2015
Basics of Special Needs Trusts

Thursday, October 15, 2015

Stetson University College of Law & The Center for Excellence in Elder Law presents:

2015 SPECIAL NEEDS TRUSTS NATIONAL CONFERENCE

October 14-16, 2015
The Vinoy Renaissance Resort & Golf Club
St. Petersburg, Florida

Center for Excellence in Elder Law

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Basics of Special Needs Trusts
Thursday, Oct. 15, 2015

9:00-10:00 a.m.
How to Make a Trust a Special Needs Trust
This presentation will explain what is required for a trust to be a "special needs trust". Participants will learn what clauses are important to include in the trust document and which standard clauses should be left out.
Craig Reaves

10:20-11:20 a.m.
The Planner's Evolving Tool Box: Part One
SNT, ABLE, ACA, MAGI, Public Benefits
This two-part session will focus on the various tools available for special needs planners, including special needs trusts, ABLE accounts, the Affordable Care Act, the use of Modified Adjusted Gross Income and various public benefits programs. In this first part, the panelists will review the different tools and when they might best be used, alone or in combination. The second part will use case studies to illustrate these various tools in application.
Mary Alice Jackson, Janet L. Lowder, Mary E. O'Byrne

11:20 a.m.-12:10 p.m.
The Planner's Evolving Tool Box: Part Two
Case Studies: What Tool to Solve which Problem
This session will use case studies to illustrate these various tools discussed in part one in application.
Mary Alice Jackson, Janet L. Lowder & Mary E. O'Byrne

1:15-2:15 p.m.
Breakout Session 1

- **Veterans Benefits and the Person with Special Needs**
  Sometimes a client who is a veteran has special needs, whether from active duty or subsequently. In other instances, a family member dependent on the veteran may have special needs. It is important for those who work in the field of special needs planning have an understanding of the myriad veterans benefits that may be available. This session will provide an overview of these benefits and the criteria for eligibility.
  Michael P. Allen, Kelly A. Thompson
- **Tax Types and Why You Care: The Relationship Between Income Tax, Capital Gain Tax, Gift Tax and Federal Estate Tax**
  In order to do any planning for clients, especially when considering charitable giving, estate planning, or the creation of third party special needs trusts, attorneys and trustees must always consider the applicable tax ramifications. Tax is more than income tax, so this session will give an overview of the "big 4" of tax, their interrelationship, and considerations for attorneys and trustees.
  Nell Graham Sale

- **Crowdfunding for Medical Needs and the Special Needs Trust**
  More and more well-meaning individuals are turning to social media and the internet to solicit donations in times of need, often for the benefit of persons or families who are applying for or receiving public benefits. Special care must be used when handling funds raised through donations which if not handled properly, could unintentionally affect the beneficiary's eligibility for or receipt of public benefits. This session will include a discussion of social media sites, how to educate the public and the special needs community, as well as options for planning with these donations.
  Mary Alice Jackson

2:30-3:30 p.m.
Breakout Session 2

- **Creating the Trust: SSA Requirements to get a Self-Settled Trust Accepted and Funded Addressing the Technicalities of Doing it Right in Light of Recent Litigation**
  Creating and establishing a self-settled Special Needs Trust is governed by federal law authorizing a parent, grandparent, court or guardian to establish and sign the Trust document. How simple is that? Not so simple in light of Draper vs. Colvin. The presentation will offer suggested ways of creating a self-settled trust that complies with both federal law and POMS policy requirements.
  Patricia Sitchler
- **Differences Matter--First vs. Third Party SNTs: Structure and Creation**
  Are first party (or self-settled) special needs trusts and third party supplemental needs trusts just horses of a different color? Not at all. Lions and tigers and bears lurk in the woods for those unaware of the important distinctions when drafting special needs trusts for different situations. In this session, we will get down to basics and outline the essential need-to-knows about the structure and creation of first and third party trusts.
  Jane Skelton
- **(Re)Introduction to Pooled Trusts**
  This session will explore the many ways your clients may integrate pooled trusts into their special needs or estate plans. What is a pooled trust? When are pooled trusts useful? What happens once the pooled trust is established? How does your client join a pooled trust?
  Laurie Hanson

3:30-4:20 p.m.
Breakout Session 3

- **Understanding Mandatory and Optional Medicaid Recipients and Services; Relation to Waiver Services**
  G. Mark Shalloway
- **Preparing to Present the SNT to the Court for Approval**
  This session will address substantive and procedural issues involved in court applications to establish special needs trusts including traps for the unwary.
  Shirley B. Whitenack
- **There's More to Public Benefits than SSI and Medicaid**
  When we think of public benefits, we think of SSI and Medicaid. There are many programs and it's important that attorneys and trustees know of them and understand them. This session will look at a few of the "other" public benefits programs, especially HUD programs.
  Janet L. Lowder

4:30-5:15 p.m.
Been There, Done That! An Effective Special Needs Practice
This panel of experts will offer tips to starting a special needs practice, sharing what they've learned (sometimes the hard way) from their experiences.
Janet L. Lowder, Moderator

2015 Special Needs Trusts National Conference

Basics of Special Needs Trusts

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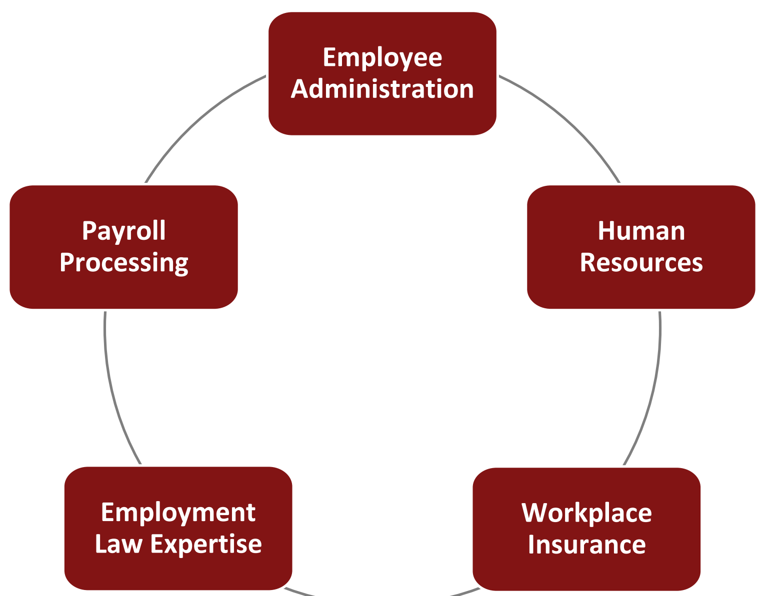

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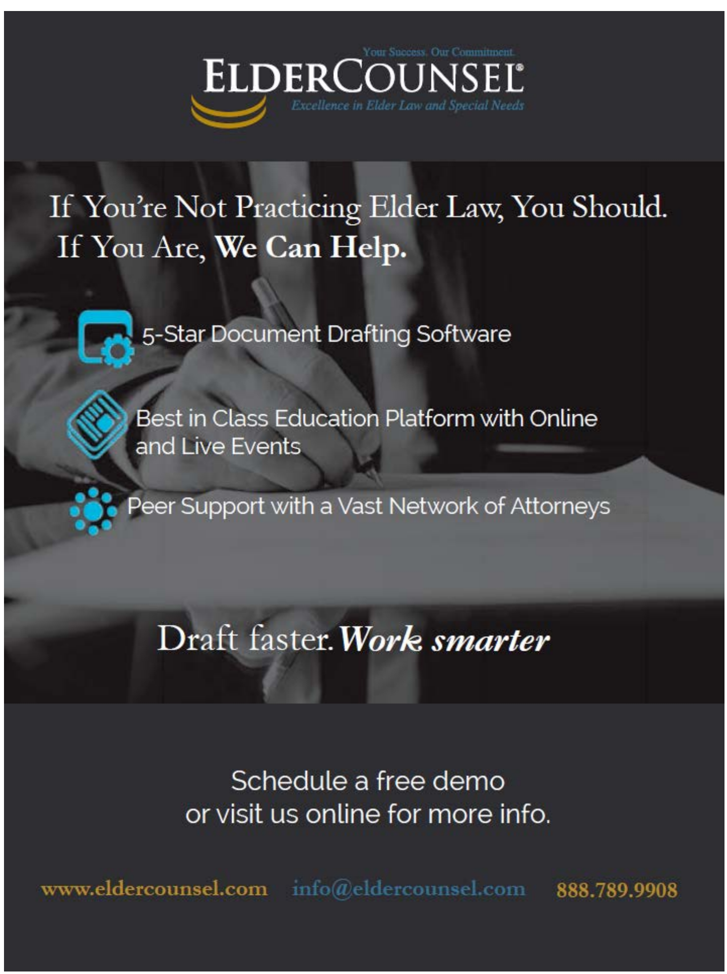

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Basics of Special Needs Trusts

Thursday, October 15, 2015
9:00 A.M. – 10:00 A.M.

How to Make a Trust a Special Needs Trust

Presenter:
Craig C. Reaves
Attorney at Law, Reaves Law Firm, P.C.
Kansas City, MO

- Materials
- PowerPoint

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How to Make a Trust a "Special Needs Trust"

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2015 Special Needs Trusts
The National Conference

Stetson University College of Law

October 15, 2015

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How to Make a Trust a "Special Needs Trust"

Table of Contents

I. First, A Primer on Trusts and Needs-Based Public Assistance. 1
- A. What is a "Trust"?. 1
  - 1. Definition of a Trust.. 1
  - 2. Illustration. 2
  - 3. There are five components to every trust. 2
- B. How Can a Trust Be Established?. 4
  - 1. Via a Last Will and Testament - A Testamentary Trust.. 4
  - 2. Via a Separate Document - A Living Trust. 5
  - 3. A Living Trust Can Be Revocable or Irrevocable. 5
- C. Whose Assets Are Being Held In Trust? Self-Settled v. Third Party-Settled Trusts. 5
- D. Which Distribution Standard Should Be Used?. 6
- E. What is Needs-Based Public Assistance?. 7
- F. What is the Purpose of a Special Needs Trust?. 8
- G. What Are the Requirements of a Self-Settled Special Needs Trust?. 8
- H. What Are the Requirements of a Third Party-Settled Special Needs Trust?. 11

II. Clauses That Need To Be In A Special Needs Trust. 11
- A. Settlor's Intent. 11
- B. Description of Type of Trust Being Established. 12
- C. Special Needs Distribution Standard. 13
- D. Broad Trustee Discretion.. 14
- E. Broad Trustee Investment Powers.. 15
- F. Limits on the Trustee's Powers. 16
- G. Limits on the Beneficiary's Powers. 17
  - 1. Power to Demand a Distribution from the Trust. 17
  - 2. Power to Remove and Replace the Trustee.. 18

III. Clauses to Consider Using in a Special Needs Trust. 18
- A. Power to Amend the Trust.. 18
- B. Oversight of the Trustee.. 20
  - 1. Guardian.. 21
  - 2. Trust Protector or Trust Advisor. 21
  - 3. Personal Agent.. 24
- C. Early Termination of the Trust.. 27
  - 1. Early Termination of a Third Party-Settled Special Needs Trust.. 27
  - 2. Early Termination of a Self-Settled Special Needs Trust.. 28
- D. IRA Paying to a Special Needs Trust.. 29

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IV. Questions to Answer When Designing a Third Party-Settled Special Needs Trust. 32
A. Should you use a Will with a Testamentary Trust or Living Trust?. 33
B. If Living Trust, Should it Be Standalone or a Section in Settlor's Primary Revocable Living Trust?. 34
C. If Standalone Special Needs Trust, Should It Be Revocable or Irrevocable?. . . . 36
1. Advantages of Revocable Standalone Special Needs Trust. 36
2. Disadvantages of Revocable Standalone Special Needs Trust.. 36
3. Advantages of Irrevocable Standalone Special Needs Trust. 37
4. Disadvantages of Irrevocable Standalone Special Needs Trust. 37
D. Is it better to write a trust in first person or third person perspective?. 38

V. And, In Conclusion. 38

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How To Make a Trust a “Special Needs Trust”

Written and Presented By:
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A special needs trust is nothing more than a traditional trust that directs the trustee to only distribute from the trust for the beneficiary’s “special needs”, preferably in a way that does not cause the beneficiary to lose or suffer a reduction in needs-based public benefits. Many provisions typically found in traditional trusts are either worded differently or eliminated in a special needs trust. And there are a few provisions that are typically only found in a special needs trust. In addition, if the special needs trust is self-settled, then it must strictly comply with federal law and should comply with administrative rules of the Social Security Administration and the agency administering the Medicaid program for the state where the beneficiary resides.

These materials will explain what the foregoing paragraph means and provide illustrations of clauses that are appropriate to use in a special needs trust. In order to help make this more understandable, we start with some very basic information about trusts and needs-based public assistance.

I. First, A Primer on Trusts and Needs-Based Public Assistance

A. What is a “Trust”?

1. **Definition of a Trust:** A trust is a legal arrangement under which one person or institution (Trustee) controls property given by another (Settlor/Grantor/Trustor) and uses it for the benefit of a third (Beneficiary). In other words, a trust separates **Legal Ownership** of property (which is given to the Trustee) from **Beneficial Ownership** (which is given to the Beneficiary).

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A trust is a legal concept concerning how property is owned and managed. A trust itself cannot be seen or touched, but the property being held by the trustee in trust can.

2. Illustration: Normally, a person owns his or her property and can use the property as he or she deems appropriate. For example, if Billy owns a checking account that has money in it, then Billy can decide how to spend that money and can write checks at any time to spend the money however Billy wishes.

However, if that checking account is in a trust for Billy's benefit and someone other than Billy is the trustee of that trust, then it is the trustee, not Billy, who can write checks and spend the money. But, because Billy is the beneficiary of the trust, the money in the checking account can only be spent by the trustee in a manner that benefits Billy. There is a long history of cases and statutes that govern how a trustee must act. They hold the trustee to a fiduciary standard and require that the trust assets be handled prudently and in a manner that benefits the beneficiary.

3. There are five components to every trust. These are:

a. Settlor (sometimes referred to as a Grantor or Trustor): This is the person (or entity) who transfers assets belonging to him or her to the trustee to hold and use for the benefit of the beneficiary. This arrangement is called the "trust". Although often the settlor is also the person who signs a written document to establish the trust, this is not necessary. Merely transferring assets to a trustee is all that is required to make a person a "settlor".

b. Trustee: This is the person or entity (such as a corporate trust department or non-profit corporation) who holds the assets transferred by the settlor and distributes those assets, or the income earned by investing those assets, to or for the benefit of

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the beneficiary. The trustee is the only person who legally has control of the trust assets.

c. **Beneficiary:** This is the person or entity (such as a charity) for whom the assets being held by the trustee, or the income generated from those assets, can be used. Whether distributed outright to the beneficiary or spent to purchase something that the beneficiary can use, the beneficiary is the only person who receives any benefit from the assets being held in the trust.

d. **Written Document Describing the Trust**: Usually there is a written document that contains the instructions for the Trustee and others to follow. This document identifies the trustee and the beneficiary, sets forth how the trustee is to decide when and how to distribute income or principal to or for the benefit of the beneficiary, and describes the investment and other authority the trustee holds. This written instrument can be a Will (Last Will and Testament) that contains provisions describing a trust or a separate written document, often referred to as the "trust agreement" or some similar name. This is more fully explained below. On rare occasions it is possible for a trust to be established based on the circumstances surrounding why a person is holding assets received from another. This type of trust is referred to as a "constructive trust."

e. **Principal (sometimes referred to as "corpus" or "res")**: This the property (assets) being held by the trustee that is to be invested by the trustee and used for the benefit of the beneficiary. This property is often referred to as the "trust assets." Normally it is necessary that some assets actually transfer from the settlor to the trustee in order for a trust to actually exist, although some states allow the mere

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existence of a living trust document to establish a trust (often referred to as a "dry trust").[1]

Because the trustee is only holding the assets "in trust" for the benefit of someone else (the beneficiary) and the trustee cannot use the assets for the trustee's benefit, the trust assets are deemed to not be personally owned by the trustee. This means that the creditors of the trustee cannot take the trust assets to pay debts owed by the trustee and the trust assets cannot be used to support the trustee. Whether the creditors of the beneficiary can force the trustee to give them the trust assets to pay the debts of the beneficiary, or the trust assets must be used to support the beneficiary, depends on how the trust is designed and the wording of the trust agreement.

B. How Can a Trust Be Established?

1. Via a Last Will and Testament - A Testamentary Trust

There are only two types of written documents that can establish a trust. One is a Will (a Last Will and Testament). A trust established by the provisions of a person's Will is referred to as a "testamentary trust." Because the deceased person's assets are transferred to the trustee pursuant to the provisions of the deceased person's Will, the deceased person is the "settlor" of the testamentary trust. Since a Will has no effect until after the person who made the Will is no longer living, a testamentary trust can only be established after the settlor's death. It is not possible for a testamentary trust to be established while the settlor is living.

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[1] See, for example, Idaho Code § 15-7-701, "Dry Trusts: A trust shall be valid and enforceable even though it may not be funded at a given time, or from time to time, or does not have any res or corpus or otherwise contain any asset of any nature." For a legal analysis of this subject see *Brief of Amici Curiae National Academy of Elder Law Attorneys, Inc. and Special Needs Alliance, Inc. in Support of Appellant Stephany Draper and Reversal* filed in *Draper v. Colvin*, 779 F.3d 556 (8th Cir. 2015).

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2. Via a Separate Document - A Living Trust

The other type of written document that can establish a trust is one that describes the details of the trust and the transfer of the settlor's assets to the trustee while the settlor is still living. This traditionally is referred to as an *inter vivos* trust, but today the phrase "living trust" is more common.

3. A Living Trust Can Be Revocable or Irrevocable

When a living trust is established, the settlor can either reserve the right to amend and terminate the trust (a "revocable" living trust) or can not reserve these rights (an "irrevocable" living trust). The laws of the state where the trust is established will determine whether the settlor can revoke or amend a trust if the written instrument does not say anything about that. For example, Section 602(a) of the Uniform Trust Code, which many states have adopted in varying forms, says, "Unless the terms of a trust expressly provide that a trust is irrevocable, the settlor may revoke or amend the trust."

C. Whose Assets Are Being Held In Trust? Self-Settled v. Third Party-Settled Trusts

Every trust is either "self-settled" or "third party-settled". These are sometimes also referred to respectively as a "first-party trust" and a "third-party trust." The determining factor is whether the assets being held by the trustee were previously owned by the beneficiary. If so, the trust is self-settled. On the other hand, if the trust assets were never owned by the beneficiary, but instead were transferred to the trustee by someone other than the beneficiary (i.e, a third party), then the trust is third party-settled. Or, said another way, if the settlor and the beneficiary are the same, then the trust is a self-settled trust. And if the settlor is someone other than the beneficiary, then the trust is a third party-settled trust.

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An example of a third party-settled trust is when a parent transfers the parent's assets to a trust for the benefit of the parent's child. This will typically occur at the parent's death as part of the parent's estate plan, but such a trust could also be established and funded during the parent's lifetime. Other examples are a grandparent establishing a trust for a grandchild, or a person establishing a trust for the benefit of his parent, grandparent, sibling or other relatives.

