Special Needs Trusts
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Strategies For Maintaining Public Housing and Section 8 Eligibility for People with Special Needs Trusts

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- Materials
- PowerPoint

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Eligibility for Section 8 vouchers and subsidized public housing depends on a family's annual income. Some special needs trust distributions can increase family income - reducing benefits or rendering a person ineligible for federal assistance. This session will examine strategies for complying with HUD regulations, maintaining benefits, and responding to reviews of trust expenditures by Public Housing Agencies. We will also discuss techniques to exclude trust expenditures from income by requesting reasonable accommodations under the ADA and the Fair Housing Act.
WHAT IS THE SECTION 8 PROGRAM?

The Housing Choice Voucher Program is a federal program that provides rental assistance through vouchers to low-income families, including senior citizens and disabled or handicapped persons. It is funded through the Department of Housing and Urban Development (“HUD”) and administered by public housing authorities (“PHA”) formed by local jurisdictions. The current Housing Choice Voucher Program is sometimes referred to as “Section 8.” Each local PHA must adopt a written Administrative Plan documenting its local policies for administration of the voucher program. The Administrative Plan is formally adopted by the PHA and must comply with HUD regulations and requirements. 24 C.F.R. §982.54.

To use the program, tenants must find private landlords renting homes in the community who are willing to participate. Once the tenant finds a cooperating landlord, the tenant generally pays 30% of her income towards the rent; this portion of the payment is called the Total Tenant Payment (TTP). 24 C.F.R. §5.628(a). The local PHA supplements the remaining rent by issuing a check directly to the landlord so that the landlord is paid the “fair market rent.” 24 C.F.R. §888.111.
The tenant must remain qualified to participate in the voucher program. The PHA must re-certify the tenant’s eligibility no less regularly than annually. 24 C.F.R. §5.628(b). Among other things the PHA calculates any changes in the tenant’s monthly income and adjusts the TTP if necessary. 24 C.F.R. §5.657 (2000).

**IMPORTANT CASES INVOLVING INCOME ELIGIBILITY AND SPECIAL NEEDS TRUST EXPENDITURES**

There are two cases that bear directly on the expenditures made from special needs trusts in relation to Section 8 eligibility, *Decambre v. Brookline Housing Authority*, Massachusetts Federal District Court, No. 14-13425-WGY (2015)(appeal pending, 1st Cir., No. 15-1458), and, *Finley v. The City of Santa Monica*, Superior Court of California, BS127077 (2011). (in the context of this presentation, a special needs trust is a trust created under 42 U.S.C. § 1396p(d)(4)(A)-(C)).

In *DeCambre*, some of the salient findings and conclusions of the District Court were:

1. Lump sum settlements, although excluded from income if not placed in a special needs trust, are included in a Section 8 participant’s annual income if expended through a special needs trust, unless they are excluded by another exclusion set forth in HUD regulations.
2. The cost of the purchase of an automobile, where the trust retained title to the vehicle, should not be included in a Section 8 participant’s annual income in determining the participant’s Total Tenant Payment;

3. The court suggested that television, internet and travel expenses are expenses a special needs trust should cover. *Lewis v. Alexander*, 685 F. 3d 325, 333 (3rd Cir. 2012) (books, television, Internet, travel, and even such necessities as clothing and toiletries — would rarely be considered extravagant.) Occasional expenditures on travel would also seem to be the type of irregular expenditures that could be excluded as sporadic income under HUD regulations.

4. The Housing authority ought to apply the HUD guidance that allows the keeping of emotional support animals in deciding whether to exclude from a participant’s income bills for the veterinary support and care for such animals.

In *Finley*, the court found that the exclusion for inheritances, lump settlements, insurance payments and other lump sum additions to family assets set forth in HUD regulations applied to the expenditures of lump sum settlements made through a special needs trust, excluding these expenditures from income for purposes of calculating a tenant’s rent and eligibility under the Section 8 program.
*Finley* and *DeCambre* are in conflict with regard to the treatment of lump sums expended through special needs trusts.

