

**PLANNING FOR THE ELDERLY, DISABLED, AND THOSE WITH SPECIAL NEEDS,
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I. INTRODUCTION

Planning for seniors and people with disabilities often revolves around the need to access or maintain government benefits that are based on financial need (“needs based benefits”).

Social Security Retirement Benefits and pensions may provide a senior with adequate retirement income. He or she may pay for basic health care services with Medicare and a Medicare supplement. However, once there is a need for expensive prescription drugs, or long-term care, then the person often cannot finance his or her care and at this point there is a need for Medicaid Assistance. Medicaid Assistance is available for single individuals who have nominal countable assets. Fortunately, there are also laws that protect the spouse at home from financial impoverishment.

A disabled person under the age of 65¹ who does not have a substantial work history probably does not have adequate income to live even modestly without public assistance. Therefore, eligibility for Supplemental Security Income (SSI) may be crucial. Further, a disabled individual usually is not able to work at a job that provides health insurance, and so access to the Oregon Health Plan or other Medicaid Assistance program is essential. Often the health care costs for a disabled person are very high, primarily due to the costs of prescription drugs and, for some disabled individuals, the cost of long-term care.

Whether we like it or not, planning for seniors and people with disabilities who do not have adequate income and resources to self-finance their living or health care needs revolves around government benefit programs.

Understanding the basics may be helpful to advisors in several scenarios: (1) an estate planning attorney may be asked to write an estate plan that leaves a portion of the client’s estate in trust to a disabled child or parent that will preserve public benefits; (2) a probate attorney may be involved in a situation in which a beneficiary is about to receive benefits that will jeopardize essential public benefits; (3) a personal injury attorney will need to carefully evaluate the effect a settlement will have on the plaintiff, or the award could hurt

¹ Use of the term “disabled person” throughout the outline assumes that the person is under the age of 65.

rather than help the beneficiary; (4) a real property attorney may be involved in helping someone sell a house, and the structure of the sale could affect public benefits; (5) a financial advisor may be involved in investment decisions, such as purchase of immediate annuities, which can permanently affect a client's government benefits; (6) a bank's trust department may be serving as trustee of a special needs trust; (7) financial advisors may be working in a team setting with other professionals and can help identify problems and solutions. The effect of receiving a lump-sum as well as the effect of any scenario requiring ongoing payment of income will vary with the type of benefits received.

II. GOVERNMENT BENEFIT PROGRAMS

A. Government Benefits Come in Many Sizes and Shapes

Some government benefits are based on disability, some on needs, some on past employment, and some on age. Knowing what government benefits the client is receiving is always the first step in identifying whether a case needs special consideration due to those benefits. An attorney can never rely on the client to know the benefits he/she is receiving. Always require verification of the type of benefits the client is receiving.

PRACTICE TIP: Have the client sign a release and request the list of benefits from the client's caseworker.

If a government benefit is not needs based or means tested, receipt of an inheritance or personal injury award will have no effect on the client's government benefits. The basic requirements for certain government benefit programs are described below. Beware that all government programs have exceptions and special categories. Only the basic requirements are described in these materials.

B. Non-Needs Based Programs

Some of the most common government benefit programs that are not needs based are as follows:

1. Social Security Retirement Benefits. Social Security Retirement Benefits is the government pension plan which pays a monthly cash benefit. Basic eligibility requirements are:

- a. Age 65 or over (age will gradually increase to age 67, age 62 for reduced benefits); and
- b. Has sufficient work history (or other wage earner on whose record the individual is entitled to draw) to qualify for insured status under Social Security guidelines.

2. Social Security Disability Insurance (SSDI). SSDI is an insurance program for disabled workers for persons under age 65 who are unable to work because of a physical or mental disability. 42 USC § 423. A disabled person is eligible for SSDI if he/she:

- a. Is under 65;
- b. Has sufficient work history (or other wage earner on whose record the individual is entitled to draw) to qualify for insured status under Social Security guidelines; and
- c. Has a mental or physical disability preventing substantial gainful activity that is expected to last for one continuous year from onset or is expected to result in death.

3. Medicare. Medicare is a health insurance program administered by the federal government for persons 65 and over and for disabled persons who have been disabled for at least two years. 42 CFR § 402. A person is eligible for Medicare if he/she:

- a. Is 65 or older and is entitled to receive Social Security Retirement benefits or railroad retirement benefits; or
- b. Is under 65 and has received SSDI benefits for at least 24 months; or
- c. Has end stage renal disease.

4. Worker's Compensation Benefits. These are benefits paid to injured workers or their dependents for injuries or death which occurred on the job.

5. Unemployment Compensation. Unemployed workers who are able to work may receive a benefit based on payments made into the unemployment compensation system from previous employment.

