> to supervise her son while she earns money to cover her and her other child's portion of the rent. The cost expended from the trust to pay for the caretakers exceeds the amount of income the trust receives from the rent because she works in a minimum wage job.

Moreover, the beneficiary, not accustomed to being with strangers, regresses and begins to lash out physically. The mother does not understand why the court and the GAL do not allow her to stay home and care for her child when the alternative is more expensive and adverse to her son's best interests.

### III. What's Past is Prologue: Background and Overview<sup>49</sup>

#### A. Medicaid and SSI

Medicaid, authorized by Title XIX of the Social Security Act, was signed into law in 1965 to provide health insurance coverage for low-income people.<sup>50</sup> SSI was created by Congress in 1972 to replace a prior system of federal grants to states which provided aid to the aged, blind, or disabled.<sup>51</sup> While Medicaid provides health insurance to low-income individuals,<sup>52</sup> SSI is intended to pay for a recipient's shelter, utilities, food, and clothing.<sup>53</sup> Medicaid and SSI are considered "dual entitlements" as they are both resource-based programs. Therefore, if a person is disabled under section 1614(a)(3) of the Social Security Act, he or she may qualify for both SSI and Medicaid.<sup>54</sup> In thirty-three states and the District of Columbia, an individual who qualifies for SSI is

---

household costs and expenses (Medicaid may insist), or to otherwise 'earn their keep' by rendering services to, or for the benefit of, the Beneficiary that they are not already legally obligated to provide."

Kristen M. Lewis, Esq., *Special Needs Trusts: The Cornerstone of Planning for Beneficiaries with Disabilities*, AMERICAN BAR ASSOCIATION, 1, 30 (2010), [https://www.americanbar.org/content/dam/aba/publishing/rpte\\_ereport/te\\_lewis.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/rpte_ereport/te_lewis.authcheckdam.pdf) (last visited Oct. 27, 2018).

<sup>48</sup> "Medicaid-eligible recipients potentially receive their covered respite care through waivers provided under Medicaid's Home [and] Community-Based Care Services (HCBS) waiver program." *Medicaid and Medicare Respite Coverage*, SENIORLIVING.ORG, <https://www.seniorliving.org/healthcare/medicare-medicare-respite-care-coverage/> (last visited Oct. 9, 2018).

<sup>49</sup> The title of this caption was generously donated by Andrew B. F. Carnabuci, Quinnipiac University School of Law, J.D., May 2018.

<sup>50</sup> *Program History*, MEDICAID.GOV, <https://www.medicare.gov/about-us/program-history/index.html> (last visited Oct. 27, 2018).

<sup>51</sup> *Introduction to the Supplemental Security Income (SSI) Program*, *supra* note 23.

<sup>52</sup> *Program History*, *supra* note 50.

<sup>53</sup> "SSI is a federal program that pays for basic living expenses of disabled individuals, such as food, clothing, and shelter." Katherine B. McCoy, *The Growing Need for Third-Party Special Needs Trust Reform*, 65 CAS. W. RES. L. REV. 461, 469 (2014). See *Introduction to the Supplemental Security Income (SSI) Program*, *supra* note 23.

<sup>54</sup> See Kalman Rupp & Gerald F. Riley, *State Medicaid Eligibility and Enrollment Policies and Rates of Medicaid Participation Among Disabled Supplemental Security Income Recipients*, 76 SOC. SECURITY BULLETIN 3, 17 (2016); see also POMS SI 01715.010.A.1-3.



automatically enrolled in Medicaid.<sup>55</sup> In ten other states, if an individual qualifies for SSI and fills out a separate Medicaid application, he or she will be enrolled.<sup>56</sup> If an individual loses his or her SSI eligibility, his or her Medicaid coverage, which was granted after qualifying for SSI, may also be terminated.<sup>57</sup>

### B. Resource Limits and Trust Disbursement Characterizations

A person typically loses eligibility for SSI if he or she possesses more than \$2,000 in “countable” income and assets.<sup>58</sup> “Countable” income and assets are those which are used to compute an applicant’s or recipient’s eligibility or recertification for public benefits.<sup>59</sup> Any money received in a current month is considered income and any remaining money left over on the first day of the next month is considered an “asset.”<sup>60</sup>

The trust corpus of an SNT is exempt from the resource calculation,<sup>61</sup> however, certain “improper” trust disbursements can remove the trust from its exempt status.<sup>62</sup> For example, disbursements that look like income to the beneficiary, such as a gift card, will jeopardize the beneficiary’s continuing eligibility for SSI and Medicaid.<sup>63</sup> The same is true for disbursements which subsume the need for the beneficiary to continue receiving SSI and Medicaid.<sup>64</sup> Paying an SSI recipient’s utility bill from his SNT would violate SNT parameters since this payment should be made from the SSI check.<sup>65</sup> Finally, trust disbursements which violate the “sole benefit” rule also may remove the trust from exempt status.<sup>66</sup> In the *Disney World* hypothetical, disbursing money to pay for anything beside the very limited travel expenses of the beneficiary’s

<sup>55</sup> See Rupp & Riley, *supra* note 54; POMS SI 01715.010.A.1-3.

<sup>56</sup> See Rupp & Riley, *supra* note 54.

<sup>57</sup> See McCoy, *supra* note 53 (“SSI is linked to Medicaid . . . . Generally, a person loses eligibility for SSI and Medicaid in he possesses more than \$2,000 in countable assets.”); see also Special Needs Answers, *What Can My Special Needs Trust Pay for Without Affecting My Disability Benefits?*, SPECIAL NEEDS ANSWERS (Jan. 24, 2015) <https://specialneedsanswers.com/what-can-my-special-needs-trust-pay-for-without-affecting-my-disability-benefits-14931> (explaining that “the additional one-third reduction could cause the beneficiary to actually lose SSI, and accompanying Medicaid benefits, entirely.”).

<sup>58</sup> “SSI is linked to Medicaid . . . . Generally, a person loses eligibility for SSI and Medicaid in he possesses more than \$2,000 in countable assets.” McCoy, *supra* note 53.

<sup>59</sup> “‘Countable’ income means that it is used to compute eligibility and benefit amount.” Special Needs Alliance, *Administering a Special Needs Trust: A Handbook for Trustees*, 1, 9 (2018), <https://www.specialneedsalliance.org/wp-content/uploads/2018/01/2018-Trustee-Handbook.pdf>.

<sup>60</sup> McCoy, *supra* note 53.

<sup>61</sup> See 42 U.S.C. § 1382b(e)(5); 42 U.S.C. § 1396p(d)(4)(A), (C); see also Zimring et al., *supra* note 9 (“Special needs trusts (SNTs) are trusts that protect a fund of money for the beneficiary who is disabled while maintaining eligibility for public benefits.”).

<sup>62</sup> POMS SI 01120.200.E.1.a; McCoy, *supra* note 53, at 469-70.

<sup>63</sup> “Any distribution from a special needs trust made directly to the disabled beneficiary or spent on support rather than supplemental benefits could make the beneficiary ineligible for need-based government benefits.” McCoy, *supra* note 53, at 473 (internal citation omitted).

<sup>64</sup> *Id.* at 474. (“[T]he SSI definition of ‘food and shelter’ covers payments for ‘food, mortgage . . . , real property taxes, rent, heating, fuel, gas, electricity, water, sewer and garbage removal.’ If the trust attempts to pay for any of these expenses on the beneficiary’s behalf, it will jeopardize SSI eligibility.”).