Technically, it is also a third party-settled trust when a person establishes a trust with the person's separate assets for the benefit of his or her spouse. However, unless established by the Will of the person, such a trust is deemed to be self-settled for both SSI and Medicaid eligibility purposes.[2] Both of these programs deem all assets of either spouse to be available to the other spouse.[3] Of course, the only way a person can establish a trust by his or her Will is for the person to die and the probate court order the establishment of a testamentary trust based on the provisions of the decedent’s Will.

Since a self-settled trust benefits the beneficiary, it can only be a living trust, and will be either revocable or irrevocable. But a third party-settled trust benefits someone other than the settlor, so it can be either established and funded upon the settlor’s death (a “testamentary trust”) or during the settlor’s lifetime (a “living trust”). As with a self-settled living trust, a third party-settled living trust will be either revocable or irrevocable.

D. Which Distribution Standard Should Be Used?

The “distribution clause” is the section found in every trust that describes when and how the trustee is to distribute from the trust for the benefit of the beneficiary. It contains one of the four different types of distribution standards that can be utilized. These are: support (or mandatory support),

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[2] 42 U.S.C. §1396p(d)(2)(A); 42 C.F.R. §435.121(a)(3)(I).

[3] 42 U.S.C. §1396p(h)(1); 42 C.F.R. §435.602(a)(1). *McKenzie v. State of Missouri, Department of Social Services, Division of Family Services*, 983 S.W. 2d 196 (Mo. App. E.D., 1998).

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discretionary support, pure discretion, and special needs, which can be further broken down into "strict" or "discretionary". Which one is utilized depends on what the trust settlor intended.

For example, if the settlor wants to require the trustee to support the beneficiary and provide for all of the beneficiary's needs, then a "mandatory support" distribution standard would be utilized in the trust's distribution clause. On the other hand, if the settlor wanted the beneficiary to be supported from the trust, but wanted the trustee to be able to determine when such support was appropriate and to curtail support if it was appropriate, then a "discretionary support" standard would be used in the distribution clause. Occasionally the settlor is very comfortable with the decision making ability of the trustee and wants to give the trustee total discretion whether or not to distribute anything or nothing at all for the benefit of the beneficiary. In this case, a "pure discretion" standard would be used in the trust's distribution clause.

But if the settlor is establishing a trust for the benefit of a beneficiary who has a disability or is elderly and is receiving (or may someday qualify for) needs-based public assistance, then a "special needs" distribution standard is most often used in the trust's distribution clause. Depending on the laws of the state where the beneficiary resides, this special needs distribution clause will be either strict (prohibiting the trustee from making a distribution from the trust that will in any way reduce or negatively impact any public assistance the beneficiary may be eligible to receive) or discretionary (discouraging a distribution that causes a reduction in the beneficiary's public assistance, but granting the trustee discretion to make such a distribution if the trustee determines that it is in the beneficiary's best interest even though it causes a reduction in the beneficiary's public benefits).

E. What is Needs-Based Public Assistance?

A special needs trust is appropriate when the beneficiary is sufficiently disabled to qualify for needs-based public assistance. "Needs-based" means that eligibility to receive assistance from a public benefit program is based on financial need, typically low income and low assets (referred to as "resources" by most programs).

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For example, in order to qualify for Supplemental Security Income (SSI) and Medicaid (in most states) a person's monthly income must be below the SSI amount and their "available" (sometimes referred to as "countable") resources must be $2,000 or less. Examples of needs-based public assistance programs are SSI, Medicaid, Section 8 housing, food stamps, and some Veterans benefits. Examples of public programs that are not needs-based are Social Security (both disability and retirement), Medicare, and some benefits available to Veterans.

F. What is the Purpose of a Special Needs Trust?

The purpose of a special needs trust is to hold assets in such a way that they can be used to enhance the beneficiary's care and life, but not be deemed to be "available" to the beneficiary and "countable" towards the $2,000 limit. In other words, they are "exempt" assets.

This is accomplished by using a special needs distribution clause in the trust, along with a few other provisions (discussed later in these materials). In addition, in most states[4], a pure discretion distribution clause can be used. What cannot be used is a support clause, whether mandatory or discretionary. These are interpreted to impose a duty on the trustee to use the trust assets for the support of the beneficiary and, therefore, the trust assets are deemed to be available to the beneficiary and, therefore, countable towards the $2,000 resource limit.

G. What Are the Requirements of a Self-Settled Special Needs Trust?

If it is the beneficiary's assets that will be transferred to the trustee of a special needs trust (or in other words, the trust will be self-settled), then the trust must strictly comply with the federal statute

[4] The State of Kansas has legislatively reversed the long-standing common law in Kansas regarding the treatment for Medicaid eligibility purposes of third-party settled trusts that contain a pure discretionary distribution standard. Effective July 1, 2004, Kansas enacted K.S.A. §39-709(e)(3) which prohibits the use of a purely discretionary trust standard in a third party-settled trust that benefits a person who is receiving Medicaid benefits in Kansas. As a result of this statute, the assets in a pure discretionary trust are now deemed to be "available" to the beneficiary for Kansas Medicaid eligibility purposes. To be exempt, the trust must contain a special needs distribution standard.

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authorizing a self-settled special needs trust. This was enacted in Section 13611 of the Omnibus Budget Reconciliation Act of 1993 (OBRA-93)[5] and can be found at 42 U.S.C. §1396p(d)(4)(A). It is also possible to join a pooled special needs trust authorized by 42 U.S.C. §1396p(d)(4)(C), but a discussion of that type of trust is beyond the scope of these materials.

Failure to meet the strict criteria of this law will cause the assets being held in the self-settled special needs trust to count towards the asset limit (usually $2,000) that is available to the beneficiary. If the assets in the trust exceed this amount, then the trust itself will cause the beneficiary to be disqualified from needs-based public assistance programs.

The criteria to qualify a trust as a self-settled special needs (d4A) trust are:

A) The beneficiary must be disabled sufficiently to qualify for SSI (as defined in 42 U.S.C. §1382c(a)(3), which is also found in Section 1614(a)(3) of the Social Security Act); and

B) The beneficiary must be under the age of 65 years at the time the trust is established and funded; and

C) The trust must be established for the benefit of the beneficiary (this was later expanded administratively to "sole benefit"); and

D) The trust must be established by the beneficiary's parent, grandparent, legal guardian or a court (Note that the beneficiary cannot establish this trust himself. However, on September 9, 2015 the U.S. Senate by Unanimous Consent passed Senate Bill 349: the Special Needs Trust Fairness Act of 2015. If this bill passes in the House and it is signed by the President, then the beneficiary will also be able to establish the trust); and

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[5] Pub. L. No. 103-66, 107 Stat. 312, enacted August 10, 1993.

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E) At the death of the beneficiary, any assets remaining in the trust must first be used to repay the state (or states) up to what it spent on the beneficiary for Medicaid assistance. (Any excess after Medicaid is repaid can be distributed however the settlor stated in the trust document).

If the foregoing conditions are met, then:

F) Transfer of the beneficiary's assets to the Trust will not create a transfer penalty for Medicaid or SSI eligibility purposes; and

G) The trust assets will not be deemed an available resource for Medicaid or SSI eligibility purposes; and

H) The beneficiary will qualify for Medicaid and SSI (assuming he or she otherwise qualifies); and

I) The trust may distribute for the benefit of the beneficiary to supplement the beneficiary's Medicaid and SSI without disqualifying the beneficiary from receiving Medicaid or SSI.

J) Although the trust can continue to provide supplemental assistance to the beneficiary after he or she attains the age of 65 years (assuming it was established prior to that time), no additional contributions can be made to the trust after the beneficiary is 65 years old.

K) NOTE: This description is based on not only 42 U.S.C. §1396p(d)(4)(A), but also §3259.7(a) of Transmittal 64 promulgated by The Health Care Financing Administration (HCFA, now known as the Centers for Medicare and Medicaid Services (CMS)) in November of 1994.

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H. What Are the Requirements of a Third Party-Settled Special Needs Trust?

If the beneficiary's assets will not be used to fund the special needs trust, but instead the assets that will be transferred to the trustee are from someone other than the beneficiary or the beneficiary's spouse (or in other words, the trust is third party-settled), then it is not necessary that the trust comply with the OBRA-93 rules. Although there are some restrictions, a third party-settled special needs trust can be much more flexible than a self-settled one.

A third party-settled special needs trust can be a testamentary trust established by the settlor's Will, or a revocable or irrevocable living trust. If a living trust, it can be standalone (i.e., only contains provisions for the special needs beneficiary) or found in a section of the document that describes settlor's primary revocable living trust and that distributes all of the settlor's estate upon death. No matter which structure is chosen, there are certain requirements the trust document must meet in order for the trust to be a successful "special needs" trust.

Now that the fundamentals of trusts, needs-based public assistance and special needs trusts have been explained, these materials turn to the specifics of special needs trust documents.

II. Clauses That Need To Be In A Special Needs Trust

Some of the clauses that are required when drafting a special needs trust are described below:

A. Settlor's Intent: While it is important that every trust instrument clearly state the settlor's intent, this is particularly important for a special needs trust. The settlor of a special needs trust should clearly state the intention that the trust estate not disqualify the beneficiary from needs-based public assistance, but instead supplement such benefits. If a court is ever asked to interpret a trust,

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it will interpret questionable provisions in a way that carries out the intent of the settlor.[6] The following language is an example of such a clause.

> "Purpose and Intent: The purpose and intent of this Trust is to create a fund to be used at the Trustee's sole and absolute discretion for the supplemental care of the beneficiary and not to displace financial or other assistance, such as Medicaid and SSI, that may otherwise be available to the beneficiary."

B. Description of Type of Trust Being Established: It is helpful if the trust instrument describes the type of trust being established so anyone reviewing the trust will understand what the settlor intended.

If the trust is a self-settled d4A trust, then consider including the following:

> "1. This Trust is a self-settled special needs trust that is established pursuant to 42 U.S.C. §1396p, as amended on August 10, 1993 by the Omnibus Budget Reconciliation Act of 1993, Pub.L.No. 103-66, for the benefit of the above-named beneficiary, who is less than sixty-five (65) years of age and is a disabled person as defined in §1614(a)(3) of the Social Security Act (42 U.S.C. §1382c(a)(3)), hereinafter referred to as "beneficiary".
>
> 2. It is intended that the beneficiary be eligible to qualify for Supplemental Security Income (SSI) and this Trust be an irrevocable trust pursuant to §SI-01120.200.D.2 of the Social Security Administration's Program Operations Manual System (POMS).
>
> 3. This Trust and all transfers to it are intended to qualify under Section 1613 of the Social Security Act (42 U.S.C. §1382b(e)(5)) as amended on December 14, 1999, by Section

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[6] See, for example, *Tidrow v. Dir., Missouri State Division of Family Services*, 688 S.W. 2d 9 (Mo. App. E.D. 1985).

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205 and 206 of the Foster Care Independence Act of 1999, Public Law 106-169, 13 Stat. 1822, et seq., H.R. 3443.

4. This Trust and all transfers to it are intended to qualify as a 42 U.S.C. §1396p(d)(4)(A) Trust for the benefit of a disabled person under the age of sixty-five (65) years old, and as such the trust estate shall not be deemed to be an available resource for Medicaid qualification purposes."

If the trust is a third party-settled trust, then consider including the following:

"This Trust is a third party-settled supplemental care (special needs) trust. As such, it does not hold any assets that were formerly owned by the beneficiary. On the contrary, the Trustee will only be holding assets that formerly belonged to me or people other than the beneficiary. Since this Trust does not hold any assets formerly belonging to the beneficiary, it will not repay Medicaid upon the beneficiary's death. This Trust does not comply with the provisions of 42 U.S.C. §1396p(d)(4)(A)."

C. Special Needs Distribution Standard: For the trust to be a special needs trust, the distribution clause used in the trust must contain a special needs standard. While it is possible to use a pure discretionary distribution standard in some states without disqualifying the beneficiary from needs-based public assistance, doing so will make the trust a purely discretionary trust rather than a special needs trust. If possible, the special needs distribution standard should be discretionary rather than strict. In most cases, the only reason a strict special needs standard would be used is when the beneficiary resides in a state that requires such a standard in order to treat the trust as an exempt trust for Medicaid eligibility purposes. A sample discretionary special needs distribution clause is as follows:

"Distributions: The Trustee may distribute as much of the income and principal of the trust estate, even to the point of distributing all or none of it, as the Trustee, in its sole and

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absolute discretion, may from time to time deem necessary or advisable to satisfy the beneficiary's supplemental needs (as defined below) and to supplement and enhance what the beneficiary is receiving from any governmental agency, including but not limited to, the Medicaid program. Any income not distributed shall at least annually be added to and become a part of the principal.

As used in this instrument, the term "supplemental needs" refers to those items needed for the beneficiary to maintain good physical and mental health, welfare, healthy companionship, and safety when, in the opinion of the Trustee, such items are not being adequately provided by any governmental agency, office or department of the United States or any state government, including but not limited to, the Medicaid program. "Supplemental needs" may include, but are not limited to, clothing and equipment; programs designed to provide the beneficiary with education, training, recreation and treatment; medical and dental expenses; and essential dietary needs. In addition, the Trustee may provide in-kind income to the beneficiary from this Trust, including in-kind support and maintenance, if the Trustee, in its sole and absolute discretion, determines such action is in the beneficiary's best interest. Other examples are described later in this instrument.

It is preferred that the Trustee not make distributions from this Trust that cause a reduction or loss of any public assistance the beneficiary is receiving or entitled to receive. However, if the Trustee, in its sole discretion, determines that any distribution from this Trust, including, but not limited to, in-kind support and maintenance, will benefit the beneficiary and is in the beneficiary's best interest, then the Trustee may make such distribution even if doing so will cause a reduction or loss of public assistance benefits the beneficiary would otherwise receive or be entitled to receive."

D. Broad Trustee Discretion: The trustee should be granted very broad discretionary powers. Often the phrases "sole and absolute" or "unfettered" are used. For example, consider the following:

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> "The Trustee is hereby granted authority to make or not make any distribution from the trust estate to or for the benefit of the beneficiary that the Trustee, in its sole, absolute and unfettered discretion, determines is appropriate, even to the point of distributing all or none of the trust estate, and any such decision shall not be subject to challenge by any person."

The purpose of this is to allow the trustee to make decisions about whether or not to distribute from the trust for the benefit of the beneficiary who has a disability without the Medicaid or SSI caseworker or any other person being able to question the distribution on the grounds that the trustee abused its discretion.

However, if the settlor wants to grant someone the authority to oversee or question a distribution decision of the trustee, then the last phrase should be altered, for example:

> "... and any such decision shall not be subject to challenge by any person other than the Trust Advisor."

E. Broad Trustee Investment Powers: The trustee should be granted broad authority to invest the trust assets in items the trustee believes are in the beneficiary's best interest, while keeping the over-arching fiduciary rules in place. For example, the trustee should be granted the authority to invest the trust estate in non-income producing assets, such as a house or condominium, a motor vehicle, and anything else the trustee believes is appropriate for the beneficiary but where the trust maintains ownership or control. Also, the trustee should be granted discretion to charge the beneficiary for the use of the item, or allow the beneficiary to use it for no charge.

To illustrate this, consider the situation where the trust purchases and retains ownership of a house where the beneficiary resides. The trustee should have total discretion to either charge rent or allow the beneficiary to live rent free. And if the trustee charges rent, the trustee should be allowed to determine the amount of that rent without taking into account what fair market rent would normally be for such a dwelling. A sample of a trust provision that accomplishes this is set forth below

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"Non-Income Producing Assets: The Trustee may buy, sell and invest in non-income producing assets, tangible personal property, and housing owned solely by the Trust, or solely by or jointly with another person, including, but not limited to, a beneficiary of the Trust. The Trustee, in the Trustee's sole and absolute discretion, may allow any beneficiary, and appropriate companions of a beneficiary, to live in any such housing on a rent-free basis, or the Trustee may charge rent of any amount, and without liability, deem such rent to be reasonable. The Trustee is authorized, but not required, to pay all costs of such housing, including, but not limited to, all taxes, assessments, maintenance, repairs and operational costs, such as domestic and/or custodial assistance. If the Trustee purchases a house or residence or other real property, the Trust Advisor, if one is then serving; otherwise the beneficiary's Personal Agent, may waive any requirement for regular appraisals or inspection of the property by the Trustee, or other administrative or supervisory requirements, that may otherwise be required by regulations, policies and procedures or supervisory organizations to the Trustee. If the Trustee purchases other non-income producing property, the Trustee, with the consent of the Trust Advisor, if one is then serving, may designate the Trust Advisor or other person to be the title holder of such property on behalf of the Trust or to hold possession of such property on behalf of the Trust."

F. Limits on the Trustee's Powers: Some powers often granted to the trustee in the standard provisions of most trusts should be removed or altered. For example, most trusts grant the trustee authority to terminate a trust early if the corpus of the trust becomes so small that it is no longer economically feasible for the trustee to continue to operate the trust. Some of these clauses will even set a dollar minimum, such as $50,000 or $100,000, and state that the trustee can terminate the trust if the corpus gets this small. Most of these clauses say the any trust assets remaining upon termination of the trust should be distributed outright to the current income beneficiary, although there may be a holdback clause elsewhere in the trust that allow the trustee to distribute this to a third-party for the beneficiary's benefit. Termination clauses such as this should either be eliminated from a special needs trust or written differently. This is discussed later in these materials.

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G. Limits on the Beneficiary's Powers: Care should be taken to limit the powers granted to the beneficiary. If the beneficiary has too much control over the trustee or the trust corpus, there is a risk that the trust estate may be deemed to be an available resource to the beneficiary and cause disqualification from the need based public assistance programs. Exactly how strictly the beneficiary's powers need to be restricted will vary by state. Each state has its own unique statutes, regulations, case law precedent and interpretations made by its Medicaid agency. However, some of the restrictions to consider are set forth below.

1. Power to Demand a Distribution from the Trust: The beneficiary must not have the ability to require the trustee to make any distribution from the trust. If so, whatever the trustee could be forced to distribute will be deemed to be an available resource to the beneficiary for Medicaid and SSI eligibility purposes. A standard spendthrift clause should always be included in a special needs trust. An example is:

> "Spendthrift Provisions: This is a spendthrift trust. None of the trust estate, income or principal, is available to the beneficiary except in the Trustee's sole and absolute discretion, and then only to the extent that other resources are not available to adequately provide for the beneficiary. No beneficiary shall have the power or authority to voluntarily or involuntarily sell, mortgage, encumber, pledge, hypothecate, assign, alienate, anticipate, transfer, convey, or in any manner dispose of any interest in the principal or the income from such trust prior to its actual receipt by the beneficiary. Furthermore, because this Trust is to be conserved and maintained for the supplemental needs of the beneficiary throughout the beneficiary's life, no part of the corpus of this Trust, neither principal nor undistributed income, shall be construed as part of the beneficiary's estate or be subject to the claims (whether during the beneficiary's life or after the beneficiary's death) of voluntary or involuntary creditors for the provision of necessities, care and/or services, including residential or institutional care by any public entity, office, department or agency of any state or the United States or any governmental, private or charitable agency.