**WHAT ARE THE SECTION 8 INCOME ELIGIBILITY LIMITS?**

They are found at 24 C.F.R. 5.603(a) and 24 C.F.R. § 982.201(b)(1).

Upper limits for income eligibility are as follows:

1. **Extremely Low Income - initial admission**
   
   75% of families initially admitted to a PHA’s Section 8 program in any one year must be extremely low income families, which is defined as not more than 30% of an area’s median income for a family.

   **EXAMPLES:**
   
   2015 Mobile Alabama - Family of 3 = $20,090  
   2015 Orlando Florida - Family of 3 = $20,090  
   2015 Boston Massachusetts - Family of 3 = $26,600

2. **Very Low Income - initial admission**

   Very low income families, which is defined as not more than 50% of an area’s median income for a family, may also be eligible for initial admission.

   **EXAMPLES:**
   
   2015 Mobile Alabama - Family of 3 = $24,000  
   2015 Orlando Florida - Family of 3 = $26,250  
   2015 Boston Massachusetts - Family of 3 = $44,350
3. **Low Income - continuously assisted families**

Families applying for continuing assistance (families that are already participating) are eligible to continue participating they are low income, which is defined as not more than 80% of an area’s median income for a family.

**EXAMPLES:**

- 2015 Mobile Alabama - Family of 3 = $38,400
- 2015 Orlando Florida - Family of 3 = $42,000
- 2015 Boston Massachusetts - Family of 3 = $62,750

http://www.huduser.org/portal/datasets/il/il14/index.html (HUD’s online tool at this URL provides eligibility limits by area)

**TIP NUMBER 1!**

As long as special needs trust expenditures, when combined with other income, do not result in the family exceeding the low income threshold for trust beneficiaries who are already participating in the Section 8 program, the beneficiary will remain income eligible for the Section 8 program, although trust expenditures may diminish the amount of their Total Tenant Payment if not excluded from income by HUD regulations.

Since diminished subsidies are a temporary problem, while exclusion from the Section 8 program tends to be permanent, a great deal of difficulty can be avoided so long as the *low income* limit is not exceeded.
WHAT COUNTS AS INCOME?

In order for trust expenditures to qualify as income to a family, 24 CFR § 5.609(a) requires that the expenditures “Go to, or on behalf of, the family head or spouse (even if temporarily absent) or to any other family member…and” are “not specifically excluded in paragraph (c) of this section.” 24 C.F.R. § 5.609(a)(1) and § 5.609(a)(3).

There is an extensive list of items that amount to income under § 5.609(a), they include, without limitation, wages, salary, commissions, tips, bonuses, business income, interest, dividends, social security payments, unemployment insurance payments, pensions, disability or death benefits, etc.

Interest income on cash or “net family assets” over $5,000 is either actual interest or the “passbook savings rate” as determined by HUD.

Income under § 5.609(a) and § 5.609(b) is rather similar to what the IRS would consider income.

NOTE: Section 8 Eligibility Is Determined by Income. Unlike Medicaid and SSI, There Is No Asset Limit.
WHAT IS EXCLUDED FROM INCOME?

There are 17 exclusions set forth at 24 CFR § 5.609(c). Exclusions include things such as income from employment of children under 18, payments received for the care of foster children or foster adults, income of a live-in aide, medical expenses, temporary income, sporadic income, nonrecurring income, lump-sum additions to family assets, including insurance payments, inheritances, capital gains, and settlements for personal injuries and property losses.

Unexpended assets of a special needs trust are not normally part of income under *Decambre*, *Finley* and HUD regulations.