<sup>65</sup> *Id.*

<sup>66</sup> POMS SI 01120.203B.6.

sister would violate the “sole benefit” rule.<sup>67</sup> Likewise, in the *Family Home* hypothetical, allowing the beneficiary’s family to reside rent-free in a home purchased by the trust may be characterized as a violation of the “sole benefit” rule, as the cohabitating family members are presumably benefiting from the arrangement. While the beneficiary is allowed to legally shelter excess resources because of his or her qualifying disability,<sup>68</sup> many disbursements which may benefit someone else violate the SSA’s interpretation of the SNT carve-out provisions created by Congress.<sup>69</sup> If the disbursement benefits someone else and does not fall within a limited exception, the SSA will characterize the trust as an “available resource.”<sup>70</sup> Once the trust is considered an “available resource” the corpus is no longer exempt in calculating SSI and Medicaid eligibility.<sup>71</sup> Once the trust is viewed as a resource, the beneficiary’s eligibility for SSI and Medicaid coverage is terminated if the trust corpus exceeds the resource limit for public benefits.<sup>72</sup> While such an administrative decision may be appealed, courts frequently defer to the judgment of local social services agencies, and a unified framework for evaluating such cases is sorely lacking.<sup>73</sup>

### C. Life Before SNTs: The Harsh Reality

Prior to the creation of SNTs, persons with disabilities who could not work had to forgo financial assistance from family members or friends to remain eligible for government benefits.<sup>74</sup> Alternatively, persons with disabilities could sacrifice their eligibility for SSI and Medicaid and, instead, rely solely upon the financial contributions of people in their lives.<sup>75</sup> Either way, a disabled person was typically living at or below the poverty level.<sup>76</sup> The means-tested government public benefits provided just enough support to cover basic living expenses and health care if a disabled individual elected to sacrifice financial assistance from outsiders.<sup>77</sup> Conversely, persons with disabilities who

---

<sup>67</sup> POMS SI 01120.201F.3.b.

<sup>68</sup> See 42 U.S.C. § 1396p(d)(4)(A), (C); POMS SI 01120.203.A; POMS SI 01120.203.B.1; POMS SI 01120.203.B.4.

<sup>69</sup> POMS SI 01120.203B.6.

<sup>70</sup> *Id.*

<sup>71</sup> See *id.* (“[A]ny provisions will result in disqualification from the special needs trust exception if they . . . provide benefits to other individuals or entities during the disabled individual’s lifetime.”).

<sup>72</sup> See *Special Needs Answers*, *supra* note 57.

<sup>73</sup> See Wilcenski, *supra* note 38 (discussing, in part, the lack of uniformity in first-party SNT administration and judicial enforcement resulting in uncertainty in SNT administration).

<sup>74</sup> McCoy, *supra* note 53, at 464.

In the past, due to the strict income-limiting eligibility standards of government assistance programs, families of disabled individuals were often unable to provide support for them without making them ineligible for public benefits. Instead, they would have to choose between retaining eligibility for public assistance, knowing that their loved one would receive only the essentials, or losing government aid and attempting to provide for the disabled individual entirely on their own.

*Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See generally *id.* (explaining, in part, that prior to the inception of SNTs, persons with disabilities were forced to choose between financial assistance from family and friends, or eligibility for public benefits).

<sup>77</sup> *Id.*

disavowed eligibility for SSI and Medicaid found that the vast amount of money expended on their behalf by family or friends was applied toward their cost of health care, which ensured that their standard of living was almost always at or below the poverty level.<sup>78</sup>

#### D. The Creation of SNTs

In 1993, Congress passed the OMNIBUS Budget Reconciliation Act (“OBRA ’93”), which, in part, allows *disabled* individuals to legally shelter excess resources to maintain eligibility for SSI and Medicaid in SNTs.<sup>79</sup> The SNT provisions of the legislation were partially enacted to stop affluent and able-bodied individuals from qualifying for Medicaid before expending their assets by segregating these same assets in trust.<sup>80</sup> “[T]rusts can enable . . . individuals to technically ‘own’ nothing at all, even though they may have access to substantial wealth. Such claimants may then qualify for Medicaid . . . . Congress understandably viewed this as an abuse and began addressing the problem with statutory standards . . . .”<sup>81</sup> Implicit in Congress’s rationale was that it was inequitable to prevent disabled individuals, who overall do not have the ability to support themselves, from sheltering some resources in order to obtain small creature comforts and still maintain eligibility for essential public benefits. Conversely, the able-bodied, and in particular, the wealthy, have ample opportunities to generate income and therefore should be prohibited from sheltering resources to qualify for means-test public benefits.

After the ratification of OBRA ’93, all trusts were generally considered assets for Medicaid eligibility purposes.<sup>82</sup> The legislation, however, carved out an exception for SNTs.<sup>83</sup> Congress recognized that the trusts could be used to pay for items not covered by public benefits, and these allowances could drastically improve the quality of life for millions of people with disabilities.<sup>84</sup> No longer would so many disabled individuals have to forgo support from family members or friends, or refuse an inheritance or a settlement; the funds could be sheltered legally in an SNT to be used for items which did not disqualify the beneficiary from eligibility to receive quality health care and basic income assistance as a result of their disability.

#### E. Types of SNTs: “(d)(4)(A)” vs. “(d)(4)(C)”

---

<sup>78</sup> See McCoy, *supra* note 53, at 464.

<sup>79</sup> See 42 U.S.C. § 1396p(d)(4)(A), (C).

<sup>80</sup> See *Lewis v. Alexander*, 685 F. 3d 325, 332-33 (3rd Cir. 2012).

<sup>81</sup> *Id.* at 333 (internal citation and quotation omitted).

<sup>82</sup> *Id.* (“Congress established a general rule that trusts would be counted as assets for the purpose of determining Medicaid eligibility.”).

<sup>83</sup> *Id.* at 333 (“But Congress also excepted from that rule three types of trusts meeting certain specific requirements. Taken together, these are generally called ‘special needs trusts’ or ‘supplemental needs trusts.’”).

<sup>84</sup> McCoy, *supra* note 53, at 464 (“Special needs trusts are a subset of trusts designed to allow a disabled beneficiary to maintain eligibility for public benefits that cover basic needs, while also receiving resources . . . that provide a higher quality of life.”).

There are six types of trusts which are classified as supplemental needs trusts.<sup>85</sup> This Note focuses solely on first-party SNTs, because these trusts are funded with the beneficiary's own assets, not third-party funds<sup>86</sup> and are subject to the "sole benefit" rule.<sup>87</sup> The two first-party SNTs are authorized under Title 42 of the United States Code section 1396p(d)(4). The disability special needs trust, authorized by (d)(4)(A), and the pooled special needs trust, authorized by (d)(4)(C), are statutory trusts created under OBRA '93.<sup>88</sup> To qualify as either a (d)(4)(A) or a (d)(4)(C) trust, the trust must never allow the beneficiary direct access to funds and the same must be irrevocable.<sup>89</sup>

A (d)(4)(A) SNT may be established by an individual, parent, grandparent, legal guardian, or by court order. The trust is funded by the individual with the disability, and a payback provision is required, whereupon the beneficiary's death, funds held in the trust are used to repay the cost of state and federal assistance provided to the beneficiary during their lifetime.<sup>90</sup> The trust must also be established and funded by the time the individual turns sixty-five.<sup>91</sup>

A (d)(4)(C) trust is a pooled trust run by a non-profit organization.<sup>92</sup> The trust maintains one large account and individual beneficiaries have sub-trust accounts.<sup>93</sup> Upon the beneficiary's death, the account closes; any remainder is given to the non-profit to assist other persons with disabilities or to payback state and federal agencies for the beneficiary's cost of care during their lifetime.<sup>94</sup> The benefit of a pooled trust is that the sub-trust accounts are pooled together for investment and management purposes, making the cost of administration low

---

<sup>85</sup> Zimring et al., *supra* note 9, § 1.05.