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Under no circumstances can the beneficiary compel a distribution from this Trust for any purpose."

2. Power to Remove and Replace the Trustee: The power to both remove and replace a trustee, or sometimes the power to do either of these, may be interpreted as granting the beneficiary de facto control over the trust and cause the trust estate to be deemed to be an available resource to the beneficiary. If this is how the state's law that will be used to interpret the trust would view these powers, then they should be granted to someone other than the beneficiary, such as to the Trust Advisor or Trust Protector, or to the beneficiary's Personal Agent (which is described later in these materials). Also, if the beneficiary is granted the power to remove a trustee of a special needs trust, it should be for "good cause" rather than for "any reason".

III. Clauses to Consider Using in a Special Needs Trust

In addition to the clauses that are required in a special needs trust, there are others that should be strongly considered. In your author's experience, most of these are always included in a special needs trust, but since they are not required in order to make a trust a special needs trust, they are described in this section of the materials.

A. Power to Amend the Trust: It is not unusual for a special needs trust to need to be amended at some time during its existence. This can occur, for example, if the beneficiary moves to another state and the new state's Medicaid agency requires that something be added to the trust or a provision of the trust be changed or removed before that agency will treat the trust as exempt for Medicaid eligibility purposes. If the trust does not have a provision authorizing someone to amend the trust, then it will often become necessary to go to court to accomplish this. If the trust was established by court action, as sometimes happens with self-settled special needs trusts or always happens with third party-settled testamentary trusts, then the court may have required that any future

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amendment be approved by the court. However, in many cases, if the trust contains appropriate authority, it is not necessary to go to court to amend a trust.

If a trust protector or trust advisor is appointed, then usually it is that person or entity who is granted the authority to amend a trust. Otherwise, the trustee is often granted such authority. Unless the special needs trust is a revocable living trust and the settlor is still living, the settlor normally does not retain authority to amend the trust.

At a minimum, the amendments allowed without court action should be the ability to amend the trust to comply with law changes or interpretations that otherwise will cause the trust to be an available resource for Medicaid or SSI eligibility purposes. As discussed elsewhere in these materials, a trust protector or trust advisor can also be granted vast authority to amend the trust to comply with changing circumstances, even to the point of changing successor beneficiaries. As an example of authorizing a trustee or a trust advisor limited authority to amend a trust, consider the following:

> "Limited Power to Amend: Notwithstanding contrary provisions of this Trust, the Trustee, if willing and with the consent of the Trust Advisor, if one is then serving; otherwise the Trust Advisor, if the Trustee does not object, shall have the power, by an instrument in writing filed with the Trust records (and, if ordered by a court of competent jurisdiction, with prior approval of such court), to alter or amend any provisions of this Trust Agreement to: (1) facilitate the administration of this Trust; and (2) correct scrivener's errors; and (3) accommodate changes in the tax or any other laws relating to or affecting this Trust; and (4) make changes that are recommended, or required, to allow the Beneficiary to qualify, or continue to qualify, for public benefits and services of any kind in any jurisdiction, including but not limited to benefits under the Medical Assistance Program (Medicaid), 42 U.S.C. §1396 and its successors [ADD FOR d4A TRUST ; provided, however, that any such amendment shall not diminish, alter, reduce or otherwise negatively affect the provisions of Section [Insert Section Containing Medicaid Payback Provisions], above, or the Trustee's duty to make such payments]. Unless otherwise ordered by a court of competent jurisdiction,

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the decision to amend this Trust or not shall be made by the Trustee (or, if applicable, by the Trust Advisor), either on its own motion or on the motion of the Trust Advisor or any beneficiary (or such incapacitated beneficiary's Personal Agent) who is then presently eligible to receive distributions from the Trust; provided, however, that no contingent beneficiary not presently vested in the trust estate, nor any government or private agency, shall have standing to petition the Trustee or any court to alter or amend this Trust. To the extent possible, amendments should conform with the purposes of this Trust and with any regulations that are approved by any governing body or agency relating to 42 U.S.C. §1396, or related statutes, including state statutes that are consistent with the provisions and purposes of this Trust."

B. Oversight of the Trustee: There should be someone or some entity who has authority and responsibility to oversee what the trustee is doing with the trust estate. This starts with requiring the trustee to keep accurate books and records and provide accountings at least annually. The questions become to whom does the trustee provide those accountings and who has access to the trust records and authority to inspect and question what the trustee is doing?

For a trust that is not a special needs trust, such oversight is usually granted to the current income beneficiary, or their guardian if they are a minor. With a special needs trust this may be appropriate if the beneficiary has only a physical disability and is mentally capable of being responsible for such oversight. However, if the beneficiary's disability affects his or her intellectual abilities, then the beneficiary may not have the capacity to review or understand the trustee's records and accountings. In such event, this responsibility should be given to someone else.

If a trust protector or trust advisor is being appointed, then usually they have this authority. Otherwise, options to consider are the beneficiary's guardian, a Personal Agent, a named person, or a court. These are discussed below.

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1. Guardian: If a guardian has been appointed by a court to make personal decisions on behalf of the beneficiary, this is the logical person to be responsible for overseeing the actions of the trustee of the special needs trust. The guardian will have been charged by the court to watch over the beneficiary and make medical and legal decisions on the beneficiary's behalf. As such, the guardian should be kept informed about the status of the trust. Therefore, it is often appropriate for the trust to grant oversight of the trustee to the beneficiary's guardian.

However, occasionally the settlor of a trust does not like or trust the beneficiary's guardian and does not want the guardian to have any oversight of the trustee or authority over the trust. This may occur, for example, when the guardian is an ex-spouse of the settlor and the beneficiary is their child. In this event, the settlor will want to specifically restrict what is disclosed to the guardian and, instead, grant someone else, such as a trust protector or Personal Agent, oversight of the trustee.

2. Trust Protector or Trust Advisor: This concept is a topic that requires an entire presentation or book all by itself, so these materials will, of necessity, be extremely limited. However, a review of some of the major options to consider when designing the responsibilities of a trust protector or trust advisor are mentioned below.

By the way, there is no hard and fast rule concerning what to call the person or group of people who are granted these powers. Often "trust protector" is used, and it is becoming the more common term in statutes, scholarly articles and CLE presentations. Other times, and particularly when the primary focus of the duties is to make sure there is someone whose primary responsibility is to look out for the best interests of the beneficiary and advise the trustee concerning appropriate distributions, the title used is "trust advisor". For ease of reference only, this section of these materials will use trust protector.

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At its core, a trust protector is charged with "protecting" the trust and/or the beneficiary and what the beneficiary receives from the trust. The powers granted to a trust protector can be broad or limited, depending on what the settlor wants to accomplish. There are a vast array of options available when designing a trust protector for a special needs trust.

A trust protector can be single person, two people acting together, or a committee of people. If a committee, it can be made up of specifically named people or categories of people. For example, a committee could be made up of the person who is serving from time to time as the beneficiary's guardian, caseworker (either provided by a state agency or privately employed by the trust), CPA, financial advisor, lawyer and a person related to the beneficiary by blood. However the original trust protector or committee members are chosen, there should be some mechanism for successor trust protectors. This can be accomplished by the settlor naming a succession of people or allowing the current trust protector (or committee) to appoint a successor. In states that allow microboards[7], a microboard can be established and named as a trust protector.

The powers granted to the trust protector can be limited or vast. Examples of some powers that can be granted, either alone or combined, include the power to guide, advise or direct the trustee in making distribution or investment decisions, to review the trustee's books, records and annual accountings, to challenge and question anything found in such records or accountings, to remove a trustee, to select a replacement trustee (either limited to a corporate trustee, a non-profit agency that serves as trustee of special needs trusts, and/or a person), to amend the trust (either limited to changes required to keep the trust exempt for Medicaid and SSI purposes, or to change trustee powers or other similar provisions, or to change how the trust estate is distributed to successor beneficiaries, or to even change the successor beneficiaries of the trust, and so on), and to terminate the trust. How much power

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[7] For a description on what a microboard is see the following websites, both last visited on August 29, 2015: http://www.communityworks.info/articles/microboard.htm and http://www.pamicroboardassociation.org/Home/History.

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is granted to a trust protector depends on what the settlor wants to accomplish and protect against.

No matter how the trust protector is designed (individual or committee) and what powers are granted, the trust also should clarify whether the trust protector has the responsibility to initiate such oversight, or merely wait until someone or some action triggers the starting of the trust protector's responsibilities. Also, it is important to clarify whether the trust protector is a fiduciary for all, some or none of the actions to be taken. A recent Missouri Court of Appeals case has focused on this issue. See *Robert T. McLean Irrevocable Trust u/a/d/ March 31, 1999 ex rel McLean v. Ponder*, 418 S.W.3d 482 (Mo.App. S.D. 2013) reh'g and/or transfer denied, (Nov. 15, 2013) and transfer denied, (Feb. 25, 2014). States that have statutes on this subject differ in whether a trust protector is a fiduciary, so be sure to confirm the law of the state where the special needs trust will be administered when designing and drafting the trust. Although the author makes no claims of viability, the following clause is offered for the readers' consideration concerning this issue:

> "Fiduciary Rules Affecting the Trust Advisor: Although any action a member of the Trust Advisor Committee takes on behalf of the Beneficiary or this Trust is to be in the best interest of the Beneficiary, a member of the Committee, and the Trust Advisor Committee as a whole, is not responsible for monitoring the Trustee's actions or the condition of the Beneficiary unless asked to do so by the Beneficiary or an interested person. This is not to imply that a member of the Trust Advisor Committee cannot take such actions on his or her own initiative or in any way limit a member's authority to do so. The purpose of this Section is to clarify that a member of the Committee, and the Trust Advisor Committee as a whole, does not have a fiduciary duty to initiate such actions or to supervise anything the Trustee does on behalf of the Trust or the Beneficiary, including, but not limited to, the trust investments or distributions made by the Trustee.

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However, if the Trust Advisor Committee as a whole, or a member of the Trust Advisor Committee individually, is asked to fulfill any of the jobs to be performed by the Trust Advisor as set forth in this instrument, or actually begins to do so on its or his or her own initiative, then all of the members of the Committee (if the Committee begins to act), or of the individual member who begins to act, shall, beginning at that time and only for that particular job, have a fiduciary duty to perform such job to the best of his or her ability and in the best interest of the Beneficiary. However, taking a particular action shall not cause a fiduciary duty to be imposed on a member or the Trust Advisor Committee as a whole for any other potential actions, jobs or responsibilities that may be undertaken by or imposed on the Trust Advisor Committee."

3. Personal Agent: Another option is a Personal Agent. This is a concept that has been used by the author for many years (and believed to have been developed by your author, although since very few ideas are truly original, it was probably borrowed from somewhere else and its true source is lost in the mists of memory). There is no magic to the name, it was chosen merely to make reference to the authority to make personal decisions on behalf of the beneficiary and distinguish it from "personal representative." In any event, this provides for a hierarchy of who the settlor wants to authorize to make decisions on behalf of a beneficiary who does not have the capacity to make them herself. In addition, it gives the trustee the comfort of knowing who the trustee must listen to regarding the beneficiary.

A Personal Agent can be given most of the same authority as a trust protector, but the person who actually serves in this role is determined by a position held, not by name. For example, the first Personal Agent can be the beneficiary's guardian, if one is appointed and if the settlor is comfortable with the guardian having this authority. If not, the second person to fill the role of Personal Agent can be the beneficiary's conservator (guardian of the beneficiary's property) if one is appointed. If not, it can then be the agent appointed in the beneficiary's durable power of attorney (if the settlor wants the beneficiary to have this much input into

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who the Personal Agent is), or a majority of the siblings of the beneficiary, and so on. The order of the authorized Personal Agents can be switched around depending on the preferences of the settlor. Normally at the end of the list, if no one else can or will fill the role, is a court of competent jurisdiction. An example of a clause that appoints a Personal Agent is below:

> “Provisions Concerning a "Personal Agent": As used in this Trust, the term "Personal Agent" shall mean the following, successively in the order named. If a person is serving as Personal Agent under the first category (as the guardian of the beneficiary), then none of the persons described in the succeeding categories shall have the authority to serve as Personal Agent. If there is no guardian appointed for the beneficiary, then the person in the second category (a conservator) shall be the Personal Agent and none of the persons in the succeeding categories shall have the authority to serve as a Personal Agent. This pattern shall continue on down the list in order of priority.
>
> Subject to the above description, the categories of persons who can serve as a Personal Agent for a beneficiary shall be the following:
>
> (I) the court-appointed guardian or co-guardians of the beneficiary;
>
> (ii) the court-appointed conservator or co-conservators of the estate of the beneficiary;
>
> (iii) a person designated in writing by either parent of the beneficiary, or the survivor;
>
> (iv) a majority of the siblings of the beneficiary, or the survivor;
>
> (v) a person appointed as the beneficiary's attorney-in-fact under a duly executed and valid Durable Power of Attorney;

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(vi) the spouse of the beneficiary (if the spouse and the beneficiary are then living together and are not in the process of separating or divorcing); or

(vii) a court of competent jurisdiction.

A Personal Agent shall be entitled to reimbursement of all reasonable expenses incurred by the Personal Agent in connection with assisting the beneficiary in matters relating to the administration of this Trust. A Personal Agent does not have to accept such reimbursement. A Personal Agent who has previously waived reimbursement of expenses may change his or her mind at any time and begin to be reimbursed for any such expenses that have not been previously waived. Unless otherwise ordered by a court of competent jurisdiction, a Personal Agent shall not be entitled to a fee from this Trust for his or her services as Personal Agent.

Although any action the Personal Agent takes on behalf of the Beneficiary of this Trust is to be in the best interest of the Beneficiary, the Personal Agent is not responsible for monitoring the Trustee's actions or the condition of the Beneficiary unless asked to do so by the Beneficiary or an interested person. This is not to imply that the Personal Agent cannot take such actions on his or her own initiative or in any way limit the Personal Agent's authority to do so. The purpose of this Section is to clarify that the Personal Agent does not have a fiduciary duty to initiate such actions or to supervise anything the Trustee does on behalf of the Trust or the Beneficiary, including, but not limited to, the trust investments or distributions made by the Trustee. However, if the Personal Agent is asked to fulfill any of the jobs to be performed by the Personal Agent as set forth in this instrument, or actually begins to do so on his or her own initiative, then the Personal Agent shall, beginning at that time and only for that particular job, have a fiduciary duty to perform such job to the best of his or her ability and in the best interest of the Beneficiary. However, taking a particular action shall not cause a fiduciary duty to be imposed on the Personal

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Agent for any other potential actions, jobs or responsibilities that may be undertaken by or imposed on the Personal Agent."

C. Early Termination of the Trust: Although cautioned against earlier in these materials, it may be appropriate for a special needs trust to contain a clause that allows the trustee (or a trust protector) to terminate the trust even though the beneficiary is still living. This can be because the trust corpus is too small, or because the trust has been deemed to be an available resource by a public benefit agency and the trustee does not want to further challenge that decision, or because circumstances have changed, such as the beneficiary no longer has a disability.

If a trust is terminated during the beneficiary's lifetime, the trust must say where any remaining trust assets are to be distributed after all of the administrative expenses are paid. Normally this will be to the trust beneficiary, but it could be to someone else. Some attorneys designing a special needs trust include such a clause as a "poison pill" to discourage an agency from challenging the trust - even if the agency wins and the trust is deemed to be an available resource, the trustee can terminate the trust and pay the proceeds to another person (usually the successor beneficiary) so the primary beneficiary will still maintain eligibility for the public assistance program. Usually, if such a "poison pill" clause is included in a special needs trust, there is a provision requesting that the people who receive the trust estate upon such early termination voluntarily use such assets for the supplemental needs of the original trust beneficiary.

1. Early Termination of a Third Party-Settled Special Needs Trust: A sample early termination clause for a third party-settled special needs trust that contains such a "poison pill" is below.

"Termination of Trust by Trustee: Notwithstanding any other provision of this Trust Agreement, if the Trustee, in its sole discretion, determines that continuation of this entire Trust or any share or trust created by the provisions of this Trust Agreement are contrary to the best interest of the beneficiaries of such trust by reason of (1)

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legislation, or government agency or court rulings, or (2) unforeseen changes or circumstances, or (3) because the value of the trust's or separate share's assets are at such a level, in the sole judgment of the Trustee, as to make continued administration of it financially burdensome and uneconomical, then the Trustee, in its sole discretion, may at any time terminate any such trust estate, share or merged trust estate and distribute the principal of it, together with undistributed income, free from trust, to the person(s) then entitled to receive the income, subject to the holdback provisions contained in this Trust; provided, however, it is preferred that the Trustee not make any such distribution to [name of the primary beneficiary who has the disability], but instead any such distribution should be to the reminder beneficiaries of the Trust as if [name of the primary beneficiary] was not living, as described above. However, the Trustee, in its sole and absolute discretion, can ignore this stated preference and, instead, distribute to or for the benefit of the beneficiary. Despite the above provisions, no Trustee who is also a beneficiary of any trust shall have nor may exercise such power to terminate a trust. This power shall only be exercised by the other Trustee, Trustees or a Special Trustee that is not a "related or subordinate party" (as defined by Internal Revenue Code §672), if any, and if none, this power shall not be exercisable except by a court of law."

2. Early Termination of a Self-Settled Special Needs Trust: If the trust is a self-settled special needs trust authorized by 42 U.S.C. §1396p(d)(4)(A), and particularly if the beneficiary is receiving SSI, then the above clause will not work. Instead the requirements contained in POMS SI 01120.199 must be followed. Failure to do so will result in the entire trust estate being deemed to be an available resource for SSI eligibility purposes. In order to satisfy this POMS, the early termination clause must meet the following three requirements:

- After the payment of taxes due to the state or federal government as a result of the termination of the trust and the payment reasonable fees and administration

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expenses associated with the termination of the trust, the State must receive all amounts remaining in the trust upon early termination up to the amount of total Medicaid assistance paid by the State on behalf of the trust beneficiary,

- After the State is reimbursed, all remaining trust assets must be distributed to the trust beneficiary (not a third person), and

- The power to terminate the trust early cannot be held by the trust beneficiary.

Although this only applies to beneficiaries who are receiving SSI, it is anticipated that many states will adopt this rule for Medicaid eligibility purposes. The following clause meets these requirements.

> "Termination During the Beneficiary's Lifetime: It is strongly preferred that this Trust not be terminated during the Beneficiary's lifetime and the Trustee is encouraged to not do so. However, if, despite this, termination is ordered by a court of competent jurisdiction or it is determined by the unanimous decision of the Trustee and all persons then serving as a Trust Advisor or as a member of the Trust Advisor Committee that it is in the Beneficiary's best interest to terminate this Trust during the Beneficiary's lifetime, then, after all expenditures and reserves described in Section _____, above, are made and the Medicaid program is reimbursed, as described in Section _____, above, then any remaining assets held in the Trust shall be distributed outright, with no restrictions, to the Beneficiary; provided, however, if the Beneficiary at that time has a guardian or conservator appointed to act on the Beneficiary's behalf, then such distribution shall be made to the Beneficiary's conservator, if any, and otherwise to the Beneficiary's guardian."