**TIP NUMBER 2!**

In can be helpful in limiting income for the trust to retain ownership of as many assets as possible, allowing the beneficiary the use of the assets. For Social Security Treatment of Trust owned homes, see POMS Section SI 01120.200F. See also, Section 8/Homeownership Option, 24 CFR 982.625-982.643. This could include a car, a computer, a television, a cell phone and other property. By retaining ownership of property used by the beneficiary, it is more difficult or impossible for the Public Housing Agency to establish that the trust asset is income. This practice also has the “benefit” of increasing the likelihood that the government can be repaid for Medicaid payments from these assets on the death of the beneficiary.
APPLICATION OF SPECIFIC EXCLUSIONS

LUMP-SUM ADDITIONS TO FAMILY ASSETS

24 CFR 5.609(c)(9) excludes:

Lump-sum additions to family assets, such as inheritances, insurance payments (including payments under health and accident insurance and worker's compensation), capital gains and settlement for personal or property losses (except as provided in paragraph (b)(5) of this section)

Whether the exclusion of lump-sum additions to family assets applies to expenditures of lump-sums made through a special needs trust is not established at present, but may be decided by the First Circuit in *DeCambre*, mostly likely by September 2016.

24 C.F.R. § 5.603(b)(2), which provides:

In cases where a trust fund has been established and the trust is not revocable by, or under the control of, any member of the family or household, the value of the trust fund will not be considered an asset so long as the fund continues to be held in trust. **Any income distributed from the trust fund shall be counted when determining annual income under § 5.609.** [emphasis supplied].

Importantly, not all distributions are counted, only "income" that is distributed is counted. Id. Income includes, among other things, “interest, dividends, and other net income of any kind from real or personal property.”
C.F.R. § 5.609(b)(3). In *DeCambre*, it is contended by the plaintiff, that lump-sum settlements that are deposited in an irrevocable special needs trust did not meet this definition. The lump sum settlements, at the time they were deposited in the trust, are assets, not income. Both the Court in *Finley* and *DeCambre* recognized that, the beneficiaries could have taken their personal injury settlement and placed it under their mattresses from which they could have freely used it for any purpose without reporting her expenditures as Section 8 income.

In *DeCambre*, the plaintiff argued that the logical purpose of § 5.603(b)(2) is to ensure that income that is simply passed through a irrevocable trust shall be included in annual income and that any interest and dividends produced by the trust should be included in annual income. Accordingly, to the extent that *DeCambre’s* Trust produced and distributed interest or dividends, or that *DeCambre* tried to pass other money that met the definition of income under § 5.609 through the trust, the BHA was required to include this in income under HUD regulations. 24 C.F.R. § 5.609(b)(3). In *DeCambre’s* case, however, the un-rebutted evidence was that *DeCambre* had no substantial interest income on the trust and that all of the disbursements were from the principal.

The construction of § 5.603(b)(2), to exclude from income lump sums distributed from a trust, is consistent with 24 C.F.R. § 5.609(b)(3), because the
placement of the lump sum asset in a trust involves the investment of the money in a trust within the meaning of HUD’s regulations. Under § 5.609 (b)(3), “Any withdrawal of cash or assets from an investment will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested by the family.” The plaintiff in *DeCambre* contends that trust expenditures were merely a re-imbursement of cash that was invested by her, and should not have been included in her income.

**TIP NUMBER 3!**

Until the issue is more firmly settled, trustees would be wise to find out from the Public Housing Agency, in advance, how the agency intends to interpret the lump-sum settlement exclusion. Many PHAs in California apparently follow *Finley*.

A request for disclosure of the PHA’s treatment of SNT expenditures can be framed as a request for reasonable accommodation under the ADA.

If the PHA indicates that they do not follow *Finley*, the beneficiary has the option of pursuing litigation to try to establish the *Finley* rule in their jurisdiction. If a split occurs within federal jurisdictions, the case might have some promise for review by the U.S. Supreme Court.
At least one housing authority, in Lincoln Nebraska, appears to have decided not to include any expenditures from Special Needs Trusts in income, regardless of whether they are made regularly.