<sup>86</sup> Myskowski, *supra* note 21, at 16 ("Self-settled' trusts are those trusts created to hold assets belonging to the intended beneficiary of the trust. 'Third party' trusts are those created to hold assets belonging to someone other than the intended beneficiary of the trust."). "The terms 'first-party' and 'third-party' refer to the source of assets used to fund the SNT. First-party trusts are funded with assets legally owned by the beneficiary (or assets to which the beneficiary would have been entitled outright) while third-party trusts are funded with assets legally owned by another." Zimring et al., *supra* note 9, at § 1.02.

<sup>87</sup> "[T]hird party special needs trusts are not subject to the [sole benefit] rule." Staunton, *supra* note 14, at 3.

<sup>88</sup> Zimring et al., *supra* note 9, § 1.05[1].

<sup>89</sup> POMS SI 01120.200.D.1.a.

Trust principal is a resource for SSI purposes if a trust beneficiary (applicant, recipient, or deemor) has legal authority to revoke or terminate the trust and then use the funds to meet his or her food or shelter needs. The trust principal is also a resource for SSI purposes if the trust beneficiary can direct the use of the trust principal for his or her support and maintenance under the terms of the trust . . . . Additionally, if the trust beneficiary can sell his or her beneficial interest in the trust, that interest is a resource.

*Id.*

<sup>90</sup> See 42 U.S.C. § 1396p(d)(4)(A); see also Zimring et al., *supra* note 9, § 1.05 [2].

<sup>91</sup> See Zimring et al., *supra* note 9, § 1.05 [2].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* See Amber K. Quintal, *Planning for Individuals with Disabilities: Special Needs Trusts*, 22 PRAC. TAX. L. 17, 20 (2008).

<sup>94</sup> See Quintal, *supra* note 93.

(depending upon the choice of non-profit trustee).<sup>95</sup> Furthermore, pooled trusts comprise professional trustees armed with more sophisticated knowledge of the complexities of SNT administration than the average family member of a disabled beneficiary serving as trustee.<sup>96</sup>

Both (d)(4)(A) and (d)(4)(C) trusts require that the trust account be established “for the benefit” of the disabled beneficiary.<sup>97</sup> The statutory language of the (d)(4)(C) trust extends the requirement; the trust must be “established *solely* for the benefit of the disabled beneficiary.”<sup>98</sup> “[A]rguably [this additional requirement] refers to the preservation of an individual’s pooled [sub-trust] account for that beneficiary and not other pooled trust beneficiaries.”<sup>99</sup>

#### IV. How the Social Security Administration Has Interpreted the “For the Benefit” Requirement of an SNT

##### A. The POMS

After an SNT has been established, the federal government, through the SSA, and state governments, through local Medicaid offices, monitor trust disbursements to make sure they comply with the applicable provisions of OBRA '93.<sup>100</sup> The SSA uses the POMS as a guide for its employees to evaluate Social Security claims, including eligibility and recertification for SSI.<sup>101</sup> State Medicaid offices also utilize the POMS to determine whether the trust is

---

<sup>95</sup> *Id.* See also Michele P. Fuller & Kevin P. Urbatsch, *Pooled Trusts: An Approach to Special Needs Planning for Families of Modest Means*, 34 BIFOCAL A J. OF THE ABA COMM’N ON L. & AGING 80, 84 (2013), <https://www.americanbar.org/content/dam/aba/publications/bifocal/BIFOCALMay-June2013.authcheckdam.pdf>. “When reviewing the pooled trusts available in the client’s state, it is important to consider several factors . . . the cost of membership, such as initial set-up, perpetual, disbursements, and extraordinary fees (which vary greatly) . . .” *Id.* (internal citation omitted).

<sup>96</sup> Fuller & Urbatsch, *supra* note 95 at 86.

[P]ooled trusts also help eliminate choice of trustee issues. Pooled trusts are administered by the nonprofits that created the trust, and typically do so with the assistance of highly experienced counsel or other professional trustees . . . [SNT] administration is also complex because the trustee must not only comply with all the fiduciary duties required of all trustees but also must be aware of changing public benefit program policies . . . [and] anticipate the impact of distributions on public benefit eligibility.

*Id.*

<sup>97</sup> 42 U.S.C. § 1396p(d)(4)(A), (C).

<sup>98</sup> 42 U.S.C. § 1396p(d)(4)(C) (emphasis added).

<sup>99</sup> Mary E. O’Byrne & Neal Winston, *Where is the SSA Going with POMS Changes? Armchair Chat*, SPECIAL NEEDS ALLIANCE (June 25, 2013), <http://slideplayer.com/slide/3589655/>.

<sup>100</sup> See generally Staunton, *supra* note 14 (discussing the “sole benefit” rule as it relates to the administration of SNTs, including applying and recertifying for Medicaid and SSI).

<sup>101</sup> See *POMS Home*, SOCIAL SECURITY ADMIN., <https://secure.ssa.gov/apps10/> (last visited Oct. 27, 2018).

considered a resource for Medicaid eligibility or recertification.<sup>102</sup> Although not binding authority, courts will often follow “the construction placed on the statute by presumed experts in the field.”<sup>103</sup> Therefore, trustees, as well as courts, frequently rely upon the POMS and give deference to the interpretations contained therein.<sup>104</sup>

### B. The “Sole Benefit” Rule

The POMS interprets the established “for the benefit” requirement to mean that most trust disbursements must be for the “sole benefit” of the beneficiary.<sup>105</sup> “Consider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual’s life.”<sup>106</sup> The “sole benefit” rule sounds very straightforward; however, what appears simple in theory is difficult in practice, since “nearly any transaction involving a trust will probably benefit someone else too.”<sup>107</sup> Trustees need to be both competent and vigilant to prevent a violation of this rule.<sup>108</sup> Again, avoiding “sole benefit” rule violations seems straightforward but is often fraught with difficulty.<sup>109</sup>

If a disbursement is not considered to be for the “sole benefit” of the beneficiary, the trust may be considered a resource for purposes of Medicaid and/or SSI eligibility.<sup>110</sup> The beneficiary may suffer a dollar-for-dollar reduction in SSI for the month in which the disbursement is made.<sup>111</sup> If the trust continues

---

<sup>102</sup> See POMS SI 01715.010.

<sup>103</sup> *In re Estate of Skinner*, 787 S.E. 2d at 451 (citing *Hobbs v. Zenderman*, 542 F. Supp. 2d 1220, 1228 (D. N. M. 2008)).

<sup>104</sup> See *id.* See generally Wilcenski, *supra* note 38 (discussing, in part, the lack of uniformity in first-party SNT administration and judicial enforcement resulting in uncertainty in SNT administration).