D. IRA Paying to a Special Needs Trust: If it is possible that a third party-settled special needs trust may receive IRA proceeds upon the death of the IRA owner, then care must be taken in

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designing and drafting the trust. This is a topic that is extremely complex and easily requires many presentations or its own book to fully explain. As a result, the details are beyond the scope of these materials. However, rest assured that it is possible to name a third party-settled special needs trust as a beneficiary of an IRA and "stretch" the IRA Required Minimum Distributions over the life expectancy of the special needs trust beneficiary if the trust is properly designed.

Briefly, in order to accomplish this, some of the items the attorney drafting the third party-settled special needs trust should take into account are:

1. The special needs trust must be a "see-through trust"[8],

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[8]In order for a trust to qualify as a "see-through trust" and allow the life expectancy of the applicable Designated Beneficiary of the trust to be used to determine the amount that must be paid out to the trust each year (i.e., the "Required Minimum Distributions"), the 2002 final IRS regulations require that the following four basic requirements be met (Reg. 1.401(a)(9)-4, Q&A-5):

1. The trust must be a valid trust under state law, or would be, but for the fact there is no corpus;

2. The trust is irrevocable or will, by its terms, become irrevocable upon the death of the IRA owner;

3. The trust beneficiaries must be identifiable individuals from the terms of the trust; and

4. By October 31 of the calendar year following the calendar year in which the IRA owner dies, the plan administrator must be provided with either:

    a. A copy of the actual trust document for the trust that is named as a beneficiary of the IRA, or

    b. A final list of all beneficiaries of the trust (including contingent and remaindermen beneficiaries with a description of the conditions on their entitlement) as of September 30 of the calendar year following the calendar year of the IRA owner's death certified by the trustee that, to the best of the trustee's knowledge, the list is correct and complete. In addition, the trustee must agree to provide a copy of the trust instrument to the plan administrator upon demand.

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2. The portion of the special needs trust that is to receive the IRA proceeds must be an "accumulation trust"[9] (sometimes referred to as a "discretionary trust"), as opposed to a "conduit trust"[10],

3. All beneficiaries who are entitled to receive the remaining assets from the portion of the trust that accumulates the IRA proceeds must qualify as a "Designated Beneficiary", which essentially means that they are humans as opposed to an entity such as a charity or an estate[11], and

4. Preferably, all of the beneficiaries who will receive the accumulated IRA proceeds upon the death of the primary trust beneficiary are the same age or younger than the primary beneficiary.[12]

As alluded to in the above list, it is possible, and preferable, to draft the third party-settled special needs trust so that any distributions from an inherited IRA that are received by the trust are allocated to a separate sub-trust of the special needs trust, often referred to as a Retirement Preservation Trust,

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[9] An "accumulation trust" is a trust that does not require that all distributions received from an inherited IRA be paid out to the beneficiary in the year they are received. It does not matter whether the trustee is directed to accumulate the IRA distributions or given discretion to accumulate or distribute; it is an accumulation trust if the trustee is not required to distribute all IRA distributions to the original income beneficiary in the year the trust receives each such distribution.

[10] A "conduit trust" is a trust that mandates that all distributions received from an inherited IRA (including, but not limited to the Required Minimum Distributions) must be paid out to the beneficiary in the calendar year they are received. Or, in other words, no IRA distributions can be accumulated in the trust. This is the type of trust described in Reg. §1.401(a)(9)-5, Q&A-7(c)(3), Example 2.

[11] IRC §401(a)(9)(E) and IRC §401(a)(9)-4, Q&A and Reg. §1.401(a)(9)-4, Q&A-3.

[12] With an accumulation trust, the life expectancy of the oldest person of the group consisting of the primary trust beneficiary and all of the people who will receive any accumulated inherited IRA proceeds upon the death of the primary trust beneficiary will be used when determining the maximum number of years over which the IRA will pay out ("stretch"). If the primary trust beneficiary is the oldest person in this group, then it will be the primary beneficiary's life expectancy that will be used when calculating the "Required Minimum Distributions" ("RMD", sometimes referred to as the "Minimum Required Distributions (MRD)) that must be made from the IRA each year.

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or some similar name. Then, upon the death of the primary trust beneficiary, the remaining assets of the Retirement Preservation Trust can be distributed to people who are near the age of the primary trust beneficiary, while the assets remaining in the special needs trust that are not retirement plan proceeds can be distributed to any people or charities chosen by the settlor without negatively affecting the number of years over which an inherited IRA can be paid out.

Although a conduit trust is much easier to design and draft, a conduit trust should not be used for a special needs trust because distributing the inherited IRA Minimum Required Distributions each year to the beneficiary will cause the beneficiary to have "income" which will usually have adverse consequences for the beneficiary's eligibility for Medicaid and SSI. Instead, the special needs trust should be an accumulation trust. This means the beneficiaries who will receive the trust estate after the current beneficiary dies must be taken into account when determining the length of time the inherited IRA distributions can be "stretched." This is why it is best that they are not older that the primary beneficiary.

If, instead of distributing an IRA to a third party-settled special needs trust, the person who has a disability is named directly as the beneficiary of the IRA, look at PLR 200620025. In this private letter ruling the IRS ruled that an inherited IRA transferred into a d4A trust was not deemed to be a transfer for income or gift tax purposes and that the beneficiary's life expectancy could be used to determine the length of the distribution of the IRA. In other words, the inherited IRA could be stretched over the beneficiary's life expectancy. This occurred because the trust was a grantor trust for income tax purposes.

IV. Questions to Answer When Designing a Third Party-Settled Special Needs Trust

A third party-settled trust can be established by using a last will and testament (a testamentary trust) or by using a living trust (sometimes referred to as an *inter vivos* trust). If a living trust, it can be a separate standalone trust for the benefit of the beneficiary who has a disability or a section of the settlor's revocable living trust that also contains provisions for other beneficiaries. Also, a living

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trust can be revocable or irrevocable. Lastly a living trust can be written in third person language or first person language. There is no right answer for every special needs trust; which option is chosen will depend on the circumstances and the settlor's desires.

A. Should you use a Will with a Testamentary Trust or Living Trust?

Whether a Last Will and Testament (that contains a testamentary trust) or a living trust is used to establish a third party-settled special needs trust usually depends on whether the settlor wants to utilize the probate process to transfer assets upon the settlor's death, or whether the settlor wants to avoid probate.

A testamentary special needs trust is established by probating the settlor's Last Will and Testament. Upon death, the settlor's Will is admitted to probate and a court oversees the settling of the settlor's probate estate. When the estate is fully adjudicated and ready to be distributed, the court will order the executor to transfer assets to the trustee of the special needs trust. The language describing the special needs trust is located in the Will.

Whether a person chooses to establish a special needs trust in this manner will depend on whether the person wants his or her estate to go through probate. If so, then a Will should be used as the primary estate planning document. However, if the person wants to avoid probate upon death, then a living trust should be used as the primary estate planning document rather than a Will. The one exception to this is if a person wants to establish a special needs trust for his or her surviving spouse. If so, then a Will must be used or the trust will be deemed to be an available resource to the surviving spouse. See 42 U.S.C. §1396p(d)(2)(A).

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B. If Living Trust, Should it Be Standalone or a Section in Settlor's Primary Revocable Living Trust?

A person who prefers to avoid probate upon death will often utilize a revocable living trust as his or her primary estate planning document instead of a Will. This living trust will direct how assets are to be distributed upon the person's death. If a beneficiary has a disability and a special needs trust is desired, the living trust will direct the trustee how to distribute the portion of the trust assets that are allocated to the person who has the disability. This will be accomplished in one of two ways:

1. By including in the living trust a section that contains the language describing the special needs trust and directing the trustee to continue to hold the assets allocated for the benefit of this beneficiary in trust as described in the special needs trust section, or

2. By directing the trustee to distribute the assets allocated for the benefit of this beneficiary to the trustee of a separate living trust (a third party-settled special needs trust) that was established for the benefit of this beneficiary (a standalone special needs trust).

Since the primary living trust contains provisions for all of the decedent's beneficiaries, if the special needs trust is contained in this trust then the entire document will need to be given to the agencies administering any needs-based public assistance the special needs beneficiary is receiving. This is often not something the settlor of the trust wants. However, this design may be appropriate if the distribution to the beneficiary who has a disability is contingent on other people not surviving the settlor, or if it is quite likely that the beneficiary may not survive the settlor.

There are many advantages to utilizing a separate standalone trust for a third party-settled special needs trust, among which are:

1. It may be easier to get the trust approved by the agency who reviews the trust to determine whether it is an exempt trust for public benefit eligibility purposes. If the trust is

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a separate standalone trust that is only for the benefit of the beneficiary it is usually easier for the public benefits agency to review and approve the trust than if the trust is buried inside a much larger trust that contains provisions for many beneficiaries. Also, there may be provisions in the larger trust that, if applied to the special needs trust, would cause the special needs trust to be an available resource.

2. Other people can name the standalone special needs trust as a beneficiary of their estate plan, or can make lifetime gifts to the trust for the benefit of the beneficiary who has a disability. For example, if a parent establishes a standalone special needs trust for the benefit of her child, then the grandparents can name that trust as a beneficiary in their own estate plans and leave money for the benefit of the child who has a disability without having to establish, and pay for establishing, a special needs trust themselves. The donor needs to be aware that if the standalone special needs trust is a revocable trust and the settlor is still living, then such a gift is actually a gift to the settlor for asset protection and income, gift and estate tax purposes. If the donor is not comfortable with this, then the trust can be amended by the settlor into an irrevocable trust, or the donor can choose to not give anything to the trust.

3. It is easier to set aside assets for the beneficiary of the special needs trust in addition to a share of the settlor's estate. For example, sometimes a parent will hold assets that are earmarked for the child who has a disability and want that child to have these assets in addition to his or her share of the parent's estate upon the parent's death. Traditionally the parent would keep these assets in a separate account and would specifically identify that account to be allocated to the special needs trust upon the parent's death. This meant if the account is ever changed, the estate plan document had to be amended to identify the new account. If, on the other hand, a standalone special needs trust is used, the parent merely has to open an account in the name of the special needs trust and transfer the money into that account. If the trust is revocable, the parent's Social Security number is the tax identification number of the trust and all income is taxable to the parent. If the trust is irrevocable, it will

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have its own tax identification number. Also, if it is irrevocable, there may be gift tax consequences when the parent transfers the money into the account in the name of the trust.

C. If Standalone Special Needs Trust, Should It Be Revocable or Irrevocable?

If a standalone special needs trust is used, then it must be decided whether the trust is to be revocable or irrevocable. There are advantages and disadvantages to each option. Which one is used will depend on the circumstances and the Settlor's desires.

1. Advantages of Revocable Standalone Special Needs Trust: If a standalone special needs trust is revocable, then the settlor can change any provisions of the trust at any time. This allows the settlor to adapt the trust as circumstances change. Also, since the trust is revocable, the settlor is the grantor of the trust for tax purposes. This means that there are no gift tax issues if the settlor transfers assets to the trust while the settlor is living and no separate income tax return required for the trust as long as the settlor is living; all trust income is included on the settlor's personal income tax return. Also, since the assets are included in the settlor's estate for estate tax purposes, if there is an estate tax in effect when the settlor dies there will be a step-up in basis for capital gain purposes.

2. Disadvantages of Revocable Standalone Special Needs Trust: Upon the death of the settlor, the assets in the trust are included in the settlor's estate for estate tax purposes. This may cause an estate tax to be payable if the settlor's estate is large enough. Also, the assets in the trust are subject to the claims of the settlor's creditors. In addition, it may be a disadvantage that the income earned on the assets held in the trust is taxed to the settlor. Any gifts made to the trust from others are actually gifts to the settlor for tax and liability purposes. Any distribution from the trust to or for the benefit of the beneficiary is deemed to be a gift from the settlor. This may cause gift tax issues for the settlor.

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3. Advantages of Irrevocable Standalone Special Needs Trust: Assets held in the trust are not included in the settlor's estate for estate tax purposes, and income earned on trust assets is not taxed to the settlor. The assets in the trust are generally free from the claims of the settlor's creditors. Other people can make a gift to the trust and it will not be something the settlor can use for the settlor's personal benefit, nor will it be subject to the settlor's creditors. Gifts from the trust to or for the benefit of the beneficiary are not deemed to have been made by the settlor.

4. Disadvantages of Irrevocable Standalone Special Needs Trust: Since an irrevocable standalone special needs trust is not a grantor trust for tax purposes (although it is possible to design such a trust to make it a grantor trust), the trust will need its own tax identification number and the trustee will need to prepare and file a separate 1041 income tax return for the trust. Income tax brackets are compressed for irrevocable trusts, so it is possible that the trust will pay more tax on the same amount of income than would be paid if the income was taxed to the settlor. However, any distributions from the trust are deemed to have been first from income, so spending money on behalf of the beneficiary will pass the income tax liability out to the beneficiary. The settlor can not amend or change the trust to adapt to changing circumstances (although such authority can be granted to the trustee or a trust protector when the trust is established). Lifetime transfers to the trust from anyone, including the settlor, will be a taxable gift for gift tax purposes. The gift will not qualify as a present interest gift (and become eligible for the annual gift tax exclusion, which is currently $14,000/person/year) unless Crummey withdrawal powers are granted to a beneficiary. See *Crummey v. Commissioner*, 397 F.2d 82, 88 (9th Cir. 1968). Withdrawal powers cannot be granted to the beneficiary who has a disability without causing eligibility issues for SSI and Medicaid. Most commentators believe it is possible to grant withdrawal powers to other beneficiaries of the trust (see *Estate of Cristofani v. Commissioner*, 97 T.C. 74 (29 July 1991)), but extreme care must be taken in designing such a trust.

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D. Is it better to write a trust in first person or third person perspective?

A trust can be written in first person language or third person language. Examples are:

> First person: "I am the Settor of this Trust and I hereby transfer my assets listed on Schedule A, attached to this Trust Document, to the Trustee to hold and use for the benefit of the Beneficiary, as described below. I reserve the right to amend or revoke this Trust at any time during my lifetime."

> Third person: "Settlor hereby transfers the assets listed on Schedule A, attached to this Trust Document, to the Trustee to hold and use for the benefit of the Beneficiary, as described below. Settlor reserves the right to amend or revoke this Trust at any time during Settlor's lifetime."

It does not matter which perspective is used; both work fine and are equally "legal". Usually, for testamentary trusts, since the Will is written in first person, so is the trust. For living trusts, traditionally third person was used, but in recent times first person is often used in an attempt to make the trust more readable and, hopefully, easier understood. Whichever one is chosen, it is important to make sure the entire trust document is in the same perspective. It is very frustrating (and unprofessional) to have some clauses in first person and others in third person.

V. And, In Conclusion

These materials are intended to provide an overview of the unique provisions that need to be included or considered when designing a special needs trust. Many of the details of the topics mentioned in these materials are merely summarized and are current as of the date these materials are prepared. The reader is cautioned to carefully review the exact details of any design strategy chosen, confirm the unique rules governing trusts and Medicaid eligibility for the state where the beneficiary resides, and update all research before drafting a special needs trust.

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How to Make a Trust a "Special Needs Trust"

Stetson University College of Law
2015 Basics of Special Needs Trusts

Presented by

[illegible]

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First - A Primer on Trusts and Needs-Based Public Assistance

A. What is a "Trust" and How to Establish

B. How to Categorize Trusts

1. Self-Settled vs. Third Party-Settled
2. Trust Distribution Standards

C. What is Needs-Based Public Assistance

D. Requirements of Self-Settled and Third Party-Settled Special Needs Trusts

Trusts – The Basics

- What is a Trust?
  - Legal arrangement under which one person (Trustee) controls property given by another (Settlor) for benefit of a third (Beneficiary).
  - Separates legal ownership (Trustee) from beneficial ownership (Beneficiary)

Trusts – The Basics

Five Components to Every Trust

1. Settlor (Grantor/Trustor)
2. Trustee

3. Beneficiary
4. Written Instrument

5. Principal / Corpus

4

How Can a Trust Be Established?

Only Two Ways

1. Via a Will – Testamentary Trust
2. Via a Separate Document – Living Trust
   A. Revocable
   B. Irrevocable

5

How Can a Trust Be Established? (said another way)

Only Two Times

1. At Settlor's Death – Testamentary Trust
2. During Settlor's Life – Living Trust
   A. Revocable
   B. Irrevocable

6

Two Types of Trusts

Every Trust is Either:

1. Self-Settled, or
2. Third Party-Settled

7

Self-Settled v. Third-Party Settled Trusts

Whose Assets Are Going Into the Trust?

1. The beneficiary's assets
   → Self-Settled Trust
2. Someone else's assets
   → Third Party-Settled Trust

8

Self-Settled Trusts

Settlor and Beneficiary are the Same Person

- Beneficiary's assets are in the trust, or
- Beneficiary's spouse's assets are in the trust
  - Unless established by the spouse's Will
- Includes trusts established by the beneficiary's guardian

9

Third Party-Settled Trusts

Who Established the Trust ?

- NOT the beneficiary, or spouse
- Does NOT hold assets belonging the beneficiary or spouse
- Beneficiary and Settlor are NOT the same person

10

Trust Distribution Standards

Four Distribution Standards

1. Support
2. Discretionary Support
3. Pure Discretionary
4. Special Needs
   - Strict, or
   - Discretionary

11

Trust Distribution Standards

Special Needs Standard

- Discretion to Trustee to distribute for "special needs" of the beneficiary
- "Special needs" are anything not paid for by public benefits
- Sometimes called "supplemental care" trust

12

Trust Distribution Standards

Special Needs Standard

- Strict – Prohibited from distributing for any food, shelter or anything provided from public benefits
- Discretionary – Trustee has discretion to distribute for food, shelter or items provided by Medicaid if the trustee deems it in the beneficiary's best interest, even if reduces benefits.

13

How Trusts Impact Public Benefits

General Rule – Trust assets are deemed to be 'available resources' to the trust beneficiary and, therefore, 'countable' towards the maximum available resources the beneficiary can have and be eligible for needs-based public assistance.

But there are exceptions...