C. Needs Based Programs

Some of the most common government benefit programs that are needs based programs are as follows:

1. Supplemental Security Income (SSI). SSI is a federal benefit program. SSI provides a monthly cash payment in order to provide a minimum level of income for persons who are disabled, blind or age 65 or over. 42 USC §§ 1382. A person is eligible for SSI if the person:

- a. Is age 65 or over, is blind or is disabled (same disability requirements apply as for SSDI);

- b. Has income which is at or below \$545.00 per month or \$817.00 for married couples (these numbers are inflated annually);
- c. Has at or below \$2,000 excluding exempt assets (\$3,000 for married couples); and
- d. Is not a resident of a public institution (i.e. prison or state mental hospital); or
- e. Has end stage renal disease.

A person who receives SSI automatically receives Medicaid Assistance for his or her basic health care needs.

2. Medicaid Assistance for Long-Term Care. Medicaid is a joint federal-state program created to assist persons with limited income and resources to obtain long-term care. 42 USC § 1396. Long-term care includes nursing homes, assisted living facilities, adult foster homes, and in-home care. A person is eligible for Medicaid if he/she:

- a. Is an Oregon resident;
- b. Is disabled (under SSDI criteria), is blind or is age 65 or over;
- c. Is receiving care services at home or in a long-term care facility; and
- d. Meets the financial criteria.

To meet the financial criteria, a person must meet both an income test and a resource test. Under the income test a person's gross monthly income must be at or below \$1,635.00 (a 2002 amount; three times the SSI standard). (People over this income cap but otherwise eligible may still qualify by creating an income cap trust.)

The person's resources must be at or below \$2,000 for single persons or for married couples below the limits provided in the Medicaid rules, which are based on a formula and are beyond the scope of this outline.

3. Oregon Health Plan (OHP). OHP is a joint federal-state program which provides basic health care including prescriptions to eligible persons. It is a part of the Medicaid program which is available in Oregon only because of a waiver received from the federal government. A person is eligible for the OHP if he/she:

- a. Is an Oregon resident;
- b. Meets the financial eligibility requirements:

- (i) Income at or below \$738.00 for an individual under the basic plan. The income limit changes depending on age and family size. OAR 461-155-0225.
- (ii) Resources at or below \$2,000 for single persons.

c. Cannot be receiving Medicare or SSI.

4. Food Stamps. Food stamps is a state program which provides assistance to purchase food for low income households. A person is eligible if he/she:

- a. Is categorically eligible, meaning he/she is authorized to receive information and referral services and countable income falls below \$1,366.00 for a single person (\$1,841.00 for a married couple). This is 185% of the federal poverty level and is adjusted every April. OAR 461-135-0505(1).
- b. There are no asset limits for those that are categorically eligible.

5. Public and Subsidized Housing. Many low and moderate income individuals receive assistance through federal rent subsidy programs. Rents are a percentage of monthly income, generally not more than 30%. There is no resource limit for federally subsidized housing. Eligibility is based on income, including fixed and investment income.

III. EFFECT OF RECEIPT OF LUMP-SUM OR ANNUITY PAYMENT ON NEEDS BASED GOVERNMENT BENEFITS

A. Effect on Federal Housing Subsidy

Since eligibility for federal housing is based on income, any situation in which the person will receive automatic payment of monthly income may make the individual ineligible for a federal housing subsidy or result in an increase in rent.

Since there is no asset limit for federally subsidized housing, receipt of a lump-sum will not automatically make the client ineligible. If the recipient immediately spends the assets on needed items or pays debts, then investment income will not be generated by the assets that would affect the client's monthly income. If the recipient receives a large lump-sum, and does not spend down, then the amount of investment income received or imputed to the individual will translate into increased rent or possibly even ineligibility.

B. Effect on Food Stamps

Eligibility for food stamps works in a similar manner to federal housing. Since eligibility for food stamps is based on income, a scenario designed to give the individual monthly

income may make the individual ineligible for food stamps or reduce the benefits.

Since there is no asset limit for food stamps for persons who are categorically eligible, receipt of a lump-sum will not automatically make the client ineligible. If the recipient immediately spends the assets on needed items or pays debts, then investment income will not be generated by the assets that would affect the client's monthly income. If the recipient receives a large amount, and does not spend down, then the amount of investment income received or imputed to the individual will translate into decreased food stamps or possibly even ineligibility.

C. Effect on Oregon Health Plan

If the client receives mandatory income payments, either under a trust, a trust deed and note, or a structured settlement in a personal injury case, then the income will cause ineligibility for the Oregon Health Plan (OHP) if the income is over the allowed limit. If the client receives a lump-sum payment, then this may cause the client to be over the resource limit and ineligible for OHP, unless the assets are spent down or transferred to a trust.