<sup>105</sup> POMS SI 01120.203B.6 (emphasis added).

<sup>106</sup> POMS SI 01120.201F.1.

<sup>107</sup> *Recent Case Proves “Sole Benefit” Rule is by No Means Cut and Dried*, SPECIAL NEEDS ANSWERS (July 13, 2016), <https://specialneedsanswers.com/recent-case-proves-sole-benefit-rule-is-by-no-means-cut-and-dried-15680>.

<sup>108</sup> See generally *In re Estate of Skinner*, 804 S.E. 2d at 461 (where husband was found not to be in violation of the “sole benefit” rule by purchasing a home and household items while living with his wife, the beneficiary, but was found to have wasted assets by spending ninety percent of the trust assets within sixty days of becoming trustee); Edward V. Wilcenski & Tara Anne Pleat, *State Court Case Puts Trustees of Special Needs Trusts on Alert*, 41 EST. PLAN. MAG. 26, 30 (Mar. 2014) <https://www.specialneedsalliance.org/wp-content/uploads/2014/04/State-Court-Cases-Put-Trustees-on-Notice.Estate-Planning-Magazine.March-2014-1.pdf> (explaining, in part, that SNT trustees have an affirmative duty to be proactive in identifying the needs of a disabled beneficiary despite the reality that many trustees have little experience with the system of supports for disabled individuals).

<sup>109</sup> See *infra* Part V Sections A and B. See generally Wilcenski, *supra* note 38 (discussing, in part, the lack of uniformity in first-party SNT administration and judicial enforcement resulting in uncertainty in SNT administration).

<sup>110</sup> See POMS SI 01120.203B.6.

<sup>111</sup> “If a distribution runs afoul of these rules, the Social Security Administration will treat the distribution as unearned income on behalf of the beneficiary and reduce the beneficiary’s income dollar-for-dollar after the first \$20 of the distribution.” *How to Make Distributions to an SNT Beneficiary Without Disrupting Their SSI*, SPECIAL NEEDS ANSWERS (Jan. 29, 2017), <https://specialneedsanswers.com/how-to-make-distributions-to-an-snt-beneficiary-without-disrupting-their-ssi-15916>. See also McCoy, *supra* note 53, at 468-70.

to pay for items which violate the “sole benefit” rule, the beneficiary’s trust may be disqualified altogether from the SNT carve-out, resulting in a disqualification of SSI eligibility.<sup>112</sup> If the beneficiary loses his or her SSI, his or her Medicaid eligibility is also typically revoked since the programs are dual entitlements.<sup>113</sup>

### C. “Clarifications”

“Clarifications” of the “sole benefit” rule can have devastating consequences on the quality of life for many disabled beneficiaries.<sup>114</sup> For example, in 2013, the SSA “clarified” its policy on travel expenses for third parties.<sup>115</sup> Beneficiaries could no longer use their trust to pay for the travel-related expenses of a third-party, even when the beneficiary required a companion as a result of their qualifying disability.<sup>116</sup> The only exception to this policy was if the beneficiary needed to travel for medical treatment.<sup>117</sup>

If vacations sound extravagant, imagine a beneficiary simply wanting to visit a sick relative. Maintaining familial relationships is something which undoubtedly improves the quality of life for many individuals. Yet, due to the SSA’s “clarification” of the “sole benefit” rule’s application, a beneficiary who required a travel companion could not make the trip unless the companion paid their own way.<sup>118</sup> The “sole benefit” rule thus prohibited the trust from being used in one major way which could potentially improve the quality of life for many disabled beneficiaries: sustaining close interpersonal relationships with family and friends through travel.

Perhaps realizing the harsh consequences of this clarification, the SSA, on April 30, 2018, again “clarified” this policy.<sup>119</sup> Currently, the SSA will allow third-party travel expenses, including food, lodging, and transportation when the beneficiary requires a travel companion due to their medical condition, disability, or age.<sup>120</sup> Nonetheless, other expenses that do not fall within those categories, such as the cost of park tickets in the *Disney World* hypothetical would still be prohibited. Furthermore, even purchasing a small inexpensive gift, such as a bouquet of flowers, for the beneficiary to give to their sick relative would be strictly prohibited, as seen in Mr. Brown’s case.<sup>121</sup>

---

<sup>112</sup> See POMS SI 01120.203B.6.

<sup>113</sup> “The Medicaid special needs trust exceptions are closely connected with trust rules for qualifying for SSI (Supplemental Security Income).” *Serious Consequences for Special Needs Trusts- Social Security’s Recent Policy Regarding the Sole Benefit Rule*, LAW OFFICES OF BRADLEY J. FRIGON, LLC (Apr. 23, 2014), <https://www.bjflaw.com/firm-news/serious-consequences-for-special-needs-trusts-social-security-s-recent-policy-regarding-the-sole-benefit-rule>.

<sup>114</sup> See O’Byrne & Winston, *supra* note 99.

<sup>115</sup> See *id.*

<sup>116</sup> See *Serious Consequences for Special Needs Trusts supra* note 113.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> POMS SI 01120.201F.3.b.

<sup>120</sup> *Id.*

<sup>121</sup> See Floyd Brown discussion, *supra* pp. 101.

Concerning visits to the beneficiary, the SSA, prior to 2012, allowed family members to be reimbursed for such visits.<sup>122</sup> In August 2012, however, the SSA changed its policy to prohibit family members of beneficiaries with first-party SNTs from being reimbursed.<sup>123</sup> After outcry from disability rights groups, the policy was again amended in 2013.<sup>124</sup> Family members could be reimbursed for travel expenses from a first-party SNT if the reason for the travel was so that the beneficiary could receive medical treatment.<sup>125</sup> Additionally, family members could be reimbursed from a first-party SNT if the beneficiary was living in an institution.<sup>126</sup> No such allowance was permitted if the beneficiary lived independently.<sup>127</sup> Why was a distinction made between a disabled beneficiary living in a nursing home or other supervised environment and one living independently? The explanation provided was that third-party travel was only permitted for “ensuring the safety and/or medical well-being of the [trust beneficiary].”<sup>128</sup> Even so, it seems that in certain circumstances, a disabled beneficiary living alone would be more vulnerable, and there would be a greater need to ensure their “safety and/or medical well-being” than an institutionalized beneficiary.

The policy was again amended on April 30, 2018. Currently, concerning first-party SNTs, both “service providers” visiting a beneficiary living in an institution and “a trustee, trust advisor . . . , or successor” visiting a beneficiary who lives independently may seek reimbursement from the trust for their travel expenses.<sup>129</sup> The third-party may include a family member; however, all third-parties who plan to seek reimbursement are advised to check with their local regional SSA office concerning the permissibility of such expenditures prior to spending any money.<sup>130</sup> The implication herein is that although such third-party expenses may be permissible according to the most recent interpretation of the “sole benefit” rule and its application, the SSA may still disallow such expenditures depending on the circumstances. The rule’s history and application in this instance is arbitrary and manifestly inconsistent.

Besides travel, beneficiaries frequently want to use the funds in a myriad of ways which may incidentally benefit others and may violate the SSA’s interpretation of the “sole benefit” rule. Yet, the allowances for trust disbursements based on the SSA’s so-called “clarification”<sup>131</sup> of the rule’s

---

<sup>122</sup> *Can Special Needs Trusts Reimburse Family Members for Travel Expenses?*, SPECIAL NEEDS ANSWERS (Nov. 28, 2017), <https://specialneedsanswers.com/can-special-needs-trusts-reimburse-family-members-for-travel-expenses-16451>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See Staunton, *supra* note 14, at 6.