**TEMPORARY, NONRECURRING OR SPORADIC INCOME**

24 CFR 5.609(c)(9) excluded from income “temporary, nonrecurring or sporadic income (including gifts).”

This regulation has little case law interpretation, although some guidance on the application of this exclusion can be gleaned from FAQs on the HUD website and from training materials contained on HUD’s website.

HUD’s Rental Housing Integrity Improvement Project (RHIIP) posts training materials on HUD’s website providing some examples of temporary, nonrecurring or sporadic income.

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According to HUD training materials, “amounts that are neither reliable nor periodic are considered sporadic”

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EXAMPLE # 1

FROM RENTAL HOUSING INTEGRITY IMPROVEMENT PROJECT

Sam Daniels receives Social Security Disability and occasionally works as a handyman. He claims he only worked a couple of times last year but has no documentation. However, regular or steady jobs count as income.

The regulation, 24 CFR 5.609(c)(9), does not define temporary or sporadic income. Therefore, PHAs must determine what is considered temporary or sporadic income, and define it in their policies. Generally, amounts that are neither reliable nor periodic are considered sporadic, and should be excluded from annual income.


One of the weakest arguments for use of this exclusion would apply to trust expenditures that are made on a monthly basis. For example, paying a cell phone bill every month might be difficult to justify under this exclusion. Car insurance, on the other hand, can be paid on an annual or monthly basis. By making a single payment annually, the trustee can better argue that the expense was nonrecurring or sporadic.

Examples of possible expenditures that might fall into the temporary, nonrecurring or sporadic income exclusion are:
- Occasional Travel and Vacation Expenses;
- Occasional Purchase of Clothing, Appliances, Electronics, other gifts;
- Occasional Purchase Household Furnishings;
- One time payment for a root canal; (also may be excluded as a medical expense)

Because the case law and guidance regarding temporary, nonrecurring or sporadic income is very limited, there are a number of questions that exist. For example, during what period must an expenditure be temporary, nonrecurring or sporadic? Is it during the year under review for annual or interim certification? This appears to be the most likely answer. If an expenditure only occurs once a year, one should argue that it is non-recurring.
LOANS AS NONRECURRING OR SPORADIC INCOME

EXAMPLE # 2
FROM HUD FAQ

55. Question: A family declares that it has received a "loan" from a family member who resides outside of the assisted family household. The family member who loaned the money has signed a declaration certifying the amount and terms of the loan. Is this "loan" excluded from annual income? Can a PHA establish a policy that requires a tenant to provide documentation that they are actually repaying the loan in order for the loan amount not to be considered annual income?

Answer: In response to the first question, a loan is excluded from annual income, as it is a debt that must be repaid (24 CFR 5.609(c)(9)). In the event that the debt is unpaid or forgiven, the loan is considered nonrecurring or sporadic income and is still excluded from annual income. In response to the second question, the family must supply any information that the PHA or HUD determines is necessary in administration of public housing or HCV programs (24 CFR 5.659 and 24 CFR 960.259). As such, the PHA may establish a policy to specify what documents a tenant must provide to the PHA, as long as the requested documents are applicable to the administration of the programs.


* Before making any loans for in-kind support and maintenance, it is important to comply with Social Security guidelines set forth at SI00835.482 in the Social Security Program Operations Manual System.
MEDICAL EXPENSES AND REASONABLE ACCOMMODATIONS

24 CFR § 5.609(c)(4) excludes from income “amounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member.”

Because special needs trust beneficiaries often need a special needs trust to maintain SSI, SSDI and Medicaid eligibility, there is a legal question as to whether disability discrimination occurs when a PHA includes expenditures of lump sums made through a special needs trust in the income of a Section 8 Participant. This issue has been briefed in the DeCambre case.