14

How Trusts Impact Public Benefits

If Trust Has a Special Needs Standard

- Trust assets NOT deemed available resource
- Trust does NOT disqualify the beneficiary from needs-based public assistance

This is the reason to use a Special Needs Trust

15

Needs-Based Public Benefits

A "needs-based" public assistance program bases eligibility on financial need, such as:

- Low income, and/or
- Low assets (resources)

Only needs-based public benefit programs are adversely affected by trusts

16

Needs-Based Public Benefits

Needs-based public benefits are:

1. SSI (Supplemental Security Income)
2. Medicaid
3. Section 8 housing vouchers
4. Food stamps
5. Some VA benefits

17

Needs-Based Public Benefits

Non Needs-based public benefits are:

1. Social Security
   - Retirement, Disability, Survivors
2. Medicare
3. Some VA benefits

18

Requirements of Self-Settled Trusts

Effect on Medicaid & SSI Eligibility

- Trust assets are available resource, unless comply with OBRA-93 (42 USC §1396p(d)(4)(A) & (d)(4)(C)) and FCIA-99:
  - d4A - (Medicaid Payback) Trust, or
  - d4C - Pooled Trust

19

Requirements of OBRA-93 Trust

1. Beneficiary sufficiently disabled
   - Must satisfy SSI definition of disability;
2. Beneficiary under age 65
   - d4A - When trust established and funded
   - Pooled (d4C)– Possibly when funded
3. Only one beneficiary – "sole benefit"

20

Requirements of OBRA-93 Trust

4. Established by the beneficiary's
   a. Parent,
   b. Grandparent,
   c. Guardian, or
   d. a Court
5. Pooled Trust (d4C) – adds beneficiary

21

Requirements of OBRA-93 Trust

6. Assets remaining when beneficiary dies will first repay Medicaid
   - Also required if trust terminates while beneficiary living
7. Pooled Trust allows non-profit trustee to keep remaining assets for use of others

22

Benefits of OBRA-93 Trust

1. Transfer of beneficiary's assets to trust does not disqualify beneficiary from Medicaid or SSI
2. Assets in trust are not deemed 'available resources' to beneficiary
3. Trust assets can be used to pay for beneficiary's special needs

23

Third Party-Settled Trusts

Effect on Medicaid & SSI Eligibility

- Does NOT have to comply with OBRA-93 or FCIA-99
- Will NOT disqualify from Medicaid or SSI IF correct distribution standard used
  1. Special Needs Distribution Standard, will always work
  2. Pure Discretion Standard, will work in some states

24

Making a Third-Party Trust a Special Needs Trust

- Start with a normal third party-settled trust document
  - Add some required clauses
  - Consider adding optional clauses
  - Remove or modify some standard clauses

25

Making a Third-Party Trust a Special Needs Trust

- Required Clauses
  1. Settlor's Intent
  2. Description of Type of Trust
  3. Special Needs Distribution Standard
  4. Broad Trustee Discretion
  5. Broad Investment Powers
  6. Limit Trustee's Powers
  7. Limit Beneficiary's Powers

26

Making a Third-Party Trust a Special Needs Trust

- Intent of the Settlor is Critical
  - Clearly state the Settlor intends for the trust to not disqualify the beneficiary from qualifying for public benefits
  - Courts will review the "four corners" of the trust document and go to great lengths to interpret trust provisions in a manner consistent with Settlor's intent

27

Making a Third-Party Trust a Special Needs Trust

Intent of the Settlor is Critical

"The purpose and intent of this Trust is to create a fund to be used at the Trustee's sole and absolute discretion for the supplemental care of the beneficiary and not to displace financial or other assistance, such as Medicaid and SSI, that may otherwise be available to the beneficiary."

28

Making a Third-Party Trust a Special Needs Trust

Description of Type of Trust

- Describe the type of trust being established and cite applicable statutes and authority.

29

Making a Third-Party Trust a Special Needs Trust

Description of Type of Trust

"This Trust is a third party-settled supplemental care (special needs) trust. As such, it does not hold any assets that were formerly owned by the beneficiary. On the contrary, the Trustee will only be holding assets that formerly belonged to me or people other than the beneficiary. Since this Trust does not hold any assets formerly belonging to the beneficiary, it will not repay Medicaid upon the beneficiary's death. This Trust does not comply with the provisions of 42 U.S.C. §1396p(d)(4)(A)."

30

If a Self-Settled Special Needs Trust

Description of Type of Trust

"1. This Trust is a self-settled special needs trust that is established pursuant to 42 U.S.C. §1396p, as amended on August 10, 1993 by the Omnibus Budget Reconciliation Act of 1993, Pub.L.No. 103-66, for the benefit of the beneficiary, who is less than sixty-five (65) years of age and is a disabled person as defined in §1614(a)(3) of the Social Security Act (42 U.S.C. §1382c(a)(3)), hereinafter referred to as "beneficiary".

31

If a Self-Settled Special Needs Trust

Description of Type of Trust, continued

2. It is intended that the beneficiary be eligible to qualify for Supplemental Security Income (SSI) and this Trust be an irrevocable trust pursuant to §SI-01120.200.D.2 and a Medicaid Trust as described in §SI-01120.200H of the Social Security Administration's Program Operations Manual System (POMS).

32

If a Self-Settled Special Needs Trust

Description of Type of Trust, continued

3. This Trust and all transfers to it are intended to qualify under Section 1613 of the Social Security Act (42 U.S.C. §1382b(e)(5)) as amended on December 14, 1999, by Section 205 and 206 of the Foster Care Independence Act of 1999, Public Law 106-169, 13 Stat. 1822, et seq., H.R. 3443.

33

If a Self-Settled Special Needs Trust

Description of Type of Trust, continued

4. This Trust and all transfers to it are intended to qualify as a trust authorized by 42 U.S.C. §1396p(d)(4)(A) for the benefit of a disabled person under the age of sixty-five (65) years old, and as such the trust estate shall not be deemed to be an available resource for Medicaid qualification purposes."

34

Making a Third-Party Trust a Special Needs Trust

3 Special Needs Distribution Standard

- Always use special needs distribution standard
- If state allows, use discretionary SNT standard rather than strict

35

Making a Third-Party Trust a Special Needs Trust

Special Needs Distribution Standard

"Trustee shall pay to or apply for the benefit of the beneficiary such amounts from the principal or income as the Trustee, in it's sole and absolute discretion, may from time to time deem necessary or advisable for the satisfaction of the beneficiary's special needs."

36

Making a Third-Party Trust a Special Needs Trust

Discretionary Special Needs Standard

"It is preferred that the Trustee not make distributions from this Trust that cause a reduction or loss of any public assistance the beneficiary is receiving or entitled to receive. However, if the Trustee, in its sole discretion, determines that any distribution from this Trust, including, but not limited to, in-kind support and maintenance, will benefit the beneficiary and is in the beneficiary's best interest, then the Trustee may make such distribution even if doing so will cause a reduction or loss of public assistance benefits the beneficiary would otherwise receive or be entitled to receive."

37

Making a Third-Party Trust a Special Needs Trust

Give Trustee Broad Discretion

- Use words like "sole and absolute" and "unfettered"
- Trustee's exercise of discretion is not subject to challenge by others

38

Making a Third-Party Trust a Special Needs Trust

Give Trustee Broad Discretion

"The Trustee is hereby granted authority to make or not make any distribution from the trust estate to or for the benefit of the beneficiary that the Trustee, in its sole, absolute and unfettered discretion, determines is appropriate, even to the point of distributing all or none of the trust estate, and any such decision shall not be subject to challenge by any person." (or, if preferred, add "other than the Trust Advisor" at the end)

39

Making a Third-Party Trust a Special Needs Trust

Broad Trustee Investment Powers

- Invest in anything Trustee deems, in Trustee's sole and absolute discretion, to be in the beneficiary's best interest, or something the beneficiary wants, could use or would be helpful

40

Making a Third-Party Trust a Special Needs Trust

Broad Trustee Investment Powers

- Authority to invest in non-income producing assets, such as:
  - Housing
  - Automobile
  - Personal use items

41

Making a Third-Party Trust a SNT

Broad Trustee Investment Powers

"Non-Income Producing Assets: The Trustee may buy, sell and invest in non-income producing assets, tangible personal property, and housing owned solely by the Trust, or solely by or jointly with another person, including, but not limited to, a beneficiary of the Trust. The Trustee, in the Trustee's sole and absolute discretion, may allow any beneficiary, and appropriate companions of a beneficiary, to live in any such housing on a rent-free basis, or the Trustee may charge rent of any amount, and without liability, deem such rent to be reasonable. The Trustee is authorized, but not required, to pay all costs of such housing, including, but not limited to, all taxes, assessments, maintenance, repairs and operational costs, such as domestic and/or custodial assistance.

42

Making a Third-Party Trust a SNT

Broad Trustee Investment Powers, cont.

If the Trustee purchases a house or residence or other real property, the Trust Advisor, if one is then serving; otherwise the beneficiary's Personal Agent, may waive any requirement for regular appraisals or inspection of the property by the Trustee, or other administrative or supervisory requirements, that may otherwise be required by regulations, policies and procedures or supervisory organizations to the Trustee. If the Trustee purchases other non-income producing property, the Trustee, with the consent of the Trust Advisor, if one is then serving, may designate the Trust Advisor or other person to be the title holder of such property on behalf of the Trust or to hold possession of such property on behalf of the Trust."

43

Making a Third-Party Trust a Special Needs Trust

- Limit Trustee's Powers
  - Such as power to terminate trust if corpus gets too small

44

Making a Third-Party Trust a Special Needs Trust

- Limit Beneficiary's Powers
  - To remove trustee
    - If allow, use "good cause" standard
  - To replace trustee
    - Especially with related or subordinate person
  - To demand distribution from trust
    - Even for necessaries
    - Use broad spendthrift clause

45

Making a Third-Party Trust a Special Needs Trust

Clauses to Consider

1. Power to Amend Trust
2. Oversight of Trustee
   - A. Guardian or Conservator
   - B. Trust Protector or Trust Advisor
   - C. Personal Agent
3. Early Termination of the Trust
4. IRA Paying to the Trust

46

Making a Third-Party Trust a Special Needs Trust

Power to Amend the Trust

- Allows trust to be amended without court involvement
- Can be held by –
  - Trustee, Trust Protector, Trust advisor, Personal Agent
- Can be narrow or broad

47

Making a Third-Party Trust a Special Needs Trust

Oversight of Trustee

- Someone should have this power
  - But not the beneficiary
- Options –
  - Guardian/Conservator
  - Trust Protector or Trust Advisor
  - Personal Agent

48

Making a Third-Party Trust a Special Needs Trust

Oversight of Trustee

- Trust Protector or Trust Advisor
  - Can be person or committee
  - Can be chosen by name or relationship
  - Powers can be limited or broad
  - Clarify when acting as a fiduciary

49

Making a Third-Party Trust a Special Needs Trust

Oversight of Trustee

- Personal Agent
  - Person filling certain role, such as:
    - Guardian, conservator, attorney-in-fact, spouse, sibling, court
  - Listed in order of priority
  - Act only if prior people unable or unwilling
  - Can have same powers as Trust Protector

50

Making a Third-Party Trust a Special Needs Trust

Early Termination of the Trust

- Use carefully
- Can be held by
  - Trustee, Trust protector, Personal Agent, Trust Advisor
  - NOT beneficiary

51

Making a Third-Party Trust a Special Needs Trust

Early Termination of the Trust

- Reasons
  - Trust too small
  - Laws changed
  - Moved to different state
  - Beneficiary no longer disabled
  - Trust deemed available resource
  - Poison pill

52

Making a Third-Party Trust a Special Needs Trust

Early Termination of the Trust

- Who can receive remaining corpus
  - Beneficiary
    - But will disqualify from needs-based benefits
  - Remainder beneficiaries
    - But only if third party-settled trust

53

Making a Third-Party Trust a Special Needs Trust

Early Termination of the Trust

- If Self-Settled Trust, POMS requires -
  - State must first receive trust assets up to Medicaid amount
  - Remainder must go to beneficiary
  - Beneficiary cannot hold termination power

54

Making a Third-Party Trust a Special Needs Trust

IRA Paying to a Special Needs Trust

- General Rule: IRA taxed (unless Roth)
  - Minimum payout over 5 years (if IRA owner under RBD) or remaining life expectancy of IRA owner (if IRA owner older than RBD)
- But can "stretch" IRA payout for lifetime of beneficiary if trust is "see through" and there are only "Designated Beneficiaries"
- SNT should not be 'conduit trust'
- SNT must be 'accumulation trust'

55

Making a Third-Party Trust a Special Needs Trust

IRA Paying to a Special Needs Trust

- Can direct IRA to Retirement Sub-Trust
- Successor beneficiaries of RST must be
  - People (not charities), and preferably
  - Younger than the primary beneficiary (must use life expectancy of oldest to calculate the IRA payout "stretch")
- Non-IRA trust assets can distribute to charities or people older than beneficiary

56

How To Establish A Third-Party Settled Special Needs Trust

Will (Testamentary) vs. Living Trust

- Either option works
- Questions to ask:
  - Does Settlor want to use probate process to establish?
  - Is SNT for Settlor's spouse?
  - Do others want to contribute now?

57

How To Establish A Third-Party Settled Special Needs Trust

- Living Trust

  Standalone vs. Section in Primary Trust

  - Advantages of Standalone SNT
    - May be easier to get agency approval
    - Others can contribute now
    - Easier to set aside additional assets for the beneficiary

58

How To Establish A Third-Party Settled Special Needs Trust

Living Trust

Disadvantages of Standalone SNT

- Probably higher attorney fees
- May seem more complicated

- Advantages of SNT in Primary Trust
  - May be less expensive to draft
  - May be more appropriate if beneficiary is contingent or probably won't survive Settlor

59

How To Establish A Third-Party Settled Special Needs Trust

- Standalone Trust
  - Revocable vs. Irrevocable
  - Advantages of Revocable
    - Settlor can change provisions
    - Grantor Trust for tax purposes
      - No gift tax when Settlor funds
      - Income taxed on Settlor's return
      - Basis step up when Settlor dies

60

How To Establish A Third-Party Settled Special Needs Trust

Standalone Trust

- Disadvantages of Revocable
  - Included in Settlor's estate upon death
  - Available to Settlor's creditors
  - May not want income taxed to Settlor
  - Distributions are gifts from Settlor
  - Contributions from others are gifts to Settlor

61

How To Establish A Third-Party Settled Special Needs Trust

Standalone Trust

- Advantages of Irrevocable
  - Trust assets not -
    - In Settlor's estate upon Settlor's death
    - Subject to Settlor's creditors
  - Trust income not taxed to Settlor
  - Gifts from others are not gifts to Settlor
  - Distributions not gifts from Settlor

62

How To Establish A Third-Party Settled Special Needs Trust

Standalone Trust

- Disadvantages of Irrevocable
  - Income taxed to trust, not Settlor
    - Requires separate tax return
    - May be more income taxes paid
  - Settlor cannot amend, but others can
  - Lifetime transfers to trust are taxable gifts
    - Unless Crummey withdrawal powers
    - Special needs beneficiary can't hold withdrawal power

63

How To Establish A Third-Party Settled Special Needs Trust

Use First Person or Third Person language?

First person: "I am the Settor of this Trust and I hereby transfer my assets listed on Schedule A, attached to this Trust Document, to the Trustee to hold and use for the benefit of the beneficiary, as described below. I reserve the right to amend or revoke this Trust at any time during my lifetime."

64

How To Establish A Third-Party Settled Special Needs Trust

Use First Person or Third Person language?

Third person: "Settlor hereby transfers the assets listed on Schedule A, attached to this Trust Document, to the Trustee to hold and use for the benefit of the beneficiary, as described below. Settlor reserves the right to amend or revoke this Trust at any time during Settlor's lifetime."

65

How To Establish A Third-Party Settled Special Needs Trust

Use First Person or Third Person language?

- Either perspective works
- But be sure to be consistent throughout the document
  - Don't use first person in some clauses and third person in others

66

How to Make a Trust a "Special Needs Trust"

Stetson University College of Law
2015 Basics of Special Needs Trusts

Presented by

Basics of Special Needs Trusts

Thursday, October 15, 2015

The Planner's Evolving Tool Box:

10:20 A.M - 11:20 A.M.
Part One: SNT, ABLE, ACA, MAGI, Public Benefits
&
11:20 A.M. – 12:10 P.M.
Part Two: Case Studies: What Tool To Solve Which Problem

Presenters:

Mary Alice Jackson
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Lutherville, MD

- Materials
- ABLE Act of 2014
- Dept. of Treasury IRS Guidance Under Section 529A Qualified ABLE Program
- PowerPoints

Stetson University College of Law presents:
2015 SPECIAL NEEDS TRUSTS
THE NATIONAL CONFERENCE
October 14-16, 2015
The Vinoy Renaissance Resort & Golf Club
St. Petersburg, Florida

Center for Excellence in Elder Law

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The National Conference on Special Needs Trusts
Stetson University College of Law
October 14-16, 2015
The Vinoy Hotel
St. Petersburg, Florida

THE PLANNER'S EVOLVING TOOL BOX: PART ONE

*"A SPECIAL NEEDS TRUST GLOSSARY"**

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***It's not perfect: add your own terms, create more understandable definitions, look for additional cites…whatever your heart desires.**

GLOSSARY OF PUBLIC BENEFIT TERMS AND RESOURCES[1]

ABLE- The Achieving a Better Life Experience Act (ABLE Act), signed into law on 12/19/14, is federal legislation that allows individuals with disabilities to open tax-free savings accounts to cover qualified expenses such as education, housing, and transportation. 26 U.S.C. § 529A.

ADLs- Activities of Daily Living (ADLs) includes tasks such as eating, toileting, grooming, dressing, bathing, transferring, and continence. 42 U.S.C. § 1396n(k)(6).

CDB- Childhood Disability Benefits (CDBs) are payable to some adults who are children of workers covered by Social Security. To be eligible, the adult child must be unmarried, age 18 or older, and has had a disability before the age of 22. POMS DI 10115.001; 20 C.F.R. § 404.350(b).children with disabilities when recipients will be rolled over to CDB, based on the parent's

CDB benefits are not means-tested.

COBRA- The Consolidated Omnibus Budget Reconciliation Act of 1985 allows eligible workers, their spouses, and their dependents to maintain previously existing health coverage for a period of time following certain "triggering events" provided they continue to pay the premiums. COBRA provides for 18 months of additional coverage; most states have adopted regulations allowing coverage to extend to 29 months.

CHIP- The Children's Health Insurance Program (CHIP) is an insurance program jointly funded by the state and federal government and administered by the states that provides health coverage to low-income children and, in some states, to pregnant women in families who earn too much income to qualify for Medicaid but cannot afford to purchase private health insurance coverage. 42 U.S.C. Ch. 7, Subchapter XXI. For more information visit Medicaid.gov.

MEDICARE PART D DONUT HOLE- Under Medicare Part D, the coverage gap (a.k.a. the "donut hole") is a period where an individual pays higher cost sharing for prescription drugs. In 2015, the coverage gap begins after an individual spends $2,960 on covered drugs, and once in the coverage gap, individuals will pay 45% of the costs for covered brand-name prescription

[1] With thanks and appreciation to my law clerk, Kristina Ferguson, for her outstanding work on this presentation.

drugs. 42 U.S.C. § 1395w-114. Under the Affordable Care Act, the donut hole is expected to be eliminated by 2020. For more information visit Medicare.gov.

CMS- Centers for Medicare and Medicaid (CMS) is the federal agency part of the Department of Health and Human Services (HHS) that administers Medicare, Medicaid, CHIP, and parts of the Affordable Care Act (ACA). CMS was formally known as Health Care Financing Administration (HCFA). . For more information visit CMS.gov.the Health Care Financing Administr

CSRA- Community Spouse Resource Allowance (CSRA) was created under the Medicare Catastrophic Coverage Act (MCCA), which was passed by Congress in 1988 to prevent spousal impoverishment for the Community Spouse (the spouse still living in the community and not in a long term care facility). Under CSRA rules, a certain amount of the couple's combined resources is protected for the community spouse. In 2015, the maximum resource standard for the community spouse is $119,220. 42 U.S.C. § 1396r-5. For more information visit Medicaid.gov.