<sup>128</sup> *Id.*

<sup>129</sup> POMS SI 01120.201.F.3.c.

<sup>130</sup> *Id.*

<sup>131</sup> See O’Byrne & Winston, *supra* note 99.



application to different scenarios varies widely.<sup>132</sup> For example, a vehicle may be purchased, but clearly, unless no one else ever rides in the vehicle, this disbursement is not made “for the sole benefit” of the beneficiary. Yet, “purchase of a vehicle and maintenance . . . is permitted under federal law.”<sup>133</sup> The trust may even be utilized to purchase a vehicle when the beneficiary cannot drive.<sup>134</sup>

A trust disbursement to cover the cost of a home modification for a disabled beneficiary who lives with others presents another interesting conundrum. Does the family have to pay for their apportionment of the modification if it is only necessary due to the beneficiary’s disability?<sup>135</sup> The beneficiary’s family is living in the home and therefore technically “benefiting” from the improvements, yet the same would not have been necessary but for the beneficiary’s disability. If the cost of improvements is \$100,000 but five people reside in the home, will the trust only pay for one-fifth of the cost? What if the beneficiary’s family cannot afford to pay for the remaining cost of the modifications? Does the beneficiary have to live alone for the trust to pay for *any* of the modifications? Little guidance is available; however, trustees are advised to proceed with caution.<sup>136</sup>

In both travel and the home setting, it appears the “sole benefit” rule and its application work to prevent beneficiaries from maintaining normal interpersonal and interfamilial relationships. Surely these limitations were not intended when SNTs were created, the purpose of which was to allow disabled beneficiaries to shelter excess resources and use the funds to enhance their quality of life.<sup>137</sup> Because the “sole benefit” rule and its application to different circumstances is inconsistent and unpredictable, trustees are wary of making disbursements unless the same falls within some explicit “clarification” of the “sole benefit” rule.<sup>138</sup> Even then trustees must always worry that the SSA will

---

<sup>132</sup> See generally Special Needs Alliance, *supra* note 59, at 10-12 (explaining, in part, the feasibility of using the trust for numerous different kinds of goods and services); Staunton, *supra* note 14, at 5-8 (discussing the “sole benefit” rule as it relates to the administration of SNTs).

<sup>133</sup> Special Needs Alliance, *supra* note 59, at 11.

<sup>134</sup> *Special Needs Trusts and the Purchase of a Vehicle*, SPECIAL NEEDS ALLIANCE (Sept. 2012), <https://www.specialneedsalliance.org/the-voice/special-needs-trusts-and-the-purchase-of-a-vehicle-2/>.

<sup>135</sup> See Lewis, *supra* note 47, at 30.

<sup>136</sup> *Id.*

<sup>137</sup> “The SNT is designed to enhance a beneficiary’s quality of life through the purchase of additional goods and services that are not covered or adequately provided by SSI and Medicaid.” Rosenberg, *supra* note 21, at 94-95.

<sup>138</sup> See generally Staunton, *supra* note 14 (discussing the “sole benefit” rule as it relates to the administration of supplemental needs trusts).

For their part, and given the ad hoc and inconsistent decisional law in this area, court examiners and judges will often default to a general and uncircumscribed “best interest” standard to pick and choose which expenditures are deemed appropriate and which should be disapproved and subject to surcharge. This leaves the trustee . . . hesitant to make distributions for fear of being second-guessed by someone with little or no first-hand knowledge of the beneficiary’s day-to-day circumstances.

Wilcenski, *supra* note 38, at 11.

amend its interpretation, making a once permissible use of the trust impermissible, and thus potentially severely negatively impacting the disabled beneficiary's quality of life. Considering how the rule frustrates both the administration and intent of SNTs, disabled beneficiaries, many of whom depend upon others, should be allowed certain trust disbursements if the predominant purpose of the disbursement is to enhance the beneficiary's quality of life. The decision to allow disbursements should be made without regard to whether a third-party may enjoy an incidental secondary benefit.<sup>139</sup>

## V. Trustees

### A. Family Members: Issues of Competency and Trustworthiness

Due to the strict "sole benefit" rule, it is quite difficult to find competent trustees who may appropriately safeguard against administrative or judicial determinations that the rule has been violated.<sup>140</sup> Family members, although well meaning, may be too willing to accommodate the wishes of a disabled beneficiary. "[M]any trusts fail because the family member who was well intentioned and willing to become trustee was ill equipped to handle the associated responsibilities."<sup>141</sup> Frequently, this will result in the family member allowing the beneficiary to utilize the trust in a way which may violate the "sole benefit" rule and subsequently jeopardize the beneficiary's continued eligibility for or receipt of means-tested public benefits.<sup>142</sup> Although a family member may have the beneficiary's best interests at heart, it is often prudent to find someone with less of an emotional connection to the beneficiary to administer the trust.

Conversely, others may seek to take advantage of a disabled beneficiary and serve as trustee with the intention of disbursing funds from the trust for items which only facially meet the "sole benefit" rule.<sup>143</sup> An unscrupulous trustee could easily purchase a computer, television, refrigerator, or other tangible item "for the benefit" of the beneficiary and simply convert the item to

---

<sup>139</sup> See *infra* Section VI.

<sup>140</sup> "To ensure that your beneficiary's eligibility is never compromised, a trustee's knowledge of public benefit programs, such as Social Security and Medicaid, is crucial." *Choosing a Trustee for a Special Needs Trust*, SPECIAL NEEDS ANSWERS (Aug. 1, 2014), <https://specialneedsanswers.com/choosing-a-trustee-for-a-special-needs-trust-13808>.

[T]he rules governing . . . [SNT] distributions often conflict from one government benefit program to another, distribution standards are often ambiguous and difficult to apply in practice and . . . many of those who review the actions of the trustee . . . have very little practical appreciation of how tough it can be to make the right decision about the use of trust money for a beneficiary with a cognitive disability.

Wilcenski & Pleat, *supra* note 108 at 30 (internal citations omitted).

<sup>141</sup> McCoy, *supra* note 53, at 472 (internal citation omitted).

<sup>142</sup> "[The trustee's] relationship with the disabled beneficiary can cloud [the trustee's] judgment. Circumstances and emotions may pressure a trustee to make distributions for the immediate well-being or happiness of the disabled individual that will ultimately result in loss of government benefits." *Id.*

<sup>143</sup> See generally *In re Estate of Skinner*, 804 S.E.2d at 461 (where husband was found not to be in violation of the "sole benefit" rule by purchasing a home and household items while living with his wife, the beneficiary, but was found to have wasted assets by spending ninety percent of the trust assets within sixty days of becoming trustee).

their own use.<sup>144</sup> On paper, it may appear that the item was legitimately bought for the beneficiary, but the beneficiary may not even be aware of the transaction.<sup>145</sup> This is especially true in a situation where the beneficiary has limited cognitive ability due to an intellectual disability, a traumatic brain injury, or mental illness.<sup>146</sup> If no one is available to advocate for the beneficiary, and the trustee is responsible for purchasing items for the beneficiary's "sole benefit," it may be all too easy for certain dishonest family members to become trustees and steal directly from the trust.<sup>147</sup> One of the "sole benefit" rule's implicit purposes, to protect disabled beneficiaries from being taken advantage of, is therefore easily defeated.

