



*Special Needs Trusts
and Estate Planning -
Tips to preserve public
benefits*

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This is Part 2 of two programs

- **Part I at 9:30 – 10:30 am:** Understanding the Social Security Act's benefit primary programs, their administration, relationships and general eligibility rules in lay terms, and the new ABLE Act
- **Part II at 10:45 – 11:45 am:** Private estate planning tools to maintain your child's access to public benefits, using Special Needs Trusts, Wills, Family Trusts and other planning techniques to supplement the income & resources to persons with disabilities

The theme is how to help without hurting

- Many substantial and important public benefits are means-tested, including SSI, Medicaid, nursing home, home & community-based services, and help paying health insurance premiums
- Government programs have unrealistic asset limits, such as the SSI limit of \$2,000 in resources/assets
- There are ways to help that create additional, private supplemental funds that don't count against receipt of public benefits but cover things disabled people need

A primer on Wills & Trusts

- **The Last Will and Testament** – me, speaking and controlling my assets, from the grave
 - “On my death, \$5,000 to Jessica Lillesand, my disabled daughter.”
- **Probate:** the Will is deposited in court, notification published that I died, creditors can file claims, my lawful heirs determined, assets in my name collected, final taxes and just debts paid, and Jessica gets her \$5,000 on July 27th when probate is closed.
- **Who’s money is it?**
- **What if Jessica is on SSI and Medicaid?**

Oops! What does Jessica do now?

She gets \$5,000 of SSI-countable “unearned” income in July and loses 1 month of SSI and potentially SSI-related Medicaid

Her options:

- She must report income to SSA by August 10th
- For each month she retains the \$5,000 she is NOT eligible for SSI because she is over the \$2,000 SSI asset limit
- Quickly spend at least \$3,000 in July so that on August 1st she has less than \$2,000; or put it in an ABLE account if eligible (age & max. contribution)

But what if I left her not \$5,000 but \$50,000 or \$500,000 or \$5 Million?

Leaving Jessica \$500,000

- **My Last Will and Testament** – me, “speaking” and controlling my assets from the grave, and not doing the smart thing
 - “On my death, I give \$500,000 to Jessica Lillesand, my daughter.”
- **Spend-down?** - She can't/shouldn't spend it in one month
- **Disclaim her inheritance?** – No, refusing the gift triggers loss of benefits for up to five years into the future
- **She can create, herself, a First Party Special Needs Trust (SNT)** that benefits herself and retains eligibility for SSI and SSI-related Medicaid benefits, **but... Problem:** a First Party SNT requires that on her death, **the government has a lien** for all the Medicaid provided during Jessica's lifetime, and no funds remaining go to my other healthy child, Wade, or other relatives or charities until lien paid, or ever if not enough

An alternative (but bad) plan: leaving Jessica \$0 and giving all to my son, Wade

My Will, now changed, says:

- “On my death, I give \$500,000 to Wade Lillesand, my healthy son, and nothing to my daughter, Jessica.”

[My hope is that Wade will use the money, as he promised, for Jessica’s needs].

I have disinherited Jessica. Good news, She keeps her SSI and Medicaid but bad news...

In spite of good intentions, Wade gets: sued, develops an opioid addiction, or a gambling problem, absconds with the money, divorced, or prematurely dies with my \$500k in his bank account inherited by Wade’s kids, and my money is not used as I want, for Jessica’s needs.

Better plan: Leaving Jessica \$500,000 in testamentary trust

My Will now says:

- “On my death, I give \$500,000 to Tom Lillesand, as Trustee, for Jessica Lillesand, my daughter.”

I have created a **Third Party Testamentary Special Needs Trust**

Tom uses the money during Jessica’s lifetime for her benefit, on her death, he gives the rest of the money to my son, Wade – by law, **free from an government lien** for the Medicaid provided to Jessica

More on the creation and use of a testamentary THIRD PARTY SNT

My Will now has a testamentary TP-SNT within it and says:

- “On my death, I give \$500,000 to Tom Lillesand, as Trustee, for Jessica Lillesand, my daughter.”

Grantor/Settlor = me, David Lillesand

Trustee = my cousin, Tom [note, legally Tom manages, but does not own, my money in trust for Jessica]

Beneficiary = my daughter, Jessica Lillesand

No government lien on my money at Jessica’s death

Required Text = “Jessica shall have no power to revoke or terminate the trust, nor direct the use of the trust proceeds.”

Another (better) alternative: create an inter vivos THIRD PARTY SNT

I can create and TODAY partially fund a TP-SNT that says:

- “Today I, David, as grantor, give \$100 to the Lillesand Family Trust, for the benefit of my daughter, Jessica; naming myself as Trustee, and on my death, Tom Lillesand, as Successor Trustee.”