There are currently no transfer of asset penalties under OHP, so an individual may transfer assets to another person or to a trust without causing a penalty period of ineligibility.

Although there are no specific rules that permit the creation of a trust and the transfer of assets to the trust, it appears that a properly drafted trust may effectively make the assets "unavailable" for purposes of OHP eligibility.

The timing of receipt of the benefits may be important for purposes of determining eligibility based on income as well.

D. Effect on Medicaid For Long-Term Care

Funds received by an individual needing long-term care are treated as income in the month received and an asset on the first of the month following receipt. Technically, the receipt of funds in the first month causes an overpayment, and the state agency administering the program can issue an overpayment notice.

If the recipient still has the funds on the first of the following month, and if this puts him/her over the applicable resource limit for non-exempt assets, then he/she will be ineligible for Medicaid for long-term care. There are various methods that may be used to "protect" a lump-sum.

1. Spend Down. One approach to insure that the client actually receives a benefit from the lump-sum is to spend down. This works particularly well when the client will receive a relatively small amount. The client may use the funds to purchase needed goods and services and/or to pay off any debt. Any goods purchased should be exempt assets under the Medicaid rules, such as a house, car, clothing, other tangible personal property,

or a prepaid burial fund.

Timing is important, because every month that the client has funds in excess of the resource eligibility limits he/she will not receive government benefits, and the award or settlement can quickly dissipate. For example, if the client is receiving \$10,000, and will be using it to purchase a car or pay off debt, then ideally he/she will have time to accomplish this before the first of the following month. If he/she receives the funds on the 30th of the month, then spend down may not be accomplished immediately, and eligibility will be affected for the month of receipt and the following month. Ideally funds from the settlement should be received at the beginning of the month in order to allow adequate time for spend down to be completed.

2. Gift. Sometimes the client wants to give away the funds. This will trigger a penalty period of ineligibility for Medicaid for long-term care. The length of the penalty period depends on the amount of the gift. A formula is used: the value of the gift is divided by \$3,750.00. The resulting number is the number of months of ineligibility. The ineligibility period begins running on the first day of the month in which the gift is given. The planning strategy is to “gift and wait.” A calculation is made to determine how much money the client can gift and how much needs to be retained to pay for care during the ineligibility period.

3. Trusts to Preserve Medicaid Assistance. In the Omnibus Reconciliation Act of 1993 (“OBRA '93”), Congress explicitly carved out two exceptions in the otherwise restrictive rules regarding trusts. The first one, called a “payback trust” or “under 65 disability trust,” allows disabled individuals who are under the age of 65 to place their assets in a trust provided certain criteria are met. Transfer of the individual's assets to this type of trust will not cause the trust assets to be deemed “available” for purposes of eligibility for Medicaid, nor will such a transfer cause a penalty period of ineligibility. The second exception allows a disabled individual of any age to transfer assets into a pooled trust. See section IV below for a description of these type of trusts.

E. Effect on Supplemental Security Income

Funds received by SSI recipients are treated as income in the month received and an asset on the first of the month following receipt, similar to the rules applying to Medicaid. Receipt of funds must be reported by the recipient. Technically, the receipt of funds in the first month causes an overpayment, and the Social Security Administration (SSA) will issue an overpayment notice. SSA typically administratively waives overpayments if they are under \$500.

If the recipient still has the funds on the first of the following month, and if this puts him/her over the resource eligibility limit for non-exempt assets, then he/she will be ineligible for SSI. Even recipients of SSI who might feel that they can forego the monthly SSI payment once they have access to some other source of funds may decide that they must maintain their SSI because it automatically qualifies them for basic Medicaid Assistance.

1. Spend Down. This approach is the same as described above in paragraph D.1 above regarding the effect on Medicaid Assistance.

2. Gift. Sometimes the recipient wants to give away the funds. This will trigger a penalty period of ineligibility for SSI. The formula to determine the ineligibility period for SSI is to take the value of the gift and divide by the maximum SSI benefit (currently \$545). 42 USC § 1382b(c)(1)(A). The resulting number is the number of months of ineligibility. This long ineligibility period makes gifting in SSI cases impractical in most cases.

3. Trusts to Preserve SSI. Foster Care Independence Act of 1999 changed the Social Security law to adopt the exception in the Medicaid rules which allow for “payback trusts” or “under 65 disability trusts”. These are described below in section IV.

IV. SPECIAL NEEDS TRUSTS—FIRST DETERMINE THE SOURCE OF FUNDS

A. Generally

Special needs trusts are used to allow the beneficiary to maintain needs based public assistance and at the same time receive some benefit from the trust estate. There are many types of special needs trusts. Trusts created and funded by a third party for a recipient of public benefits are treated in some respects differently than special needs trusts that are funded with the assets of the recipient of public assistance.