Because of the possible questionable motives driving family members to become trustees of SNTs, courts are often left to sift through the specific facts and circumstances behind certain disbursements to determine whether they were made for the "sole benefit" of the beneficiary. Adding to the problem of sifting through the facts and circumstances, is the SSA's inconsistent application of the "sole benefit" rule. This culminates in the perfect storm, making it unsurprising that courts have trouble interpreting and applying the POMs in such a manner as to provide a workable framework for trustees to identify what is and is not permissible in SNT administration. Specifically, there is a sizable lack of clear guidance as to whether a trustee has in fact violated the "sole benefit" rule.<sup>148</sup>

*In re Estate of Skinner* is illustrative. Respondent, Mark Skinner, appealed from the lower court's decision to remove him as the trustee of his wife, Catherine Bass Skinner's, SNT.<sup>149</sup> This removal occurred after Mr. Skinner used the trust to purchase a home where he and Mrs. Skinner lived together.<sup>150</sup> The North Carolina Court of Appeals determined that the trial court had interpreted the "sole benefit" rule to mean that it would be violated if "Mr. Skinner used or enjoyed—and thus 'benefitted' from—the house, furniture, and appliances."<sup>151</sup> The court of appeals then reversed, finding the lower court's holding that the purchase of the home and appliances violated the "sole benefit" rule was erroneous because "the term 'sole benefit' does not mean that a disabled person . . . must live in a state of bizarre isolation in which no other person may

---

<sup>144</sup> See generally Dave Stafford, *Lawyer Accused of Stealing from Special Needs-Trusts*, THE INDIANA LAWYER (Sept. 6, 2017), <https://www.theindianalawyer.com/articles/44716-lawyer-accused-of-stealing-from-special-needs-trusts> (reporting on a particularly egregious instance where an attorney, serving as trustee of multiple SNTs, was accused of stealing large amounts of money from various beneficiaries' trust accounts for items such as casino trips and dry cleaning bills).

<sup>145</sup> See *id.*

<sup>146</sup> See generally *In re Estate of Skinner*, 804 S.E. 2d at 461 (where husband was found not to be in violation of the "sole benefit" rule by purchasing a home and household items while living with his wife, the beneficiary, but was found to have wasted assets by spending ninety percent of the trust assets within sixty days of becoming trustee).

<sup>147</sup> See generally *id.*

<sup>148</sup> See generally *id.*

<sup>149</sup> *In re Estate of Skinner*, 787 S.E. 2d at 442.

<sup>150</sup> *Id.* at 443.

<sup>151</sup> *Id.* at 450.

‘benefit’ from her house or furnishings.”<sup>152</sup> The application was “particularly absurd given the likelihood that a disabled person may need some assistance from someone living in the home.”<sup>153</sup> The court of appeals subsequently reinstated Mr. Skinner as trustee.<sup>154</sup>

The Supreme Court of North Carolina reversed the appellate court order after finding that Mr. Skinner breached his fiduciary duties by expending “more than ninety percent of the monies that had been deposited in the Special Needs Trust . . . within sixty days of obtaining control of those monies.”<sup>155</sup> However, the court distinguished between complying with the applicable provisions of the beneficiary’s SNT, which the intermediate appellate court found he had not violated, and “the broader issue of whether the guardian or trustee acted in such as manner as to violate the fiduciary duty that he or she owes to the ward or beneficiary.”<sup>156</sup> The court found that the trial court properly removed Mr. Skinner as trustee because his actions “constituted waste and mismanagement” of trust assets and not due to a violation of the SNT trust provisions.<sup>157</sup>

Justice Morgan dissented, opining that Mr. Skinner acted in his wife’s best interest and that no fiduciary duty was breached.<sup>158</sup> Moreover, Justice Morgan agreed with the appellate court’s view that the trial court misinterpreted the “sole benefit” rule. “Contrary to [the trial court’s] misapprehension of the law, the purchases of the house and related expenditures were authorized by the Special Needs Trust consistent with the purposes of a special needs trust.”<sup>159</sup> Forcefully asserting that the new house was appropriate because it suited the beneficiary’s needs and did not subsume resources available from state or federal government, Justice Morgan argued: “[t]he failure of the [trial court] to recognize Mr. Skinner’s sanctioned fulfillment of his duties as Trustee of Mrs. Skinner’s Special Needs Trust, coupled with [its] concomitant negative view of these permissible expenditures, constitutes a clear misapprehension of the law.”<sup>160</sup>

Despite the dissenting opinion of Justice Morgan, together with the intermediate appellate court’s holding that the “sole benefit” rule was not violated, the trial court’s determination is more consistent with the SSA’s application of the rule in these circumstances.<sup>161</sup> While Justice Morgan may have argued passionately that the purchases of the home and related appliances were consistent with the *purpose* of a SNT, the current application of the “sole

---

<sup>152</sup> *Id.* at 449-50.

<sup>153</sup> *Id.* at 450.

<sup>154</sup> *In re Estate of Skinner*, 787 S.E. 2d at 453.

<sup>155</sup> *In re Estate of Skinner*, 804 S.E. 2d at 460.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 461 (Morgan, J., dissenting).

<sup>159</sup> *Id.* at 463 (Morgan, J., dissenting).

<sup>160</sup> *In re Estate of Skinner*, 804 S.E. 2d at 463 (Morgan, J., dissenting).

<sup>161</sup> “If members of the Beneficiary’s family also reside in a home owned by the SNT, beware violation of ‘the sole benefit’ rule.” Lewis, *supra* note 47, at 30.

benefit” rule would seem to prevent a married beneficiary from using his or her trust on household items, because the same will presumably “benefit” the cohabitating spouse.<sup>162</sup> Justice Morgan and the intermediate appellate court understood the unreasonableness of the SSA’s interpretation, but failed to comprehend that this was in fact the exact logical, albeit, absurd conclusion of the rule’s application. This example illustrates the confusion courts, as well as trustees especially family members, without sophisticated knowledge of trust administration, may feel when dealing with the “sole benefit” rule.<sup>163</sup>

Recently, the SSA has stated in its explanation of the “sole benefit” rule that family members may cohabitate with the beneficiary.<sup>164</sup> The explanation, however, is still silent on whether the trust may purchase items used in the household which would benefit more than just the beneficiary or whether the trust will charge rent to a family member residing in a home purchased by the trust.<sup>165</sup>

### **B. Institutionalized Trustees: Problems with Advocacy**

The institutionalized trustee administering a pooled SNT may have more specialized knowledge of SSA POMS than the average lay person.<sup>166</sup> However, due to the volume of trust activity, institutional trustees may not advocate as effectively, or *at all*, for beneficiaries to receive certain support and individualized attention in the same way that a trusted friend or family member could in a (d)(4)(A) trust.<sup>167</sup> This is caused by myriad factors, including the delegation of duties to less educated employees, the sheer volume of sub-trust accounts, and the lack of a personal connection between the institutionalized trustee and individual beneficiary.<sup>168</sup>

---

<sup>162</sup> *See id.*

<sup>163</sup> *See generally* Wilcenski, *supra* note 38, at 10 (discussing, in part, the lack of uniformity in first-party SNT administration and judicial enforcement resulting in uncertainty in SNT administration).