CUSTODIAL CARE- Custodial care includes non-skilled personal care, like help with activities of daily living (ADLs) bathing, dressing, eating, getting in or out of a bed or chair, moving around, and using the bathroom. Medicare does not pay for custodial care, except within the scope of services for hospice care. POMS HI 00620.130. Medicaid covers long term care services, including custodial care in nursing homes and at home. 42 U.S.C. § 1396d(7)-(8).

(d)(4)(A) SNT - A self-settled, first party "(d)(4)(A)" SNT is a trust that meets the statutory requirements as proscribed under 42 U.S.C. § 1396p(d)(4)(A). The trust must be for the sole benefit of the beneficiary, and subject to a state Medicaid pay-back provision. Upon the beneficiary's death or the termination of the trust, if funds remain, an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State Medicaid plan must be reimbursed to the State. When the SNT is established and funded, the beneficiary must be under 65 and the trust may only be established by a parent, grandparent, guardian, or court. The trust is treated as an exempt asset for Medicaid eligibility purposes, and a transfer to the trust, by a Medicaid applicant, is an exempt transfer. 42 U.S.C. § 1396p(c)(3)(A).

(d)(4)(C) POOLED SNT- A pooled SNT established under 42 U.S.C. § 1396p(d)(4)(C) is managed and created by a non-profit association, that maintains separate accounts for multiple beneficiaries. All beneficiaries' funds are pooled for investment purposes and the pooled trust serves as Trustee, managing distributions in accordance with federal and state laws and regulations. The beneficiary must have a disability as defined in 42 U.S.C. § 1382c(a)(3). The accounts in the trust are established solely for the benefit of the individual, and can be established by the parent, grandparent, legal guardian, court, or by the individual herself. Upon the beneficiary's death, of the remaining account, an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan will be paid to the State.

Note regarding Medicaid Payback trusts (d)(4)(A) and (d)(4)(C): Federal estate recovery programs provide that estate recovery applies only when payment of Medicaid assistance was made for the benefit of recipients who are 55 and older and only for assistance covering nursing homes, HCBS, related hospital and prescription drug services or Medicare cost sharing. However, the creation and funding of a payback Special Needs Trust creates a right of reimbursement for all Medicaid benefits received during the beneficiary's lifetime. "Medicaid payback may also not be limited to any particular period of time, i.e. payback cannot be limited to the period after establishment of the trust." 42 U.S.C. § 1396p(b).

DEEMING- is the process of considering another person's income and resources to be available to an individual applying for or receiving government benefits, if that person is responsible for the applicant's or recipient's income. 20 C.F.R. §§ 416.1160, 416.1202. POMS SI 01310.001. SSI Handbook 2167.

DISABILITY- Having a disability determination approved by the Social Security Administration (or another authorized agency in very limited circumstances) is a pre-requisite for a SNT. A disability for Social Security purposes is defined as the inability to engage in substantial gainful activity (SGA) by reason of any medically determinable physical or mental impairment that can be expected to result in death or to last for a continuous period of no less

than 12 months. There are special rules that apply for workers over the age of 44 whose disability is based on blindness. 42 U.S.C. § 423(d)(1).

DME- Durable Medical Equipment (DME) are equipment and supplies ordered by a health care provider that can withstand repeated use and are primarily and customarily used to serve a medical purpose. Coverage for DME may include oxygen equipment, wheelchairs, crutches, or blood testing strips for diabetics. POMS HI 00610.200. For more information visit Healthcare.gov.

ESTATE RECOVERY- Under the congressional mandate that every state adopt a program to recover Medicaid expenditures from the estates of first party Medicaid recipients, states can attach liens to personal or certain real property to seek recovery for Medicaid expenses. 42 U.S.C. § 1396p(b)(1).

The Federal Poverty Level (FPL) is an income level used to determine eligibility for certain programs and benefits. The FPL is determined annually by HHS and defines the amount of annual income which constitutes "poverty" in the United States. For 2016, the FPL is not going to reflect a cost-of-living adjustment and will remain the same as the 2015 figures. The FPL for individuals is $11,770, and $24,250 for a family of 4. For more information visit Healthcare.gov. or SSA.gov.

HCBS- The Home and Community-Based Services (HCBS) program is a Medicaid state waiver program that provides services to functionally disabled elderly individuals. Services may include, but are not limited to, home health aide services, personal care services, nursing care services, respite care, and adult day care. 42 U.S.C. § 1396t. Although HCBS waivers are optional, nearly all states (with the exception of Arizona) offer at least one HCBS waiver program. To determine whether a proposed change in service or service provision would be beneficial, some waivers are established for a limited period of time. For more information visit CMS.gov.

HHS- The Department of Health and Human Services (HHS) is the federal agency that administers over 100 programs, including Medicare, Medicaid, and TANF, and promulgates regulations under congressional authority. For more information visit HHS.gov.

HOMESTEAD- Under SSI/Medicaid resource rules, an individual's home is an excluded resource for purposes of determining SSI/Medicaid resource eligibility. The home is defined as property in which the individual has an ownership interest and that serves as his or her principal place of residence. It can include the shelter in which he or she lives; the land on which the shelter is located; and related buildings on such land. An individual's principal place of residence is the dwelling the individual considers his or her established or principal home and to which, if absent, *he or she intends to return*. It can be real or personal property, fixed or mobile, and located on land or water. POMS SI 01130.100.

IADLs- Instrumental Activities of Daily Living (IADLs) include, but are not limited to, meal planning and preparation, managing finances, shopping for food, clothing, and other essential items, performing essential household chores, communicating by phone or other media, and traveling around and participating in the community. 42 U.S.C. § 1396n(k)(6).

ICF/ID- Intermediate Care Facilities for Individuals with an Intellectual Disability (ICF/ID) is an optional state Medicaid benefit, offered by all states, to individuals in need of and receiving, active treatment services. ICF/IDs provide comprehensive and individualized health care and rehabilitation services to individuals to promote their functional status and independence. 42 C.F.R. § 440.150.

ISM- In Kind Support and Maintenance (ISM) is unearned income in the form of food or shelter or both. SSI eligibility and payment amounts are determined by whether a recipient is receiving ISM and the value of the ISM. The SSA uses two rules for determining the value of ISM—the one-third reduction rule and the presumed value rule. POMS SI 00835.001.

LTCSSS- Long Term Care Supports and Supports and Services (LTCSS) are medical and non-medical services (such as assistance with ADLs) that can be provided in an institutional, home or

community settings to individuals who have a chronic illness or disability. For more information visit longtermcare.gov.

MAGI- Modified Adjusted Gross Income (MAGI) is gross income adjusted for deductions and then modified by adding some deductions including tax-exempt social security, interest or foreign income back in. MAGI is used to calculate cost assistance for individuals enrolled in the health care marketplace under the ACA. POMS HI 001101.010. For more information visit IRS.gov. and HealthCare.gov.

MEDICAID EXPANSION- The ACA provides states with the ability to expand their state Medicaid programs to cover adults under 65 with income up to 138% of the FPL. Originally, Medicaid expansion was mandated under the ACA, but in *NFIB v. Sebelius*, 132 S.Ct. 2566 (2012), the Supreme Court held that expansion is optional for the states. States who expand Medicaid by using this income-only criteria have all budget increases attributed to expansion paid 100% by the federal government from 2014-2016, instead of the usual cost-sharing provision in 42 U.S.C. § 1396a. Federal cost-sharing is expected to be reduced to a minimum of 90% by 2020 under the ACA. Currently Medicaid expansion has been adopted by 30 and the District of Columbia. Nineteen states have chosen not to expand Medicaid at this time, and expansion is currently in discussion in one state. 42 U.S.C. § 1396a(a)(10)(A)(i). For more information visit Healthcare.gov.

MEDICAID MCOs- Medicaid Managed Care Organizations (MCOs) are entities contracted by the States that agree to provide comprehensive services to Medicaid beneficiaries. Approximately 80% of Medicaid enrollees are served through a managed care delivery system. MCOs serve beneficiaries on a risk basis through a network of employed or affiliated providers. The term MCO generally includes HMOs, PPOs, and Point of Service plans. For more information visit Medicaid.gov.

MEDICAID- A joint federal and state program that provides health coverage for people with low incomes and limited resources. Though federal law requires states to cover certain mandatory populations and provide mandatory benefits, states have flexibility in providing

coverage to other populations and can choose to provide optional benefits. Medicaid is the only federal public benefits program which covers the costs of long term non-acute care (custodial care). 42 U.S.C. Ch. 7, Subchapter XIX. For more information visit Medicaid.gov.

MEDICARE WAITING PERIOD FOR SSDI AND CDB RECIPIENTS- SSDI entitlement begins after a 5-month waiting period following the onset of a disability. CDB eligibility begins immediately after the application is approved. Both SSDI and CDB recipients will receive Medicare benefits, but not until 24 months after they have been receiving their respective benefits. No waiting period is required for individuals who have End Stage Renal Disease or ALS (Lou Gehrig's disease), or those who were previously entitled to a period of disability and became disabled again within five years following the month the previous disability ended. SS Handbook 502.

MEDICAID WAIVERS- States may use federally approved waivers to test new or existing ways to deliver and pay for health care services in Medicaid and CHIP. The term "waiver" refers to a deviation in the existing state Medicaid plan. There are four primary types of waivers and demonstration projects: § 1115 Research & Demonstration Projects; § 1915(b) Managed Care Waivers; § 1915(c) HCBS Waivers; and Concurrent § 1915(b) and 1915(c) Waivers. For more information visit Medicaid.gov.

MEDICALLY NECESSARY- Under Medicare, medically necessary is defined as health care services or supplies that are needed to diagnose or treat an illness, injury, condition, disease, or its symptoms and that meet accepted standards of medicine. 42 U.S.C. § 1395y(a)(1)(A). For more information visit Medicare.gov.

MEDICARE- An exclusively federal program (unlike Medicaid) that provides health care insurance to individuals ages 65 and older, people with disabilities, people with ALS and those with End Stage Renal Disease. 42 U.S.C. Ch. 7, Subchapter XVIII. Medicare is not free and not all individuals are eligible. Individuals who did not pay Medicare taxes while working canpurchase Medicare benefits. Medicare does not pay for long term care, but

does cover brehabilitative stays in a nursing home or rehabilitation center. For more information visit Medicare.gov.

MEDICARE ADVANTAGE PROGRAM- Created under the Balanced Budget Act of 1997, the Medicare Advantage Program (a.k.a. Medicare Part C) is a type of Medicare health plan offered by private companies that contracted with Medicare to provide Part A and B benefits. The program provides an alternative means of financing or receiving Medicare coverage, and includes HMOs, PPOs, Private Fee-for-Service Plans, Special Needs Plans, and Medicare Medical Savings Account Plans. Advantage programs may provide more benefits than traditional parts A and B but are often less advantageous for the disability and aged communities due to strict limits on coverage for LTCSS. 42 U.S.C. Ch. 7, Subchapter XVIII, Part C.

MEDICARE OPEN ENROLLMENT PERIOD- The Medicare Open Enrollment Period is between October 15 and December 7 every year, and is the time period when Medicare recipients can change their Medicare health plans and prescription drug coverage. For more information visit cms.gov.

MEDICARE PART A- Covers hospital care, SNF care, nursing home care, hospice, and home health services. Part A is funded by payroll deduction taxes. 42 U.S.C. Ch. 7, Subchapter XVIII, Part A.

MEDICARE PART B- Part B, which is optional, primarily provides physician services, and covers medically necessary and preventative services such as clinical research, ambulance services, durable medical equipment, inpatient and outpatient mental health, limited outpatient prescription drugs, and getting a second opinion before surgery, among other things. Part B requires a payment of a monthly premium of $104.90 in 2015-16. The premium is typically deducted from the recipient's monthly Social Security check. 42 U.S.C. Ch. 7, Subchapter XVIII, Part B.

MEDICARE PART D- In 2003, the Medicare Prescription Drug, Improvement and

Modernization Act of 2003 added Part D to the Medicare program, which took effect in 2006. Part D coverage is purchased from private insurance companies who meet provider qualifications. The program provides optional source of benefits to the prescription drug coverage offered by companies approved by Medicare to Original Medicare, some Medicare Costs Plans, some Medicare Private Fee-for-Service Plans, and Medicare MSA Plans. 42 U.S.C. Ch. 7, Subchapter XVIII, Part D

MEDICARE MSA- Medical Savings Account (MSA) may be provided by a Medicare Advantage Program. When an individual elects to have a MSA, the individual will choose a high-deductible insurance plan. Any unused amount in the individual's benefit will be deposited into a savings account, which can be used for medical care until the high deductible is met. 42 U.S.C. § 1395w-28. For more information visit Medicare.gov.

MEDICARE SET-ASIDE- A Medicare Set-Aside is a trust arrangement established to hold settlement proceeds for future medical expenses. During litigation, an evaluation is done of the beneficiary's future medical needs, and the evaluation includes an amount that should be set aside for future medical care. The funds are then either placed in the Medicare Set-Aside account in one lump-sum or the account is funded with an annuity. The administrator of the Medicare Set-Aside trust may use the funds only to pay for medical care related to your personal injury, leaving Medicare or your private insurance free to provide coverage for medical expenses that are not related to your injury. Medicare set-aside companies provide services specifically intended to assist with this process. The MSA may be created as a provision of a SNT.

MEDIGAP- Medigap Insurance Policy covers items not covered by Medicare, including substantial deductibles and copayments. These policies are provided by insurance companies, and must include certain core benefits such as a deductible for hospitalization days 61 through 90 and a deductible for the "lifetime reserve" hospitalization days 91 through 150. All Medigap policies must offer one of ten predefined sets of benefits identified as standardized Plans A through N (Plans E, H, I, and K are no longer offered). 42 U.S.C. § 1395w-21.

MEDIGAP OPEN ENROLLMENT PERIOD- A six month period starting the first month that an individual is covered under Part B and is 65 or older. During this period, federal law prohibits insurance companies from denying a Medigap policy or charging higher premiums due to past or present health problems. Some states have additional open enrollment rights. 42 U.S.C. § 1395w-21. For more information visit Medicare.gov.

MMNA- The Minimum Monthly Needs Allowance (MMNA) (sometimes referred to as MMMNA for Minimum Monthly Maintenance Needs Allowance) is an allowance under Medicaid for a community spouse with inadequate income where income may be either from the Medicaid applicant or the couple's resources may be received by the spouse. 42 U.S.C. § 1396r-5(d)(3).

OASDI- Old Age, Survivors and Disability Insurance benefits (OASDI) (a.k.a. Social Security) **is a federal program that covers Social Security retirement benefits for all who qualify, as well as survivor benefits and benefits for individuals with disabilities (SSDI). OASDI is primarily funded through payroll** taxes. 42 U.S.C. Ch. 7, Subchapter II.

POMS-

POMS-The Program Operations Manual System (POMS) is the regulation manual (similar to a state Medicaid manual in some ways) used by Social Security employees to process claims for benefits that are administered by the Social Security Administration. Special Needs Trust practitioners use it to gain information regarding drafting of special needs trusts and to be updated on SSA's interpretation of the law related to SSI/Medicaid. Regular, updated versions are available https://secure.ssa.gov/apps10/poms.nsf/partlist!OpenView.

PPACA- Patient Protection and Affordable Care Act (PPACA) (a.k.a. ACA) is federal legislation enacted in March 2010. This legislation includes significant health-related provisions and reforms. Some key provisions include the elimination of all pre-existing condition exclusions for individuals applying for Medicaid, expanding the Medicaid coverage population

and prohibiting certain practices by the health care industry such as denying of coverage due to pre-existing conditions. Some individuals with disabilities may benefit from the purchase of an ACA insurance policy in lieu of creating a special needs trust. For more information visit healthcare.gov.

QC- Quarter of coverage (QC), now technically called a credit, is a calendar quarter of a year in which a worker received employment (or self-employment) income of a minimum amount, and as to which FICA was paid. 20 C.F.R. § 404.140. POMS RS 00301.200.

QDWI PROGRAM- The Qualified Disabled and Working Individuals Program is a state program that pays Part A premiums for individuals with disabilities who have gone back to work and have lost their SSDI benefits. To be eligible, the individual must be: under 65; have a disability; the State no longer pays for his or her Part A premium because the individual works above the SGA limit; is ineligible for state medical assistance; and meets the income and asset tests in the individual's state. Eligible individuals are permitted to purchase Part A and B, so long as they have a disability. 42 U.S.C. § 1396(d)(s). POMS SI 01715.005.

QI PROGRAM- The Qualified Individual (QI) program is a Medicaid benefit which helps pay Part B Medicare premiums for people who have Part A and have limited income and resources.

QMB- Qualified Medicare Beneficiary (QMB) means a Medicaid eligible individual who is entitled to Medicare Part A, is a resident of the state where applying for QMB benefits, and has limited income and resources. Benefits of QMB include payment of Part A monthly premiums, Part B monthly premiums and the annual deductible and co-insurance and deductible amounts for services covered under Medicare Parts A and B. 42 U.S.C. § 1396d(p)(1). POMS SI 01715.005.

QMB PROGRAM- The Qualified Medicare Beneficiary (QMB) Program is a state program that helps pay Part A and B premiums, and other cost-sharing (like deductibles, coinsurance, and copayments) for people who have Part A and limited income and resources.

RESOURCES- An individual's resources are considered as one of the two "need" criteria in determining SSI eligibility. Not every asset is considered a resource—the SSA and other Federal statutes allow for certain types of exclusions. The resource limit of a Medicaid recipient has remained at $2,000 since 1989. See POMS SI 01110.000 for Resource rules.

SECTION 8 HOUSING- The housing choice voucher program Section 8 of the Housing Act of 1937 (42 U.S.C. § 1437f) provides the U.S. Department of Housing and Urban Development (HUD) to assist low income families, the elderly, and individuals with disabilities to afford housing in the private market. Under the housing choice voucher program—the main Section 8 program which is administered locally by public housing agencies (PHAs)—individuals are able to find their own housing so long as the housing meets requirements of the program. For more information visit HUD.gov.

SGA- Substantial Gainful Activity (SGA) means the performance of significant physical and/or mental activities in work for pay or profit, or in work of a type generally performed for pay or profit, regardless of the legality of the work. However, activities involving self-care, household tasks, hobbies, clubs, and social programs are generally not considered to be SGA. POMS DI 10501.001.

SLMB- Specified Low Income Medicare Beneficiaries (SLMB) are individuals who meet the QMB eligibility standards except for income. However, their income cannot exceed 120 percent of the FPL. POMS SI 01715.005.

SNAP- The Supplemental Nutrition Assistance Program (SNAP) a/k/a "food stamps" offers nutrition assistance to millions of eligible, low-income individuals and families and provides economic benefits to communities. The Food and Nutrition Service works with State agencies, nutrition educators, and neighborhoods to ensure that those eligible for nutrition assistance can make informed decisions about applying for the program and can access benefits. For more information visit fns.usda.gov. POMS SI 01801.000.

SNF- A Skilled Nursing Facility (SNF) is an institution which primarily provides skilled nursing

and related services to residents who require medical, nursing, or rehabilitation care.
42 U.S.C. § 1395i-3. POMS HI 00401.2600.

SNT- Special Needs Trusts are trusts that are created for the benefit of an individual who is or may become disabled and contains terms and conditions recognized under state and federal law that exempt the trust assets from being counted toward the beneficiary's eligibility for public assistance.

