



## **SNT Beneficiaries on the Move: Second in a Series**

*The Voice is the e-mail newsletter of The Special Needs Alliance. This installment of The Voice was written by Special Needs Alliance member [Kristen M. Lewis, Esq.](#), who practices in Atlanta, Georgia at Smith, Gambrell & Russell, LLP. Kristen is also a Fellow of the American College of Trust and Estate Counsel (ACTEC). She is a frequent national speaker on special needs planning, and serves on the Boards of numerous non-profits that support individuals with disabilities and their families. In her vast amounts of free time, she trains certified service dogs for [Canine Assistants](#) in Milton, Georgia.*

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*This series reviews the myriad issues that arise as a result of the increased mobility of beneficiaries of Special Needs Trusts (SNTs). Special needs planning attorneys, and the other allied professionals with whom they collaborate (as described in [the first article of this series](#)), are increasingly called upon to help facilitate the transition of mobile beneficiaries, and the SNTs they bring with them, from one jurisdiction to another.*

### **The “Network” of Special Needs Trusts**

#### **“I know I need a SNT.”**

*Many prospective clients start a discussion about special needs estate planning with the following statement: “I know I need a SNT to help secure the future of my child [or grandchild, or spouse, or other person] who has a disability.” Many traditional estate planning attorneys who seek to co-counsel with special needs planning attorneys will similarly lead with this request: “My client has a child [or grandchild, or spouse, or other person] with a disability, and I’d like you to draft a SNT for my client to fund.” These folks may be commended for knowing that the SNT is the primary vehicle used to safeguard funds for a person with a disability. What they typically do not recognize is that comprehensive special needs planning encompasses a network of SNTs, each designed to receive funding from different sources at different times.*

*For families planning on a pro-active strategic basis, the network will be comprised largely of “third-party” SNTs (TPSNTs), i.e. designed to hold assets that the beneficiary of the TPSNT does not already own and to which the beneficiary is not already legally entitled. In contrast, a “first-party” SNT is designed to hold assets which the beneficiary already owns or to which he is already legally entitled. At least one first-party SNT should also be part of the network, just in case any assets “fall through the cracks” and pass to the beneficiary*

notwithstanding the best efforts of the estate planning team. The rest of this article will address only TPSNTs. Although many families prefer TPSNTs that are custom drafted by their attorney, they may also choose to establish a TPSNT as a sub-account with a “pooled” SNT that is governed by a “master trust agreement” that is already drafted and has already been approved by state and federal authorities.

TPSNTs are not subject to most of the federal statutory requirements mandated for first-party SNTs under federal law. Most importantly, there is no “Medicaid payback” for a TPSNT that is drafted and administered properly from the outset. Anyone can serve as the Settlor of a TPSNT. The beneficiary of a TPSNT need not meet any particular definition of “disabled.” There is no age limitation on the beneficiary of a TPSNT, or [on the timing of funding the TPSNT](#). The beneficiary of the TPSNT need not be the sole beneficiary. However, as is the case with a first-party SNT, the beneficiary cannot hold the right or power to revoke or [terminate a TPSNT](#).

### **Testamentary SNT or TPSNT under a Funded Revocable Trust**

The most basic type of TPSNT is one created under the Last Will and Testament of a decedent (typically the parent or grandparent of the beneficiary with a disability). By definition, a testamentary SNT does not exist until the testator’s Will “matures,” i.e. he dies. A testamentary SNT is a TPSNT designed to hold assets that are subject to disposition under the testator’s Will.

For clients who utilize a simple “pour-over” Will in tandem with a funded [Revocable Living Trust \(RLT\)](#), the provisions of the TPSNT for the client’s child [or grandchild, or another person other than a surviving spouse] generally has two stages: (i) while the client is still alive, whether with mental capacity or during a period of lifetime incapacity, and (ii) after the client’s death. Only upon the client’s death is a separate and distinct TPSNT created and funded for the beneficiary under the RLT agreement.

If one spouse wishes to establish and fund a TPSNT for the benefit of the other spouse after the death of the first spouse to die, under federal law, such a TPSNT must be established under a Will. Accordingly, a TPSNT established under a RLT, a technique used by many clients as a “Will substitute” to avoid probate as to any assets held in the RLT upon the death of the settlor/grantor, would not be treated as a TPSNT if the intended beneficiary is a spouse.

### **Inter-Vivos (Living) TPSNT Funded with Gifts and Bequests from Multiple Sources**

In many families, there are numerous relatives in multiple generations who wish to help secure the future of the beneficiary with a disability. However, since a testamentary TPSNT does not materialize until the client’s Will matures, those other relatives cannot leave a gift

or bequest as part of their own estate plans if the client is still living and the testamentary TPSNT is thus not yet established and available to receive the intended gifts and bequests from others.

This author uses the term “receptacle” TPSNT to describe an inter vivos TPSNT designed for the purpose of receiving gifts and bequests from relatives or other persons. Created during the client’s life, and nominally funded to satisfy state trust law requirements, the receptacle TPSNT is ideally suited to coordinate the well-intended generosity of relatives and friends who wish to help secure the future of the beneficiary but who do not wish to create a full-fledged TPSNT under their own estate planning documents. These benefactors may be advised of this convenient option by means of a “Dear Family and Friends Letter.”

The letter will describe the special needs planning that has already been undertaken to benefit the beneficiary, and the ultimate goal of preserving his means-tested government benefits. The letter will then provide the precise verbiage necessary to incorporate by reference the TPSNT that is available to receive gifts and bequests from the beneficiary’s relatives or friends. The letter should also include a strong caveat that any potential benefactor should seek the advice of his professional tax advisor and estate planning attorney prior to implementing any proposed transfer to the TPSNT.

Part Three of this series will continue the discussion of [the network of SNTs that comprises a comprehensive special needs estate plan](#).

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