<sup>164</sup> On April 30, 2018, the SSA published new guidance interpreting the “sole benefit” rule, which specifically states that disabled beneficiaries may reside with family members without violating the “sole benefit” rule. SI POMS SI 01120.201.F.3.a. “[I]f the trust buys a house for the beneficiary to live in, that does not mean that no one else can live there . . .” *Id.*

<sup>165</sup> *See id.*

<sup>166</sup> “[P]ooled trusts also help eliminate choice of trustee issues. Pooled trusts are administered by the nonprofits that created the trust, and typically do so with the assistance of highly experienced counsel or other professional trustees.” Fuller & Urbatsch, *supra* note 95, at 86.

<sup>167</sup> Explaining the potential pitfalls of institutional trustees, in particular the institution’s lack of personal connection with the beneficiary:

Professional [and institutional] trustees also lack the personal touch that many families desire in a trustee. They do not have a relationship with the beneficiary or knowledge of his or her needs and preferences. Depending on the nature of the beneficiary’s disability, he or she may have very specific or unique needs, or may be completely self-sufficient in some areas and totally helpless in others. Without knowledge of these details, the trustee may make some completely unnecessary distributions while neglecting to cover other important needs.

McCoy, *supra* note 53, at 473 (internal citations omitted).

<sup>168</sup> “Pooled trusts are only as good as the nonprofit that is managing it. Some may do a good job for a while, but in the face of financial problems or management changes, may end up doing a terrible job or

In the pooled trust setting, those who review requests may not be the trustees themselves, but rather employees of the institution, armed with far less sophisticated knowledge and training.<sup>169</sup> Employees may be directed to simply deny requests based on certain criteria or in accordance with strict internal policies which may demand absolute unquestioning adherence to the SSA's "sole benefit" rule.<sup>170</sup> Conversely, the trustee of an individualized SNT may have the luxury of petitioning the court to allow a disbursement or checking with a local Social Security office to see if the same is permissible, whereas case managers at pooled trusts are beholden to the rules and regulations of their employer.<sup>171</sup>

Adding to this problem, a pooled trust, by definition, is one large trust account filled with many sub-trust accounts.<sup>172</sup> This means that a non-profit must administer hundreds of individual SNTs, comprised of countless disabled beneficiaries. Because of the number of beneficiaries contained within the pooled trust, it is impossible to attend to the needs of every beneficiary contemporaneously. As a result, beneficiaries who lack communication skills or the benefit of having a family member, friend, or guardian to represent their interests, may be neglected.<sup>173</sup> This is not out of cruelty, but only because those who are employed by the SNT can only keep up with the large volume of beneficiaries who are *actively* attempting to utilize their trusts. Further, in certain circumstances, institutionalized trustees may be more concerned with collecting fees for administering the trust and less concerned with getting to know the beneficiary, including what disbursements would improve his or her quality of life.<sup>174</sup>

The combination of these factors presents a situation wherein the trust may become dormant. This is further exacerbated by stringent SSA interpretations which inhibit ease of use in disbursing trust funds. The biggest predictor of this occurrence, in the Author's experience, is when the beneficiary lacks an effective advocate.<sup>175</sup>

---

even going out of business altogether." Betsy Simmons Hannibal, *Pooled Special Needs Trusts*, NOLO, <https://www.nolo.com/legal-encyclopedia/pooled-special-needs-trusts.html> (last visited Oct. 12, 2018).

<sup>169</sup> This statement is based on the Author's own experience and observations working at a SNT: I was a Case Manager for a Pooled Supplemental Needs Trust, tasked with determining whether disbursements could be paid out of sub-trust accounts without jeopardizing beneficiaries' eligibility or receipt of public benefits.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> See Quintal, *supra* note 93, at 20; see also Fuller & Urbatsch, *supra* note 95, at 84.

<sup>173</sup> "[I]n those cases where the beneficiary is unable to communicate and has no one . . . there is typically little activity." Wilcenski & Pleat *supra* note 108, at 27.

<sup>174</sup> "Investigate the nonprofit trustee's policy regarding the fees associated with disbursement of the residual funds to the designated beneficiaries, and whether the trust retains a percentage or charges a flat fee for wrapping up the affairs of the trust. In some pooled trusts, this fee can be extraordinarily large." Fuller & Urbatsch, *supra* note 95, at 84 n. 2. See generally *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, 956 N.Y.S.2d 856 (Sur. Ct. 2012) (where beneficiary's SNT, worth millions of dollars, was left to languish while trustees attempted to collect fees for maintaining the trust).

<sup>175</sup> See *supra* note 169.

For example, in *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, the beneficiary was a profoundly disabled young man, and his SNT, worth millions of dollars, was left to languish.<sup>176</sup> The co-trustees consisted of an experienced estates attorney who was well versed in the world of SNTs and a well-known banking institution.<sup>177</sup> Yet, for almost five years, no disbursements were made.<sup>178</sup> The attorney acting as trustee had not seen the beneficiary since he was six years old and admitted he was involved only as a favor to the beneficiary's late mother.<sup>179</sup> The reason proffered by the institutional trustee for the lack of disbursements was that it lacked the "capacity to ascertain or meet the needs of this severely disabled, institutionalized young man."<sup>180</sup> In response, the judge ordered the trustees to "obtain the services of someone who could assess [the beneficiary's] situation and ascertain his needs."<sup>181</sup> After hiring a certified care manager, the beneficiary was permitted to utilize his trust for "apparently trivial expenditures."<sup>182</sup> This resulted in a significant improvement in his quality of life, including his ability to communicate with the outside world, interact with others and integrate himself into the community.<sup>183</sup> Such disbursements included a trampoline, computer, and various sensory items together with communication devices.<sup>184</sup>

Although not directly addressed, one can imagine a primary reason the trust remained dormant was resistance toward the complexity of SNT administration. Rather than expending effort to comply with the SSA's strict interpretations for allowable SNT trust disbursements, including the "sole benefit" rule and its inconsistent application, it was easier to forgo making expenditures altogether. No one was there to insist the trust be utilized for the disabled beneficiary's benefit, so it was more convenient to let it lie dormant.

Discussing the problem of under-utilized SNTs, Attorneys Edward V. Wilcenski and Tara Anne Pleat<sup>185</sup> say this is not an uncommon situation: "[w]e regularly encounter trusts that have sat 'dormant' for years. The trustees . . . do not mishandle or misappropriate trust money . . . . But in those cases where the beneficiary is unable to communicate and has no one . . . there is typically little activity."<sup>186</sup> In fact, in *Matter of JP Morgan Chase Bank, N.A.*, those at the facility where the beneficiary lived had no idea that the beneficiary had

---

<sup>176</sup> *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, 956 N.Y.S.2d at 856-57.

<sup>177</sup> Wilcenski & Pleat, *supra* note 108, at 27.

<sup>178</sup> *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, 956 N.Y.S.2d at 860. "The almost negligible amount paid to Staver [the care manager hired as a result of the article 17-A proceeding] . . . is the *only* money paid out for the benefit of . . . the disabled beneficiary, in five years." *Id.*

<sup>179</sup> *Id.* at 861.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, 956 N.Y.S.2d at 862.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 863.