SOCIAL SECURITY ACT- The Social Security Act, enacted in 1935, and now codified in 42 U.S.C. Chapter 7, created the Social Security system in the U.S that continues to provide benefits for workers, victims of industrial accidents, unemployment insurance, dependent mothers and children, the blind, and the physically handicapped. Title 42 of the United States Code deals with public health, social welfare, and civil rights.

SPELL OF ILLNESS- Most Medicare benefits are limited in duration, with the most common benefit period being the "spell of illness." Readmission to the same level of care within 60 days of discharge will lead to treatment as continuing "spell of illness." Readmission more than 60 days after discharge (even if for treatment of the same condition) will be treated as a new admission, with new co-payments and time limitations. 42 U.S.C. § 1395x(a).

SSA- Social Security Administration (SSA) is the federal agency that, among other things, determines initial entitlement to and eligibility for Medicare benefits. For more information visit ssa.gov.

SSDI- Social Security Disability Income (SSDI) pays benefits to people who can't work because they have a medical condition that's expected to last at least one year or result in death. To be eligible for SSDI benefits, the recipient must have earned sufficient income during a certain time period, typically 40 quarters (may be less for younger workers who becomedisabled). SSDI recipients receive Medicare benefits, but must wait 24 months from the date of SSDI entitlement to cash income before coverage begins.

SSI- Supplemental Security Income (SSI) is a monthly benefit paid by Social Security to people with limited income and resources who are disabled, blind, or age 65 or older. 42 U.S.C. Ch. 7, Subchapter XVI. For more information visit SSA.gov.

STATE MEDICAID MANUALS- Each state provides a manual for its state Medicaid program. State manuals are used to determining Medicaid eligibility and on-going coverage. CMS provides a State Medicaid Manual (SMM), which is available to all State agencies. The SMM offers mandatory, advisory, and optional Medicaid policies and procedures to Medicaid State agencies.

STATE PLANS FOR AID TO PERMANENTLY AND TOTALLY DISABLED- Under 42 U.S.C. Ch. 7, Subchapter XIV, funds are authorized to states for plans for aid to the permanently and totally disabled. The term "aid to the permanently and totally disabled" means money payment to needy individuals eighteen years old or older who are permanently and totally disabled, but does not include any such payments to or care in behalf of an individual who is an inmate of a public institution or any individual who is a patient in an institution for tuberculosis or mental disease.

TANF- In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) created Temporary Assistance to Needy Families (TANF) as a replacement for Aid to Families with Dependent Children. TANF is a block grant program that provides cash assistance to needy families and is intended to encourage adult members of such families to seek work. 42 U.S.C. Ch. 7, Subchapter IV. For more information visit acf.hhs.gov.

TRICARE- TRICARE is a health care program for active-duty and retired uniformed services members and their families. TRICARE is managed by the U.S. Department of Defense Military Health System, which created the TRICARE Management Activity (TMA). For more information visit Tricare.mil.

The Planner's Evolving Tool Box:
Overview of Benefit Programs

The National Conference on Special Needs Trusts
Stetson University College of Law
October 15, 2015
The Vinoy Hotel, St. Petersburg Florida

Mary Alice Jackson
Mary Alice Jackson, P.C.
804 Rio Grande
Austin, TX 78701

Government Benefits Programs

- Gov't benefit programs can be a great solution to your client's needs
- Benefits include:
  - Income
  - Housing
  - Medical care
  - VA benefits
- Eligibility rules vary by program
  - "Means-tested"
  - "Entitlement based"
- Presentation is not comprehensive
  - Check out Benefits.gov

www.ccdaily.com

Planning for Individuals with Disabilities – Who, What, Where, When and How (& If)?

- Income?
- Housing?
- Food?
- Education?
- Medical care?
- Caregiving?
- Asset Management?

Income possibilities:

OLD AGE, SURVIVOR, AND DISABILITY INCOME (Social Security, circa 1935)

- **SS Retirement Benefits**
  - Earned enough SS credits (QCs); income based on wages
  - At least 62 throughout the first month of entitlement
  - If you have been on SSDI, must transition to SS
- **SS Spouse and Divorced Spouse Benefits**
- **SS Benefits for a Widow with a Disability**
- **SS Benefits for a Surviving Divorced Spouse with a Disability**

SS continued:

- **CDB – Child Disability Benefits**
  - Paid to worker's biological child, adopted child or dependent stepchild.
  - Child must have a parent(s) who is *disabled* or *retired* and entitled to SS benefits, *or* a parent who *died* after having worked long enough in a job where he or she paid SS taxes.
  - Child must be unmarried, or 18 years old or older and with a disability which was diagnosed **before age 22.**
  - Amount of monthly check based on parent's earnings
  - If on SSI, benefits will change if meet these criteria
  - Can adversely affect Medicaid benefits

Supplemental Security Income

Monthly cash assistance to low-income aged, blind, or disabled individuals **for food and shelter**.

Eligibility:

- Must be aged (65), blind **or** disabled
- Monthly payment: $733 (individual)/ $1,100 (couple) in 2015
  - Subject to reduction: assistance with shelter expenses; wages
- Limited assets: 2,000 (individual)/ $3,000 (couple)
- Meet additional requirements

What Are Shelter Costs?

SI 00835.465D(1):

Food

Mortgage including PMI if required by lender

Real property taxes

Rent

Heating fuel

Gas

Electricity

Water

Sewage

Garbage

Social Security Disability Insurance (SSDI)

- Monthly check amount based on average past reported earnings
- Eligibility (*not means-tested*)
  - Over 18 - under 65
  - Earned enough SS credits
  - Disabled per SSA: Unable to engage in substantial gainful activity (SGA) b/c of a disability that has lasted or will last for at least 12 months or end in death.
- Medicare eligible 29 months after date disability approved

Veterans' Pensions

Veteran's Pension:
- Age 65 or older, ***or***
  - Must not be dishonorably discharged; served 90+ days of active duty with 1+ day during a period of war time;
- Permanently and totally disabled, ***or***
- Patient in a nursing home receiving skilled nursing care, ***or***
- Is receiving SS disability benefits and has countable family income that is below the amount set by Congress and net worth is not excessive.

Disabled Military Child Protection Act of 2014
- Veterans may assign pension benefits to a Special Needs Trust for the benefit of an adult disabled child.

Medical coverages

Medicaid

- Federal *means-tested* program; jointly funded by federal and state governments.
  - States opt-in and create a "State Plan" to be approved by CMS (Google your state plan)
  - State laws cannot be more restrictive than federal law.
  - States required to cover mandatory populations and benefits. Optional = waiting lists
- Medical coverage for individuals with low incomes and limited resources.
  - Income limits: None or 300% FPL; or in Medicaid expansion states - 133% FPL
  - Resource limits: $2,000 or in Medicaid expansion states: None

MEDICAID CONTINUED

- Coverage:
  - Acute Medical Needs (doctors, hospitals, medications, etc.)
  - Long Term Care Supports and Services (Home and Community Based Services, ALF, SNF)
  - Eligibility criteria very different
- Medicaid Waiver Programs
  - Waiver of state plan; i.e. not originally included in the State Plan

Medicare

- Federal program that provides health insurance for:
  (a) Individuals 65 or older, *or* (b) receiving SSDI benefits, *or* (c) with ESRD (must enroll) *or* (d) with ALS – (automatically eligible)
- Medicare Part A—hospital care, nursing home benefit, hospice & home health approved services
- Medicare Part B—physician services, therapies, x-rays, etc.
- Medicare Part C—aka Medicare Advantage Program
  - *Private insurance which replaces "traditional" Medicare (A&B)*
- Medicare Part D—Prescription Drugs *(optional)*

Medicare continued:

- SS Medicare Savings Program
  - Limited income and resources that pay some or all of their Medicare premiums, Medicare deductibles, and coinsurance.
  - 4 kinds: QMB Program, SLMB Program, QI Program, & QI Program
- Dual Eligibles: Medicare/Medicaid Coverage
- Medigap
  - Private insurance policies cover items not covered by Medicare, pay for deductibles, co-insurance and copayments.

Children's Health Insurance Program (CHIP)

- CHIP provides health coverage to eligible children, through Medicaid and separate CHIP program
- Jointly funded by states and the federal government.
- Administered by states, according to federal requirements.
  - States choose to provide benchmark coverage or benchmark-equivalent coverage. Must include inpatient and outpatient hospital services; physician's services; surgical and medical services; laboratory and x-ray services, well-baby and well-child care, including immunizations.
- 46 states and DC cover children up to or above 200% of the FPL (24 of these states provide coverage to children in families with income at 250% of the FPL or higher.

Housing and Food options

Housing:

- Housing Choice Voucher Program (Sec. 8)
  - For low income families; subsidy paid directly to landlord
  - Administered by local Public Housing Agencies (PHAs)
- Low Income Home Energy Assistance Program (LIHEAP)
- HUD Public Housing Program
- Homeless Veterans Assistance Center
- Section 811 Supportive Housing for Persons with Disabilities.
  - At least one adult member with a disability

- *DeCambre case

Supplemental Nutrition Assistance Program (SNAP)

- Food for household
- Benefits placed on an EBT card
- Benefit depends on household size, income, and expenses
- Eligibility
  - Households may have $2,250 in countable resources, or $3,250 if one person is age 60 or older, or is disabled.
    - Certain resources are excluded, vehicle ownership varies by state.
  - Must meet income test unless all members are receiving TANF, SSI, or in some place general assistance.
    - Gross monthly income—130% of FPL. 1 Individual $1,276. 4 individual household: $2,628.

Asset Management Tool: SNTs

- **D(4)(A) trusts**
  - Irrevocable, for the sole benefit of the beneficiary
  - Medicaid pay-back provision
  - Beneficiary must be under 65 when SNT is established and funded
  - Created by a parent, grandparent, guardian, or court
  - Beneficiary must have a disability as defined by 42 USC 1382c(a)(3)
  - Exempt asset for Medicaid eligibility purposes.
- **D(4)(C) trusts**
  - Managed and created by a non-profit association. Separate accounts for its beneficiaries
  - Beneficiary must have a disability as defined by 42 USC 1382c(a)(3)
  - Created by parent, grandparent, legal guardian, court, or by the individual.
  - Medicaid pay-back provision.

Special Needs Trust Fairness Act

- Enables individuals with disabilities to create their own individual SNTs.
  - H.R. 670 would amend 42 U.S.C. § 1396p(d)(4)(A) by adding the words "the individual"
- Rejects the false presumption that all individuals with disabilities lack the mental capacity to establish their own SNTs.
- The Senate passed a companion version of the bill S. 349 by unanimous consent 9/9/15.
- Current Status of house------

The Planner's Evolving Toolbox:
Impact of the Affordable Care Act on Special Needs Planning

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October 15, 2015

Introduction

The Patient Protection and Affordable Care Act of 2010 ("Affordable Care Act" or "ACA") includes many reforms of the health insurance industry in the United States. This act is referred to commonly as "health care reform" and "ObamaCare". While there are several provisions that do in fact address improvements in the delivery of health care services, we should be clear that the ACA is a change of how we access health insurance in the United States.

The principal objective of the ACA is to ensure access to health insurance for everyone. As of 2014, almost everyone in the United States was required to have health insurance or pay a penalty. The corollary is that no one may be denied coverage by health insurance companies, regardless of age, pre-existing conditions, or the amount of coverage that may be subsequently needed. The rationale for these reforms is that, if all American citizens are members of the insured pool, the risks for insurance companies will be spread across a larger group of persons so that the cost of private insurance coverage will be less.

Eligibility

To obtain insurance through the marketplace, the individual must live in the U.S., a U.S. citizen or national, not be incarcerated, reside in the area served by the Marketplace, and not have other Minimum Essential Coverage. Minimum Essential Coverage includes employer-provided health insurance, Medicare, Medicaid,

TRICARE, and Veterans health care benefits.

If applying for insurance through the Marketplace, an individual is assessed for both private insurance and all categories of Medicaid. If a Medicaid-eligible individual elects to purchase private insurance, he is not eligible for premium subsidies or cost-sharing. Open enrollment for Marketplace coverage is November 15 through February 15; Medicaid can be obtained any time.

Major Provisions that Impact Special Needs Planning

The provisions of the ACA that have the greatest impact on special needs planning include the following:

1. Expansion of Coverage for those Excluded from Health Insurance Coverage

Effective September 23, 2010, health insurers were prohibited from denying coverage to children with pre-existing conditions whose parents had them on their health insurance. This was expanded in 2014, at which time no one could be denied health insurance because of a pre-existing condition. As a result of the elimination of pre-existing condition exclusions, new health insurance options have opened up for persons with permanent injuries and disabilities.

The ACA also prohibits individual and group health plans from placing lifetime limits on the dollar value of coverage and prohibit insurers from rescinding coverage except in cases of fraud. The ACA requires guaranteed issue and renewability of insurance policies, and allows rating variation based only on age (limited to 3 to 1 ratio), premium rating area (geographical location), size of family, and tobacco use (limited to 1.5. to 1 ratio) in the individual and the small group markets and the Exchange.

Another group receiving coverage under the ACA is adult children over the age of 19. As of September 23, 2010, health insurers were required to extend dependent coverage for children under family policies up to age 26. Parents who had health insurance in-force were able to add a disabled child to their coverage and can enroll any child up to age 26 as a dependent on the parent's health plan, even though the child may not be a dependent or live at home with the parents.

2. Mandate of Health Insurance Coverage for Everyone

As of last year, almost everyone in the United States is required to have health insurance. For those who do not have coverage through Medicare, Medicaid, Veterans Affairs, or employer benefits, health insurance can be obtained through health insurance exchanges. These exchanges will provide a marketplace in which to compare plans and purchase coverage. The four types of available plans are labeled Bronze, Silver, Gold, and Platinum. Health insurance companies participating in the exchanges must offer, at a minimum, one Silver and one Gold plan. Small businesses are able to access health insurance for their employees through the Small Business Health Options Program or 'SHOP' exchange.

Each plan must provide hospitalization, prescription drug coverage, rehabilitation, mental health services, substance abuse treatment, preventative and wellness health coverage, chronic disease management, pediatric coverage (including dental and vision for children), and maternity coverage. These services are known collectively as "essential health benefits." Not included are custodial care at home, companion services, caregiver assistance and transportation. Long-term or custodial nursing home care is excluded from essential health benefits by regulation.

The Bronze plan will pay 60% of the costs, the Silver 70%, the Gold 80%, and the Platinum 90%. The Bronze plan will have an out-of-pocket limit of $5,950 per year for the insured. As stated earlier, the ACA is intended to guarantee availability of coverage; health insurance companies will not be able to exclude anyone from coverage for a pre-existing condition, or set a cap for the amount of coverage regardless of an illness.

There will be a uniform enrollment form for health coverage through the exchanges, which can be submitted on-line or in person. The exchanges will be a clearinghouse to determine eligibility for Medicaid, CHIP (Children's Health Insurance Programs) or premium credits using this uniform enrollment form. Moreover, the exchanges can screen for families that may be exempt from tax penalties.

All individuals in the United States who refuse to obtain health insurance coverage will pay a "shared responsibility payment." On June 28, 2012, the United States Supreme Court held that this tax was constitutional. In 2015, the shared

responsibility payment is the greater of $325 or 2% of taxable income, and in 2016 the payment will be $695 or 2.5% up to a maximum of $2,085. The penalty cannot be greater than the national average premium for Bronze level coverage in an Exchange. After 2016, a cost-of-living adjustment will apply to penalty amounts. When an individual's income is low enough, the individual is exempt from having a penalty imposed.

For those who obtain health insurance, there is a sliding scale of premium assistance and tax credits to make it affordable. “Affordable" is defined as meaning that the premiums shall not exceed 8% of the family's annual income. The Act provides for refundable and advanceable premium credits to eligible individuals and families with incomes between 100-400% FPL (federal poverty level) to purchase insurance through the Exchanges. The premium credits will be tied to the second lowest cost Silver plan in the area and will be set on a sliding scale such that the premium contributions are limited to the following percentages of income for specified income levels:

100-133% FPL: 2% of income

133-150% FPL: 3 – 4% of income

150-200% FPL: 4 – 6.3% of income

200-250% FPL: 6.3 – 8.05% of income

250-300% FPL: 8.05 – 9.5% of income

300-400% FPL: 9.5% of income

For individuals who earn more than $200,000 per year, and couples who earn more than $250,000 per year, the ACA imposes a surtax of 0.9% on excess earned income. For example, for an individual whose total earned income is $250,000, a surtax is imposed on earnings in excess of $200,000; this translates to a charge of $450 (0.9% of $50,000).

The ACA also imposes a 3.8% "Medicare tax on investments" on unearned income of individuals who have an adjusted gross income over $200,000, and couples

over $250,000. For example, if the AGI of an individual exceeds the $200,000 base amount, and $10,000 of that excess is unearned income, the additional Medicare tax would be $380.

Employers with more than 50 employees are now required to provide health insurance coverage to employees, or the employer will be penalized. The penalty is $2,000 per year per full-time employee. The penalty is nondeductible.

3. Medicaid Expansion

Prior to the ACA, millions of people had no health insurance; most were from working families, and some of them were very poor. Prior to the ACA, most states did not extend Medicaid coverage to adults unless they have children or are disabled. In 2014, 100% federal funding was made available for state Medicaid programs to provide overall medical services to every adult under age 65 whose income is below 133% of the federal poverty line (about $15,654 per year for an individual in 2015) and who is not otherwise insured.

Eligibility for the benefit will be based on modified adjusted gross income (MAGI) only, without a resource analysis. The federal funding to the states will decrease in 2017 from 100% to 95%, to 94% in 2018, to 93% in 2019, and to 90% from 2020 on. In the June 2012 U. S. Supreme Court decision, it was held that the Medicaid expansion provision of the ACA is optional for the States.

Although the ACA improves access to health insurance, it does not significantly expand the services available for the long-term needs of people with disabilities or long-term chronic illnesses. It is still the case that those types of services are available only through private resources or Medicaid. The ACA does provide for improvements, however, in the delivery of these services under Medicaid.

In October 2011, the ACA provided for the implementation of the Community First Choice Option for home- and community-based services through additional funding to state Medicaid programs. A state plan option under Section 1915(k) of the Social Security Act, this program is available for those who have functional needs that would otherwise require institutional care and whose incomes are no more than 300% of the Supplemental Security Income threshold, i.e., $2,199 per month in 2015. One's

age or diagnosis is not a determining factor for eligibility. As of August 2015, five states had a state plan amendment approved.[1]

The services include assistance with ADLs, transition costs such as bedding or rent, training in management of assistants, backup safety devices, and assistance with health- related tasks. The program does not cover room and board (such as in an assisted living facility), medical equipment, home modifications, or special education services. The federal Medicaid funding available to states will increase by 6% for those states that adopt this program. States that implement the Community First Choice Option will not be allowed to have waiting lists. Although very similar, this is not a "Medicaid Waiver" program.

The Effect of the Affordable Care Act on Special Needs Planning

Up until now, an individual with a disability or a pre-existing condition had a very difficult time obtaining health insurance in Ohio. Private insurance was unavailable because of underwriting standards, and Ohio had no high-risk pool to make insurance available. HMOs had to offer open enrollment for one month each year, but the enrollment process was very difficult, the premiums were high (often more than $1,500 per month), and the application had to be accompanied by payment for three months of premiums. Even if one could overcome these hurdles, the coverage provided was marginal.