Special needs trusts were developed by lawyers who realized that if a trust, by its terms, makes the trust estate *unavailable* for food, clothing, and shelter, then the existence of the trust should not affect an individual’s eligibility for needs based public benefits.

Eligibility for needs based public assistance programs is determined after a review of the assets and income of the person applying for help. If assets and income are *available* to the person for food, clothing and shelter, then generally the person is expected to use the available funds for those basic needs, thus reducing his or her need for government benefits.

B. Trusts Funded With Third Party Assets

Traditionally, a special needs trust was created by a third party for a named beneficiary and funded with a third party’s funds, either in a Will or an Irrevocable Living Trust. The availability of trust income and principal to a recipient of public benefits in a third party funded trust will be determined based on the trust distribution standard.

If by the terms of the trust the beneficiary is given the authority to control trust principal, either on his or her own or by directing the trustee, then the trust assets may be considered

an available resource.² Generally speaking, a special needs trust created and funded by a third party will not be considered as an available resource. Courts that have addressed this issue look to the grantor's intent, which is evidenced in the language of the trust itself.

The grantor is not required to name the state agency to receive the remaining trust property in a trust created and funded by a third party.³

Under Oregon's current estate recovery rules, the remaining trust assets in a third party funded trust are not subject to recovery at the recipient's death.⁴

C. Under 65 Disability Trust or Payback Trust

Congress has passed laws intended to chill the use of trusts funded with the assets of recipients of SSI and Medicaid. An inheritance, proceeds from the sale of a home, and a personal injury or wrongful death settlement will be treated as owned by the individual for purposes of eligibility for public assistance.

In the Omnibus Reconciliation Act of 1993 (OBRA '93), Congress enacted several provisions restricting the use of trusts to qualify an individual for Medicaid for long-term care.⁵ The former Health Care Financing Administration interpreted many of the provisions of OBRA '93 in its Transmittal 64. Later, in the Foster Care Independence Act of 1999 (FCIA '99), Congress enacted similar provisions restricting the use of trusts to qualify an individual for SSI.⁶ Neither OBRA '93 nor FCIA '99 affect trusts created and funded by third parties, with the exception of some trusts created by the spouse of the recipient or for the sole benefit of a blind or disabled child when the transferor is trying to avoid transfer of assets penalties.

With certain exceptions, under both OBRA '93 and FCIA '99, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the principal from which, or the income on the principal from which payment to the individual could be made, shall be considered available to the recipient.⁷ OBRA '93 also created a 60-month look-back period for certain transfers involving trusts.

² POMS 01120.200-D-1-b.

³ See later discussion of the "Medicaid payback trust" for purposes of eligibility for Medicaid for long-term care and SSI, in which the state agency providing Medicaid must receive the remaining trust property to the extent assistance has been provided. However, this only applies to a trust funded with the assets of the recipient.

⁴ OAR 461-135-832(14).

⁵ 42 USC 1396p.

⁶ P.L. No. 106-109, December 14, 1999.

⁷ See 42 USC 1396p(d)(3)(B)(i)(I); 42 USC 1396(a)(2)(6); 42 USC 1396(b)(c)(3(A) and (B)).

FCIA '99 incorporates a 36-month look-back period, and does not extend this to 60 months for certain transfers involving trusts.

Congress explicitly made an exception in both OBRA '93 and FCIA '99 for disabled beneficiaries who are under the age of 65.⁸ These trusts have commonly been called “payback trusts” or “under 65 disability trusts.”

The key elements of a Medicaid payback trust are as follows: (a) the trust is created by a parent, grandparent, guardian/conservator, or court; (b) the individual is under 65; (c) the trust is created for the benefit of a disabled person; (d) any remaining trust balance at the death of the life beneficiary is first paid to the state agency to the extent Medicaid Assistance has been provided.⁹

1. Grantor/Trustor. Although the disabled individual is contributing the trust assets, he or she may not act as the grantor or trustor. The trust must be created by a parent, grandparent, legal guardian, or court. The term “legal guardian” is presumably intended to include a conservator in States like Oregon. ORS 125.440 specifically allows a conservator to create a trust, but only with prior court approval.

Probate court approval is always required when the recipient is a minor or mentally incapacitated. If a conservator has not been appointed, and no parent or grandparent is available, then a petition may be filed with the probate court to establish or authorize the establishment of a trust on behalf of the disabled individual.¹⁰

2. Under 65. The life beneficiary must be under 65 when the trust is created. HCFA Transmittal 64 clarified that the trust is excepted for purposes of Medicaid eligibility after the individual reaches 65, but assets of the individual cannot be added to the trust after age 65.¹¹

3. Disabled. The trust must be established for an individual who is disabled as defined in the Social Security Act.¹² If the beneficiary is receiving either Social Security Disability Income (SSDI) benefits under Title II or SSI benefits as a disabled person under Title XVI, then the State will accept this determination. If the beneficiary is not receiving SSDI or SSI benefits, then the agency caseworker must make an independent determination.