<sup>185</sup> Attorneys Edward V. Wilcenski and Tara Anne Pleat are experienced and accomplished leaders in the administration of SNTs in the State of New York. Mr. Wilcenski serves on the board of the pooled SNT where this Author was previously employed.

<sup>186</sup> Wilcenski & Pleat, *supra* note 108, at 27.

substantial assets until the certified care manager became involved.<sup>187</sup> Were the beneficiary to have had an effective advocate from the inception of his trust, the trustee most likely would have made expenditures from the trust to improve the beneficiary's quality of life without the necessity of court intervention. Further, were the POMS, including the "sole benefit" rule and its application, less rigid and more consistent, use of trust funds would be less onerous. The trustees would be faced with less doubt as to whether they were complying with the POMS and therefore less apprehensive regarding the permissibility of certain disbursements.

Ultimately, the trial court judge held that the trustees were not entitled to the full amount of their charged commissions:

it was not sufficient for the trustees merely to prudently invest the trust corpus and to safeguard its assets. The trustees here were affirmatively charged with applying trust assets . . . [for the beneficiary's] benefit . . . . Both case law and basic principles of trust administration and fiduciary obligation require the trustees to take appropriate steps to keep abreast of . . . [the beneficiary's] condition, needs, and quality of life, and to utilize trust assets for his actual benefit . . . . [The trustees'] failure to fulfill their fiduciary obligations should result in denial or reduction of their commissions for the period of their inaction.<sup>188</sup>

The case stands for the proposition that a trustee, even while not in violation of requisite fiduciary duties, needs to be cognizant of how to administer SNTs and ascertain the needs of a disabled beneficiary. The institutional trustee, including trustees administering pooled SNTs, should not forgo individualized attention to the beneficiaries in the interest of expediency or to avoid compliance with the POMS through atrophy.

Despite the chance of less individualized attention, a pooled SNT is an attractive option for many beneficiaries because the cost of administration may be relatively low.<sup>189</sup> However, without an advocate, the beneficiary's sub-trust may be left to languish as was the beneficiary's in *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*. One reason these particular kinds of trusts are left to wither is the difficulty of properly safeguarding disbursements so as not to violate the SSA's "sole benefit" rule.<sup>190</sup> The disabled beneficiary may request the

---

<sup>187</sup> *Id.* at 27 n. 10.

<sup>188</sup> *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, 956 N.Y.S.2d at 867-68.

<sup>189</sup> See generally Fuller & Urbatsch, *supra* note 95, at 84 (explaining, in part, that because assets are pooled together, a pooled trust may be more affordable due to reduced administrative costs).

<sup>190</sup> Wilcenski & Pleat, *supra* note 108, at 30.

[T]he rules governing . . . [SNT] distribution often conflict from one government benefit program to another, distribution standards are often ambiguous and difficult to apply in practice and . . . many of those who review the actions of the trustee . . . have very little practical appreciation of how tough it can be to make the right decision about the use of trust money for a beneficiary with a cognitive disability.



funds be utilized; however, much to the beneficiary's frustration, the same may be denied because it would violate the "sole benefit" rule.<sup>191</sup> Without an effective advocate who can communicate with the trustee and formulate a plan as to how to obtain the beneficiary's desired objectives without violating the "sole benefit" rule, the beneficiary's requests may continue to be flatly denied.<sup>192</sup> At a certain point, it becomes highly probable that the beneficiary will give up trying to use their trust altogether, resulting in a dormant fund.<sup>193</sup>

## VI. Proposed Solution

To distinguish sole benefit from "predominant purpose," the disbursement request should be examined comprehensively without regard to whether the disbursement will incidentally benefit someone else. Rather, an objective test is needed to determine if the request is reasonable and if the "predominate purpose" is to enhance the beneficiary's quality of life. Factors to be considered should include: 1) the nature of the request, including the facts and circumstances behind the request; 2) the beneficiary's age; 3) the beneficiary's living situation; 4) the size of the trust corpus; and, 5) the type of government benefits the beneficiary receives. No one factor is dispositive; however, if under the totality of the circumstances, the request is objectively reasonable, does not subsume the beneficiary's need for benefits, and the request's predominant purpose is to enhance the beneficiary's quality of life, the distribution should be allowed.

For example, in the *Disney World* scenario,<sup>194</sup> the facts and circumstances indicate that the beneficiary has long desired to travel to Disney World but requires a travel companion due to her disability. Although she is young, her needs are met through SSI and Medicaid, and she is unlikely to expend the trust quickly. While her sister may also enjoy the vacation and thus "benefit" from the same, the predominant purpose of the trip is for the beneficiary to fulfill a life-long dream. The sister's presence is necessary due to the beneficiary's qualifying disabilities and not because the sister wishes to exploit the beneficiary. The request should be honored, especially given that other related expenses would be permitted to be paid from the trust and it is only the cost of the park tickets themselves which would be considered a violation of the "sole benefit" rule.

Conversely, suppose that a six-year-old beneficiary wants to go on a Disney cruise and requests that the trust pay for her and her entire immediate

---

*Id.*

<sup>191</sup> See generally Staunton, *supra* note 14 (discussing the "sole benefit" rule as it relates to the administration of SNTs).

<sup>192</sup> See generally Wilcenski & Pleat, *supra* note 108 (explaining, in part, the Court's holding in *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, that SNT trustees have an affirmative duty to be proactive in identifying the needs of a disabled beneficiary despite the reality that many trustees have little experience with the system of supports for disabled individuals).

<sup>193</sup> *Id.*

<sup>194</sup> See *supra* Part II Section A.

family to accompany her on an all-expenses-paid trip. Under these circumstances, the request should be denied. The beneficiary is quite young and will need the trust for the rest of her life. The request is also facially exploitative because a young child should not be paying for the cost of a family vacation. Even if the beneficiary had obtained the age of majority, the number of third-parties who accompany her on the trip should be limited to those who must attend to ensure the beneficiary's health, safety, or comfort.

In the second example, *Family Home*,<sup>195</sup> the beneficiary's mother would prefer to stay home and care for the beneficiary rather than employ strangers while she works to reimburse the trust for her portion of the rent. The advantages gained by the beneficiary in this scenario are manifest and outweigh any loss in monetary compensation. This arrangement provides that the beneficiary is in a stable and supportive environment, with a loving caregiver who is focused on his best interests. The arrangement also alleviates some taxpayer burden as the mother is not using respite aides paid for by the state through its Medicaid waiver program. This is a reasonable use of trust assets and improves the beneficiary's quality of life exponentially. The arrangement should be allowed.

## VII. Conclusion

The purpose of an SNT is to supplement and improve the quality of life for disabled individuals while they continue to remain eligible for governmental means tested programs. The SSA's interpretation of the "for the benefit" language of the SNT statutes should reflect the reality that most, if not all, disabled beneficiaries require additional assistance from friends, family members and other caregivers to navigate their world. Disbursements which are made with the predominant purpose of helping the beneficiary, while not subsuming the need for means-tested programs, should be allowed even if the same benefits someone else other than the beneficiary. The requests should be examined by looking at the beneficiary's age, their living situation, the type of benefits they receive, and the nature of the request. Rather than narrowly construing the "for the benefit" requirement to mean "sole benefit" the SSA should be more flexible in its interpretation of the statutory language which will allow disabled beneficiaries to achieve a better quality of life while ensuring they remain eligible for vital public benefit programs.

---

<sup>195</sup> See *supra* Part II Section B.