[“inter vivos” just means a gift made during my lifetime instead of a legacy in my Will after I’m dead]

Grantor/Settlor = is still me, David Lillesand

Trustee/Successor = me, David, and when I die, my cousin, Tom

No government lien on my money at Jessica’s death – the remaining funds go to my healthy son, Wade, or his kids

Advantages to the inter vivos THIRD PARTY SNT

- **Others can contribute** - Being created now, during my lifetime, means that other people, like brother, Wade, could also leave money for Jessica easily:
For example, Wade's, (Jessica's brother's) simple Will now says:
“On my death, I leave \$10,000 to the Lillesand Family Trust.”
- **Each member of the family does NOT have to pay a lawyer** to create a separate Special Needs Trust in their estate documents.
- **Submit trust now for approval** – to Social Security and/or Medicaid, so if there has to be changes, I am alive to change the terms
- **Avoids probate for some assets** – I, David, can set up pay-on-death (POD) bank accounts to read, “On my death, pay remaining funds to the Lillesand Family Trust created in 2018” or name the Family Trust as the beneficiary of my life insurance.

When does Jessica, the disabled daughter, have to create her own SNT?

- **First Party SNT vs. Third Party SNT** – Medicaid payback
- Remember previous slide where I just left \$500,000 for Jessica in my Will?
 - “On my death, I give \$500,000 to Jessica Lillesand, my daughter.”
- **Unplanned inheritances** – create havoc and can be avoided. Grandparent leaves Jessica \$50,000 for example.
- **Spend-down plan?** – Can Jessica buy exempt assets (home, car, furnishings, repairs, pay off credit cards, pay down/off mortgage, etc.) quickly, to get under the \$2,000 limit?

When does Jessica, the disabled daughter, have to create her own SNT?

- **A second situation:** Jessica, on SSI/Medicaid, wins a lawsuit!
- **Alternatives** – spend-down plan, ABLE account, go off public benefits (if for example a very large settlement) and buy better private health insurance in spite of Jessica's pre-existing conditions via ACA
- **Requires cost-benefit analysis** – does private health insurance provide HCBS services Jessica now gets? What are the fees to create SNT? What is the value of public services retained versus cost of replacement?

If going ahead with a First Party SNT, what does it have to say?

Jessica's First Party SNT is valid if it...

- contains the assets of an individual who is **under age 65** and is **disabled**;
- is **established for the benefit of such individual through the actions of the *individual*, a parent, a grandparent, a legal guardian, or a court**; and
- provides that the **State(s) will receive all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State Medicaid plan, and**
- “Jessica shall have **no power to revoke or terminate the trust, nor direct the use of the trust proceeds.**”

For both First and Third Party SNTs, what can funds be used for?

Almost Anything! – food and shelter*, education, companions, travel, computers, medical equipment, dentists, doctors not on Medicaid, clothing, season tickets for herself and companion, furniture, repairs to home, new washer and dryer, car insurance, new cars, new handicapped van, professional fees, UBER, Employment training and support; Assistive technology and related services; Personal support services; Prevention and wellness; Financial management and administrative services; Legal fees; candy bars, movie tickets, etc.

“*food and shelter” – either pay these through an ABLE account, or from the disability check(s), or pay from the trust if the SSI check is greater than \$250 per month.

For both First and Third Party SNTs, how should bills be paid?

Remember the SSI rules on income – unearned income, like gifts, is “countable income” subtracted from the SSI check. So...

Tom the Trustee pays third parties directly to provide goods and services to Jessica

Example:

- Jessica needs a new computer costing \$800
- If Tom gives Jessica \$800 to buy it, she loses her SSI for that month
- Instead Jessica shops, tells Tom the make & model of computer she wants from Best Buy, and Tom writes the check for \$800 to Best Buy
- Jessica gets the new computer and keeps her full SSI/Medicaid benefits

Can Jessica have both a First and a Third Party SNT (or multiple SNTs)?

Yes. Remember that if Jessica receives an unplanned inheritance or proceeds from a lawsuit, she HAS TO create a FIRST Party SNT.

Another first or third party SNT – does NOT prevent the creation of additional SNTs

Why do more than one TP-SNT? – the heirs may be different

Best strategy in spending from multiple trusts – always spend the money in First Party SNT before spending TP-SNT funds – to preserve the family's money for other family members

Terminating Special Needs Trusts, upon Jessica's death

Third Party SNTs. – pay final expenses and legitimate bills to close the trust, distribute the remainder to the “residual beneficiaries” as per terms of the trust, file final tax return.

First Party SNTs – can pay final taxes, trust administrative expenses (but perhaps NOT outstanding bills), cannot pay Jessica's funeral expenses, **MUST** pay off the Medicaid liens in all states where she received services, and if there's any money left, distribute remainder to residual beneficiaries named in the trust, or her heirs at law (spouse, children, parents, siblings, etc., per state intestate law), and close the trust.

Questions?

If not asked during the conference, emailed questions to me are encouraged, phone conferences as necessary.

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