⁸ See 42 USC 1396p(d)(4)(A); 42 USC 1382(b)(e)(5).

⁹ See also OAR 461-145-540(10)(a).

¹⁰ See section VII.A. below regarding the mechanics of obtaining a court order.

¹¹ See HCFA Transmittal 64 Sec. 3259.7.

¹² See 42 USC 1382c(a)(3).

4. State Receives Remaining Trust Property. The trust must provide that upon the death of the individual, any remaining trust property will be distributed to the State agency, up to the amount paid in Medicaid benefits on behalf of the individual. When the individual has received Medicaid benefits in more than one State, the trust “must provide that the funds remaining in the trust are distributed to each State in which the individual received Medicaid, based on the State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual's behalf.”¹³ FCIA '99 does not require payback of SSI, but does require the payback of Medicaid. The interest of the State in the remaining trust assets by the terms of the trust is completely separate from the right of the State to estate recovery.

D. Pooled Trusts

Under OBRA '93, a non-profit organization may establish a trust in which the funds of the disabled recipients are pooled for purposes of investment and management.¹⁴ There is no age limit. The exception made for pooled trusts found in FCIA '99 appears to limit their use to disabled beneficiaries under the age of 65. The assets may be contributed by a third party or the individual.

In Oregon, ARC of Oregon has formed a pooled trust, which is available to beneficiaries who have been disabled before the age of 65. The pooled trust is a professionally managed program. Funds are deposited into a pooled bank trust fund, although each beneficiary will have a separate account consisting of his/her separate share. Funds can be transferred to the ARC of Oregon pooled trust without the need for a separate trust created by a parent, grandparent, court, or conservator. For information about the pooled trust, call Mitch Teal, Pooled Trust Director, at the ARC of Oregon, (503) 581-2726 or toll-free at (877) 581-2726.

A non-profit association managing a pooled trust, such as The ARC of Oregon, can retain any remaining balance in the deceased beneficiary's account to be used for the benefit other disabled individuals. The ARC of Oregon's joinder agreement does now allow the non-profit organization to retain the funds.

This change has the potential to be of overall benefit to disabled people. Many of our clients will feel good about the opportunity to leave funds with a non-profit organization that benefits the disabled population. However, there is the potential for abuse. There may be individuals establishing pooled trusts that do not have a longstanding and demonstrated interest in serving the disabled, who would use the retained funds primarily to pay for administrative expenses such as his or her salary, with little or no benefit to disabled people.

¹³ HCFA Transmittal 64 Sec. 3259.7.

¹⁴ 42 USC 1396p(d)(4)(C).

Attorneys who are working with clients who are contemplating transferring funds to a pooled trust should advise their clients to investigate the non-profit organization managing the trust. Among the questions that the attorney or client might ask: (1) how long have you been incorporated; (2) what services do you provide to the disabled community beyond administering the pooled trust; (3) how many employees do you have and what is their experience?

This rule change has the potential to be beneficial to our client constituency. If we and our clients make appropriate inquiries, there is less chance that it will be misused.

V. DISTRIBUTION STANDARD

A. Special Needs Only

A “special needs only” standard restricts distributions to special (or supplemental) needs, expressly prohibiting distributions for basic needs. The term *special needs* suggests needs particular to the person and his or her disability, such as medical equipment or rehabilitative treatment, and usually special needs trusts do specify that distributions are allowed for such needs.

However, a trust limiting distributions to special needs can allow distributions for anything that is not food, clothing, and shelter. This encompasses many things that are not related to a disability or medical treatment, and may not even be properly classified as a need. For example, a special need can include distributions for the cable television bill, Internet services, or vacation expenses. The term *supplemental needs* is sometimes used to perhaps more accurately describe the type of distribution that can be allowed by the terms of the trust.

Supplemental needs distributions are anything **but** food, clothing, and shelter. Typically, distributions for medical expenses are limited by the terms of the trust to medical, dental, and psychological services not otherwise covered by Medicaid.

Further examples of supplemental needs are as follows: medical insurance premiums, telephone services and equipment, transportation (including automobile, auto maintenance and repair, gasoline, auto insurance, and/or bus pass), recreation, education, pet care, subscriptions, and computer equipment and services.¹⁵ The list of potential distributions for supplemental needs is unlimited.

Perhaps of more use is to know what is **not** considered supplemental: rent, mortgage, property taxes, heating, gas and electric power, garbage, sewer, water, fire insurance (if

¹⁵ For more information about the operation of special needs trusts, see Wesley D. Fitzwater and Richard Pagnano "Special Needs Trusts," Oregon State Bar CLE publication, Administering Trusts in Oregon, 1995, updated 2000.

required by mortgage holder), clothing, and food.