Arguably, trust expenditures that are needed because of a person’s disabilities must be excluded as medical expenses under § 5.609(c)(4) based on the requirements of § 504, the ADA, the FHA, and regulations promulgated under these statutes. HUD is an administrator of § 504 and the FHA, and has promulgated detailed regulations prohibiting discrimination against persons with disabilities in housing and in the provision of public services. 24 C.F.R. § 8.4. The ADA, which is enforced by the Department of Justice, also has numerous regulations providing protection to the disabled that are applicable to Section 8 participants. 28 C.F.R., part 35.

Expenses of this sort might include: hearing aids, care and support of assistance or emotional support animals, eye glasses, wheelchairs, medical equipment, physician or drug co-payments, heated pools needed for arthritis or joint problems. In *DeCambre*, we contend that lump-sum’s expended through a special needs trust must be excluded as a reasonable accommodation under § 504, the ADA and the FHA.

**LEGAL REQUIREMENTS FOR A REASONABLE ACCOMMODATION**

To prevail on a claim for denial of reasonable modifications under Title II of the ADA and § 504, a plaintiff generally bears the burden of establishing: (1) that the defendant is a "public entity"; (2) that the plaintiff is a person with a
"disability"; (3) that the plaintiff is "qualified" to participate in or receive the benefits of the defendant's services, programs, or activities; (3) that the plaintiff informed the defendant of his or her disability and requested a modification of the defendant's rules, policies or practices (or that the plaintiff's disability and need for a modification was obvious); (4) that the requested modification was "reasonable"; (5) that the defendant nonetheless refused; and (6) that, as a result, the plaintiff was not able to "to participat[e] in" or enjoy "the benefits of the [defendant's] services, programs, or activities," or was otherwise "subjected to discrimination."

42 U.S.C. §§ 12102, 12131, 12132; Kiman v. N.H. Department of Corrections., 451 F.3d 274, 283 (1st Cir. 2006); Reed v. LePage Bakeries, Inc., 244 F.3d 254, 258 (1st Cir. 2001) (Title I "reasonable accommodation" case); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 265 (1st Cir. 1999) (Title I "reasonable accommodation" case); Bercovitch v. Baldwin School, Inc., 133 F.3d 141, 152 (1st Cir. 1998).

**STRATEGIES TO EXCLUDE EXPENDITURES BASED ON REQUESTS FOR REASONABLE ACCOMMODATIONS**

To be completely safe, a trustee can ask the PHA to excluded an anticipated expenditure as a reasonable accommodation. Although there are no “magic words” or any specific form required for a reasonable accommodation request,
many housing authorities have a specific form where a physician can certify that a reasonable accommodation is necessary. Since physicians are often busy, it can be helpful for the beneficiary’s trustee/attorney to fill out the request for reasonable accommodation, specifying in detail what the accommodations are and that they are needed “because of” the beneficiary’s disability or disabilities, and to then have the beneficiary bring the completed form to the physician for the physician to sign.

Where expenditures have already been made and an individual is under review for re-certification, it is prudent for the individual or his attorney/trustee to make a request for reasonable accommodation excluding trust expenditures (such as lump sums, medical expenses, or other expenditures needed because of a person’s disability) prior to the time that the decision determining the individuals’ eligibility or establishing the Section 8 participants rent contribution is made. It is likely easier to prevent the PHA from making a bad decision, than it is to get the PHA to reverse an adverse decision once it has been made.

**TIP NUMBER 4!**

In making a request for reasonable accommodation, it is best to make a detailed request that includes a certification by a physician that the requested accommodations are needed because of the beneficiaries’ disability or disabilities.
TIP NUMBER 5!

Where a PHA is reviewing trust expenditures for purposes of determining an individual’s eligibility or establishing the Section 8 participant’s rent contribution, it can be helpful to provide a written explanation identifying, for each expenditure, any applicable exclusions under 24 CFR § 5.609(c). Furthermore, it can be helpful for the trustee to submit an affidavit detailing the best legal position of the trust with regard to the exclusion of expenditures from income and any needed reasonable accommodations.