A trust limiting distributions to special needs is the safest course of action to preserve public benefits now and in the future. The trustee has clear prohibitions. The government agency worker reviewing the trust is more likely to readily recognize that the trust is not disqualifying.

See Attachment item #1 for sample language limiting distributions to special needs.

B. Prohibiting Distributions for Basic Needs--Is It Too Restrictive?

Is it necessary to completely prohibit distributions for basic needs? While a strict special needs trust can work well for many beneficiaries, for some individuals the restrictions will limit options that could substantially increase their quality of life.

For example, we may wish to write a trust for someone who is now disabled and receiving public assistance, but who later may not be disabled and no longer need public assistance. This particularly arises when writing special needs trusts for minor children, or for individuals who are mentally ill who at some point may recover or find a treatment that helps them successfully manage their symptoms. If the trust prohibits distributions for basic needs, the trustee will be breaching his/her fiduciary duty if prohibited distributions are made, even though there may no longer be a concern about whether a distribution from a trust will affect eligibility for public benefits.

As another example, the beneficiary may be receiving SSI and Medicaid, and living in substandard housing. Her parents would like to create a trust that will allow distributions for shelter, so that she can improve her living situation. The biggest concern is to maintain her Medicaid. If the trust allows the trustee to make some distributions for basic needs, then the trustee can pay for rent in a decent apartment. While her SSI will be reduced under the in-kind support and maintenance rules, she will continue to receive some SSI to pay for food and clothing, and will retain her Medicaid. (See discussion re in-kind support and maintenance in section VI.A. below.)

C. Possible Alternatives to Strict Special Needs Trust Standard

1. Discretionary Support Trust. The trust can be written to give the trustee absolute discretion to make (or refuse to make) payments for the benefit of the disabled individual. Arguably, the principal and income is unavailable because the beneficiary is unable to compel distributions for his or her basic needs. Courts that have addressed this issue look to the grantor's intent, which is evidenced in the language of the trust itself. Trust assets to which a beneficiary has no right of access (or has a limited right of access) are unavailable except to the extent of the limited actual interest.

This approach is accepted by some government agencies and in some parts of the country. The Seattle Region of the Social Security Administration, of which Oregon is a

part, currently does not deny benefits to recipients of SSI who are beneficiaries of wholly discretionary support trusts. If the beneficiary cannot compel distribution under any circumstances, then the trust is not treated as a resource. Of course, an actual distribution for food, clothing, or shelter will in most cases cause a reduction in benefits.

As noted above, government agencies are prone to changing policies, often without warning. Reported cases throughout the country are mixed on discretionary support trusts, and a recent Ohio Court of Appeals case found a discretionary support trust was a countable resource under Medicaid eligibility rules. (Ct.App.Ohio, 6th, No. OT-00-048, August 17, 2001.) There is no binding precedent in Oregon on which to rely. Clifton B. Kruse, Jr., a noted elderlaw scholar and writer on this issue, has published a detailed study of these cases in his book, Third Party and Self-Created Trusts, a Lawyer's Comprehensive Reference.¹⁶ After reviewing the cases nationwide, he offers this summary:

The right of government agencies to consider resources held in discretionary support trusts created by third parties for beneficiaries who are receiving public support has been considered in numerous state court cases with inconsistent results. Beneficiaries of such trusts who are recipients of Medicaid, Supplemental Security Income, or other public welfare may or may not be able to continue receiving their basic support from public agencies while at the same time receiving their supplemental and special needs by way of such trusts. The discretionary support trust may be deemed to be available for the support needs of the beneficiaries. The discretionary support trust is, therefore, an unreliable vehicle by which settlors may provide for beneficiaries' expenses that the state does or is otherwise obligated to pay.¹⁷

In short, when drafting a trust the safest course for protecting eligibility for public benefits for long-term care is to restrict distributions to special needs.

2. Purchase of Exempt Resources. A common provision in special needs trusts allows distributions for purchase of exempt resources, such as a home or car. A provision allowing transfer of the exempt asset to the individual outright, free of trust, can be included with a trust funded with third party assets. See Attachment, item #2 for sample language.

Can distribution of exempt resources to the beneficiary free of trust be made from a payback trust? The Seattle Region of the Social Security Administration allows distribution of exempt assets from a payback trust without penalty.

3. Hybrid Approach. An intermediate approach is to clearly state that the purpose of the trust is to preserve the beneficiary's ongoing eligibility for public benefits and to provide for the beneficiary's special needs, but not to expressly prohibit all distributions for

¹⁶ Clifton B. Kruse, Jr., Third Party and Self-Created Trusts, A Lawyer's Comprehensive Reference, *supra* n. 13.

¹⁷ *Id.* pages 82-83.

food, clothing, and shelter. The trust provisions might also expressly allow distributions for some basic needs.

Courts typically interpret trusts in light of their express purpose. With the hybrid approach, the stated purpose is to preserve the beneficiary's ongoing eligibility for public benefits, but flexibility is incorporated. This approach is clearly successful now for SSI beneficiaries in the Seattle Region, in which even discretionary support trusts are accepted. This hybrid standard is commonly used in Washington State. In Oregon, SPD now accepts the "hybrid" distribution standard.

When using this standard, it is advisable to include a provision allowing the trustee to amend the trust if necessary to accomplish the stated trust purpose, which is to preserve public benefits.

See Attachment, item #3 for hybrid special needs distribution standard language.

CAUTION: The practitioner should exercise extreme caution when advising the client about the options. When drafting any special needs trust with a distribution standard that is not strictly limited to special needs, the effect of actual distributions should be considered. For example, if an individual is receiving Social Security Disability Income and only a small amount of SSI, then even a small distribution for basic needs may disqualify the beneficiary from both SSI and Medicaid.

5. Modification of Existing Trusts. Oftentimes a parent dies with an estate plan which includes a testamentary trust for the benefit a child. If the child is receiving SSI, and if distributions can be made only in the sole discretion of the trustee, it may not be necessary to seek an amendment to the trust.

If an amendment is necessary, will the trust assets now be considered within the control of the beneficiary, and thus cause a disqualifying transfer unless the payback provision is included?

The current policy of the Seattle Region of the Social Security Administration is that amendment of an existing trust that does not include mandatory distributions will not be treated as a disqualifying transfer. A modification changing mandatory distributions to discretionary distributions may be treated as a disqualifying transfer.

The SPD treatment of an amendment to an existing trust has been consistent with the policy of the Social Security Administration.

VI. PRACTICAL ISSUES IN ADMINISTERING TRUSTS

A. In-Kind Support and Maintenance

1. Generally. In-kind support and maintenance (ISM) is food, clothing, or shelter or anything that may be used to acquire these necessities that is provided by a third party at a reduced rate or no cost to the recipient.¹⁸ Thus, an individual receives ISM when he or she receives food, clothing, or shelter directly without having paid for it or receives these items because someone else pays for it.¹⁹

Generally, SSI benefits will be reduced in cases where the individual is not paying the full cost for his or her food, clothing, and shelter. In-kind income is normally valued at the current market rate. However, two rules govern how ISM will affect the SSI benefit: the one-third reduction rule (VTR) and the presumed maximum value rule (PMV). The composition of the household will determine whether the VTR rule or the PMV rule will apply.²⁰

The VTR rule applies only when the SSI recipient lives in another person's household and receives both food and shelter from that person.²¹ When this applies, the actual value of the in-kind income is not used. Rather, SSA reduces the SSI benefit by an amount equal to one-third of the FBR for SSI. The SSI benefit will not be reduced more than one-third of the FBR. The one-third reduction applies in full or not at all.

2. The Home. As stated above, the home in which the individual (or spouse or minor child) resides or intends to return to is an exempt asset for SSI and Medicaid purposes.²² Therefore, the trust beneficiary may not be adversely affected by having outright title to a home. If the trust is a "payback trust" as recognized by federal and State law, it may be preferable to keep the home outside of the trust because the remainder beneficiary is the State that provided Medicaid assistance.

On the other hand, there are often good reasons for including the home as an asset of the trust. For example, the grantor of a third-party funded special needs trust may have specifically included the home as an asset, thereby allowing the grantor to determine the ultimate distribution upon the death of the special needs beneficiary. More commonly, the home is included because the beneficiary lacks the capacity or judgment to manage such a significant asset.

Treatment of a house owned by a trust has been a source of considerable confusion. Social Security Administration helped clarify the rule regarding home ownership by a trust in the POMS issued in August, 1999. Under the POMS, a home-owning trust is

¹⁸ 42 USC Section 1382a(a)(2)(A); 20 CFR Section 416.1102.

¹⁹ 20 CFR Section 416.1130(b).

²⁰ 20 CFR Section 416.1130(a).

²¹ 20 CFR Section 416.1131.

²² 20 CFR Section 416.1212.

not an outside source providing shelter to the beneficiary because the beneficiary “would be considered to be living in his/her own home based on having an ‘equitable ownership under a trust.’”²³ However, to the extent that the trust pays for the mortgage, property taxes, homeowner’s insurance and utilities from the trust assets, the PMV rule will apply.²⁴

If the trust pays for improvements to the home, the individual does not receive income. Disbursements for improvements increase the value of the resource and thus do not provide ISM.²⁵

3. Food. Distributions from a special needs trust for food can be treated as ISM. Are there exceptions to this? The author spoke a SSI policy analyst for the Seattle Region, Doug McSweyn, about payment of food by a trust. The policy is that “food is food.” Although arguments have been made that food purchased on vacation or in the course of other entertainment should be distinguished from “basic” food, purchase by the trust of food on a trip is now considered ISM. Food that has been thrown away and rescued by the individual is not considered ISM. The unofficial policy at this time is that candy is not food. This leaves an open question about what level of nutrition is necessary to be considered food.

B. Distributions for Companions--the Disneyland Question

If a disabled individual is unable to travel alone, can the trust pay for the travel costs for a companion to accompany him or her, knowing that the companion is also benefitting from the trip? Doug McSweyn, Social Security Administration policy analyst, indicated that this is not a problem, even though the companion may be a relative or friend of the beneficiary.

VII. SPECIAL NEEDS TRUSTS IN THE CONTEXT OF LITIGATION

A. Court Approval

1. Mechanics of Court Approval of Trusts. In some instances, a disabled individual is not mentally incapacitated, and court approval is not required to fund a trust and preserve Medicaid assistance. However, court approval is required when a trust is being created for a minor or mentally incapacitated person with his or her own funds.

In such cases, a petition can be filed under ORS 125.650(1), which allows the court to exercise any power that could be exercised by a conservator in a protective proceeding (in this case, the power to create a trust under ORS 125.440). ORS 125.650(5) also

²³ SI 01120.200F(1)

²⁴ SI 01120.200F(3)(b) and (c).

²⁵ SI 1120.200F.3.c

allows the court to authorize, direct, or ratify any “contract, trust or other transaction relating to the protected person's financial affairs...”

Alternatively, a petition may be filed under ORS 125.650(4) for the appointment of a temporary conservator with authority “limited to a specified time and whose power is limited to certain acts needed to implement the protective order.” Under this subsection, the fiduciary “need only make such report to the court as the court may require.”

Note also ORS 125.440(2), which states that the “court may not approve a trust that has the effect of terminating the conservatorship.” Be prepared to explain to the court why this does not apply.

B. Structured Settlements--Special Issues

If a special needs trust is contemplated in the context of a personal injury (PI) or wrongful death award, it is critical that the PI lawyer contact the trust lawyer before settling the case. The PI lawyer may obtain a good settlement or award for the client, but the client may realize no benefit if the process isn't handled correctly.

First, if a structured settlement is arranged naming the claimant or the conservator as the direct beneficiary, then it could cause him or her to permanently lose eligibility for public benefits. While the periodic payments can be assigned to the trust after the purchase of an annuity, some government agencies will treat the payments as constructively received by the individual.

Second, it is possible that an award or settlement will be treated as an available resource during the pendency of a proceeding in the court to establish the trust.

These outcomes can both be avoided if the PI lawyer recognizes the problem sufficiently ahead of the settlement to engage the trust lawyer. The trust lawyer can then identify whether the beneficiary is in fact receiving needs based government benefits, help the PI lawyer and the injured party decide on a plan, and then obtain court approval, if needed, prior to or contemporaneous with the settlement.

VIII. SPECIAL NEEDS CONSIDERATIONS AND CHARITABLE GIVING

A. Charitable Remainder Trusts

A revenue ruling dated April 29, 2002 clarifies that a special needs trust, including an “under 65 disability trust” or “payback trust” discussed above, can receive the income stream from a charitable remainder unitrust or charitable remainder annuity trust. The income stream must be paid for the life of a financially disabled individual to a separate special needs trust. The ruling thus clarifies that for charitable trust purposes the beneficiary is treated as if he or she directly received the income.

A person is “financially disabled” if he or she is unable to handle his or her own financial affairs by reason of a medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months. All individuals who receive SSI or SSDI based on disability meet this test.

B. Charitable Gift Annuity

Sometimes a senior or disabled individual doesn’t receive needs based public benefits, but could benefit from a simple estate planning vehicle that won’t require ongoing management. A charitable gift annuity provides a mechanism for a person with charitable intent to receive income and also qualify for an immediate income tax deduction. It also protects the funds from being squandered, or the donor from being taken advantage of if the nature of the disability may make him/her susceptible to financial abuse.

C. ARC Pooled Trust

The pooled trust allows the individual to specify that any trust balance at the death of the beneficiary remain with ARC of Oregon, rather than distributed first to the State agency that administers Medicaid Assistance as required if the trust assets were contributed by the recipient. If the funds were contributed by a third party, then any person or charity can be named to receive the entire remaining trust property. So, for example, if the disabled individual had multiple sclerosis, or Alzheimer’s Disease, then the beneficiary may wish to name a hospital or other organization that works to prevent the disease or provides support to families who have suffered from the impact of the disease.

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