The ACA contains many provisions discussed above that are obvious benefits to our clients. The most important provision is the prohibition of excluding a person with a pre-existing condition from health insurance coverage, making health insurance available to these individuals at a reasonable cost. The ACA puts a new focus on the planning that we do with disabled adults and families who have children faced with long- term injury or illness. Until the ACA, planners working with children or adults who had suffered a disabling injury were forced to think in terms of applying for Medicaid, because it was a foregone conclusion that the injured person would not be able to obtain health insurance. Because an individual can have no more than $1,500 in

[1] California, Maryland, Montana, Oregon, and Texas.

resources in order to be eligible for Medicaid, special needs trusts, which are exempt as a resource, were considered to be the only option in these cases.

How will the accessibility of medical insurance to everyone affect our planning for clients?

1. Private Medical Insurance v. Medicaid

Individuals with a disability for whom we are planning can be roughly divided into three groups:

1. Individuals who have a work history and will be eligible for Social Security Disability Income (SSDI) 5 months after their injury, followed by Medicare eligibility 24 months later;
2. Individuals who are disabled as an adult but have minimal or no work history, so they will not be eligible for SSDI and Medicare. This group includes young adults just out of college, or women who took time off from working to care for children and are not currently insured; and
3. Individuals who were injured prior to age 22, who may eventually be eligible for SSDI or Medicare when a parent retires, becomes disabled or dies, at which time they become eligible for these non-need-based benefits based on that parent's earnings history.

Planning for people in the last two groups almost automatically included using a special needs trust in order to maintain eligibility for Medicaid, as it was ordinarily the only medical insurance available to them. Even with a sizeable settlement, the risk of having no medical insurance is too great a risk to bear. We often also used special needs trusts for the first group if (1) Medicaid was needed until Medicare started, (2) Medicaid was needed as a Medicare supplement to cover deductibles and co-pays; or (3) the person required care in a skilled nursing facility or had significant care needs in the home not covered by traditional medical insurance.

With the availability of medical insurance for reasonable premiums with no pre-existing condition exclusions, our analysis changes dramatically.

The elimination of annual or lifetime caps and the prohibitions against rescission of insurance policies, non-renewability, and higher premium costs for

persons with pre-existing conditions, also impact our deliberations. For individuals with significant medical problems, elimination of cost-containment ceilings can be as important as access to private medical care. It is not unusual to see clients who are seeking Medicaid because they have reached their lifetime cap.

Many clients would choose to pay for private health insurance rather than maintain eligibility for Medicaid for several reasons. First, private insurance can provide access to a wider range and often significantly better medical care for basic medical treatment and hospitalization. Many physicians do not accept Medicaid, and it can be difficult to see a specialist, especially if you live in a rural area. Most Medicaid programs are now managed care programs, which also lead to restrictions in coverage.

Purchasing private insurance eliminates the administrative costs of the trust - attorney fees to draft the special needs and obtain court approval if necessary; lifetime payment of bank and trustee fees; and the ongoing court costs involved. If a client is a competent adult, they can retain control over their own funds rather than depend on a trustee to release funds for their benefit (although for many clients control over their funds often leads to a negative outcome.) They can make gifts of their funds, and use them to benefit spouses and children more freely than in a trust.

Avoiding the Medicaid payback at death is also a big deal for most clients. Clients also prefer that their funds go on to their family members upon death, rather than repay the state for Medicaid benefits received. For a person with disabilities, who may need significant medical care, relying on Medicaid can build up a very large lien very quickly. Even if a decision is made to utilize a special needs trust because the individual needs attendant care or other services which are not covered by traditional medical insurance, purchase of private health insurance from the special needs trust will likely make sense. With much of the individual's medical care paid for by the private health insurance, the Medicaid payback will be significantly reduced.

2. Who Still Needs a Trust?

There will still be some clients who will need or will opt for special needs trusts. The group of those continuing to need SNTs includes clients who require long- term nursing home care or Medicaid waiver services and who want to shift the cost to

Medicaid. The cost of these services, which are not covered by medical insurance, such as long-term care on a ventilator unit in a skilled nursing facility or 24-hour nursing care in the home, can be staggering.

Those clients with small settlements whose income is insufficient to pay private health premiums and co-pays may choose to utilize a special needs trust regardless of the Medicaid payback. Although the premium subsidies under the ACA will provide some relief for these individuals with limited income, relying on Medicaid may remain the better option.

Even if a determination is made that maintaining Medicaid eligibility is not critical, a trust can still be an important planning tool in a settlement. Expertise in money management through trusts in general will become important. A 23- year old who suffered a head injury in a motorcycle accident may still be legally competent, but handing him $300,000 in a single lump-sum payment clearly has drawbacks. A structured settlement can provide some reassurance that funds will last for the lifetime of the individual, but with so many companies advertising re-purchase of structured settlement annuities at such deep discounts, an individual can end up in a worse position if he structures and then sells the annuity. Also, as discussed more below, a careful analysis of income provided by the settlement should be made as well.

A settlement preservation trust can provide ongoing professional management of the settlement, and protection against depletion of the funds. The trust can be drafted in a manner that converts to a special needs trust in the future if care needs change and the beneficiary would be better-served by Medicaid. Another advantage of a trust, even if the individual is able to obtain private medical insurance, is the creditor protection provided to special needs trusts in some states. Special needs trust attorneys have expertise in providing these protections, and also have experience negotiating with banks on fees and the terms of trust administration agreements, and know which banks and trust companies would be a good fit for our clients and their individual lifestyles and needs.

3. <u>Income versus Resources</u>

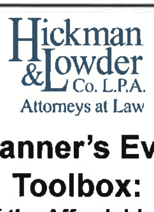
The basic purposes of a special needs trust have always been (1) to hold assets in a manner which prevented them from being counted as an available resource for

benefit eligibility; and (2) distribute those assets for the beneficiary in a manner which does not disrupt necessary benefits. Structured settlement annuity payments were directed to the special needs trust as well to avoid being countable income. With the availability of private health insurance through the ACA and the expansion of Medicaid, which looks only at income, not resources, the availability of resources becomes less important. What becomes more important is the concept of modified adjusted gross income (MAGI) which is the determining factor for expanded Medicaid eligibility and for the insurance premium subsidies available under the ACA. MAGI is defined as adjusted gross income (from line 4 on Form 1040EZ, line 21 on Form 1040A, or line 37 on Form 1040), increased by foreign earned income, housing cost while in foreign country, interest received which is exempt from tax and non-taxable social security benefits.[2]

Conclusion

In summary, the ACA reforms the health insurance industry and changes our analysis of how best to configure a settlement in order to provide maximum benefit to the client and his family. While special needs trusts continue to be an appropriate solution in many cases, a much broader array of options are available to ensure future care for our disabled clients. These options must be presented to allow the client to make an educated decision.

[2] 26 U.S. Code Sec. 36B(d)(2)(B) Internal Revenue Code



The Planner's Evolving Toolbox:

Impact of the Affordable Care Act on Special Needs Planning

Janet L. Lowder, CELA
The National Conference on Special Needs Trusts
October 15, 2015

Why Is It Needed?

- Over 50 million people did not have health insurance
- Many individuals with chronic conditions or high healthcare needs were unable to obtain coverage
- Health reform means millions more get quality health care that is affordable

Major Provisions Impacting SNTs

1. Expansion of coverage to those excluded from health insurance coverage and reforms of existing coverage
2. Medicaid Expansion

4

Major Reforms

- Nondiscrimination based on health status
- Guaranteed issue and renewability
- No pre-existing condition exclusions for adults
- No annual or lifetime dollar caps
- Ratings based only on age, geography, size of family and tobacco use

5

Coverage Mandates

- Everyone must have coverage or pay a penalty in 2014
- For those not on Medicare, Medicaid, VA, Tricare or employer-provided insurance (these are called Minimum Essential Coverage), health insurance can be purchased from "exchanges" or Marketplace
- The exchanges act as a clearing house for both Medicaid eligibility and insurance subsidies

6

Eligibility to Purchase from the Marketplace

- Live in the United States
- Be a U.S. citizen or national (or be lawfully present)
- Not be incarcerated
- Live in the area served by the Marketplace
- Not have other Minimum Essential Coverage
- Can still purchase insurance privately but no subsidies or cost-sharing

7

MAGI - Modified Adjusted Gross Income

- No resource test for Marketplace policies or expanded Medicaid
- Eligibility and subsidies will be based on modified adjusted gross income (MAGI)
  - Adjusted gross income (from line 4 on Form 1040EZ, line 21 on Form 1040A, or line 37 on Form 1040)
  - Increase by foreign earned income, housing cost while in foreign country, tax-exempt interest, and non-taxable social security benefits.
- 26 U.S. Code Sec. 36B(d)(2)(B) Internal Revenue Code

8

Qualified Health Plans

PLAN	ACTUARIAL VALUE
BRONZE	60%
SILVER	70%
GOLD	80%
PLATINUM	90%

9

Premium Credits - Available for individuals with income up to 400% FPL

INCOME AS % OF FPL	MAX % INCOME PAID FOR PREMIUMS
100 – 133%	2%
133 – 150%	3 - 4%
150 – 200%	4 - 6.3%
200 – 250%	6.3 - 8.05%
250 – 300%	8.05 – 9.5%
300 – 400%	9.5%

10

QHP - Essential Health Benefits

- 1. Ambulatory patient services
- 2. Emergency services
- 3. Hospitalization
- 4. Maternity and newborn care
- 5. Mental health and substance use disorder services
- 6. Prescription drugs
- 7. Rehab. and habilitative services and devices
- 8. Laboratory services
- 9. Preventive services, chronic disease management
- 10. Pediatric services, including oral and vision care

11

Qualified Health Plans

- Must meet cost-sharing requirements – no cost-sharing for preventive health services
- Covers the essential health benefits
- Private insurance sold off the exchanges must provide the same coverage as the Marketplace plans, but no premium subsidies or cost-sharing
- Open enrollment for Marketplace plans is Nov. 15 – Feb. 15

12

How to Evaluate a QHP

- Review the following for the plan:
  - Summary of benefits and coverage
  - Formulary
  - Provider directory
  - Evidence of coverage
  - State EHB benchmark
  - Need to reassess every year

13

Medicaid Expansion

- Medicaid eligibility has been based on 2 main concepts:
  - Being very low-income with few savings/assets
  - Fitting into a "category" (pregnant women, children, elderly, people with disabilities)
- States must cover certain mandatory groups; states may take up optional categories or raise income thresholds
- Adults generally left out (Except parents with dependent children, who are covered at extremely low income levels in most states)

14

Medicaid Expansion

- Age 19-64, not pregnant, not Medicare eligible
  - No other category requirement
- Income up to 138% of FPL
  - No asset test
- Must meet Medicaid immigration status requirements
- "Alternative Benefit Package" coverage must provide certain minimum benefits for those newly eligible
- Federal government pays 100% of costs for newly eligible individuals from 2014-2016 then phases down to 90%

15

Impact of ACA on SNTs

- Most important provisions:
  - Prohibition of pre-existing condition exclusions
  - Limitations on rating for premiums
  - Elimination of annual and lifetime caps
- Insurance is now affordable for individuals with a disability or chronic medical condition

16

Pros of Private Insurance

- Better access to health care
- Plaintiff keeps control of funds (can also be a con)
- No administrative costs for trustee, legal fees
- Funds can be used more freely for other family members
- No Medicaid payback
- Minimal worry about deeming

17

Pros of Special Needs Trust

- Medicaid eligibility now or if needed in future
- Medicaid covers broad range of services not paid by private insurance or Medicare
  - Long-term care
  - Waiver or custodial services in home
  - Transportation
- Professional administration and management
- Creditor protection

18

Factors to Consider - Trust or ACA

- Need for long-term care or traditional "waiver" services (in-home nursing, therapies significant durable medical equipment, etc.)
- Funds available
- Benefit needs of other family members/deeming
- Ability to manage money/creditor issues

Combining the Best of Both

- Settlement preservation trust with special needs provisions
- SNT with Medicaid for waiver services but private insurance for basic medical care
  - Minimizes payback
  - No premium subsidies available

Income versus Resources

- With expanded Medicaid eligibility and health insurance premium subsidies income analysis becomes important
- MAGI determines eligibility for non-disability Medicaid and premium assistance for private medical insurance
- Claimant or applicable plan notifies CMS any time 120 days prior to settlement, judgment or award with expected date and amount
- Conditional payments must be available on a website 65 days after notification, and additional payments must be posted within 15 days of payment date

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Stetson College of Law

Special Needs Trust Conference

The Planner's Evolving Tool Box: Part One

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I. Overview of the ABLE Act

On December 16, 2014 Congress passed the Stephen Beck, Jr. Achieving a Better Life Experience Act of 2014, and President Obama signed the act into law three days later.[1] The ABLE act amended Section 529 of the Internal Revenue Code of 1986, adding a new Section 529A. The ABLE Act defines an ABLE account as a tax free savings vehicle, with some similarities to (and many important differences from) Section 529 college savings plans, for people with disabilities and their families. Subject to certain limitations, funds held in an ABLE account will be exempt from consideration as countable resources by Supplemental Security Income (SSI) and Medicaid, thus allowing an individual to accumulate funds in excess of the Two Thousand Dollars ($2,000) resource limit for these programs. ABLE accounts have long been championed by disabilities advocacy organizations as a cost effective alternative to special needs trusts that allows individuals to control their own funds while remaining eligible for important public benefits. Although the ABLE Act enjoyed broad bipartisan support, the fiscal impact of the program as originally envisioned resulted in a final bill more modest in scope and application than hoped. Nonetheless ABLE accounts provide a useful new tool in attaining some financial security and independence for people with disabilities.

[1] Division B of Public Law 113-295, December 19, 2014

On June 19, 2015, the Department of the Treasury published Notice of Proposed Rulemaking (NPRM) and proposed regulations for ABLE programs.[2] The comment period extended to September 21, 2015; a public hearing on ABLE regulations was scheduled for October 14, 2015.

Although states are not required to enact an ABLE program, as of the time of publication of this article, 41 states have ABLE legislation pending or signed.[3] Many states have task forces or other working groups underway to share their ABLE programs. The enabling legislation and proposed regulations define what makes a "qualified ABLE program" and outlines the program requirements the states must meet.

A. ABLE account requirements related to the individual account holder – the "designated beneficiary".

The person with disabilities who opens an ABLE account is referred to as a "designated beneficiary."[4] A designated beneficiary may have only one ABLE account.[5] The designated beneficiary is considered the owner of the account.[6] If a designated beneficiary is unable to exercise signature authority over his or her account, an agent under the beneficiary's power of attorney, or if none, a parent or legal guardian of the beneficiary may do so.[7] This differs from the treatment of 529 college savings accounts, for which the custodian is considered the owner. If more than one account is established, the subsequent accounts have no protection for tax or benefits purposes.[8] An account may only opened in the individual's state of residence, or in a state with which the individual's home state has contracted to provide an ABLE program.[9] To be eligible to have an ABLE account, the individual must have become blind or disabled before the age of twenty-six (26).[10] If the individual has not yet been determined eligible

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[2] https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able-programs

[3] http://www.thearc.org/what-we-do/public-policy/policy-issues/able-legislation-by-state
Site visited August 30, 2015.

[4] 26 U.S.C.S §529A(b)(1)(B); 26 C.F.R. §1.529A-1(b)(4) (*Citations are to proposed regulations, published June 19, 2015; final regulations may differ*.)

[5] 26 U.S.C.S §529A(b)(1)(B), 26 C.F.R. §1.529A-2(a)(3),(c)(2)

[6] 26 U.S.C.S §529A(e)(3); 26 C.F.R. §1.529A-1(b)(4)

[7] 26 C.F.R. §1.529A-1(b)(4)

[8] 26 U.S.C.S §529A(c)(4)

[9] 26 U.S.C.S §529A(b)(1)(C); 26 C.F.R. §1.529A-2(a)(2)

[10] 26 U.S.C.S §529A(e)(1)(A); 26 C.F.R. §1.529A-1(b)(9)

for SSI or Social Security Disability Insurance due to blindness or disability, verification may be established through a disability certification by a physician.[11]

B. ABLE account requirements related to contributions.

Contributions to ABLE accounts may be made by the designated beneficiary or by third parties.[12] Contributions must be in cash.[13] Proposed regulations provide that cash contributions may be made in the form of a check, money order, credit card, electronic transfer or similar method.[14] Contributions to an account from someone other than the designated beneficiary are treated as a completed gift.[15] Contributions are not tax-deductible. The total annual contributions to the ABLE account from all sources may not exceed the annual gift tax exclusion amount, currently $14,000.[16] The one exception to this limit comes in the case of a rollover from another ABLE account. An individual may rollover his or her ABLE account to another ABLE account for himself or herself, or for an eligible individual who is a family member under certain circumstances, and as long as the rollover is completed within sixty (60) days.[17] Such a rollover may only be done once in any twelve month period.[18]

A 6% excise tax will apply to excess contributions to an ABLE account.[19] The maximum aggregate contributions to an ABLE account will be capped at the same amount of each State's college savings plan program.[20]

The funds in an ABLE account are not counted towards the resource limit for any federal funded benefit which has at least one financial criterion for eligibility, with one exception.[21] If the designated beneficiary is an SSI recipient and the balance in the ABLE account exceeds One Hundred Thousand Dollars ($100,000), the account balance in

[11] 26 U.S.C.S §529A(e)(1)and (2); 26 C.F.R. §1.529A-1(b)(5),(9)
[12] 26 C.F.R. §1.529A-2(a)(4)
[13] 26 U.S.C.S §529A(b)(2)(A); 26 C.F.R. §1.529A-2(g)(1)

[14] 26 CFR §1.529A-2(g)(1)
[15] 26 U.S.C.S §529A(c)(2)(A)(i); 26 C.F.R. §1.529A-4(a)(1)
[16] 26 U.S.C.S §529A(b)(2)(B); 26 C.F.R. §1.529A-2(g)(2)

[17] 26 U.S.C.S §529A(c)(1)(C); 26 C.F.R. §1.529A-1(b)(17); 26 C.F.R. §1.529A-3(b)(1)
[18] 26 U.S.C.S §529A(c)(1)(C)(iii); 26 C.F.R. §1.529A-1(b)(17); 26 C.F.R. §1.529A-3(b)(1)
[19] Section 102(b)(1), Div.B, ABLE Act of 2014, amending 26 U.S.C.S.§4973(a)(6); 26 C.F.R. §1.529A-3(e)
[20] 26 U.S.C.S §529A(b)(6); 26 C.F.R. §1.529A-2(g)(3)
[21] Section 103(a), ABLE Act of 2014.

excess of this amount will be considered a countable resource for SSI purposes.[22] The designated beneficiary's SSI eligibility will be suspended; Medicaid eligibility will not be affected.

C. Effect of Distributions from an ABLE Account.

Distributions from ABLE accounts that do not exceed the designated beneficiary's "qualified disability expenses" will not be included in the individual's gross income for tax purposes.[23] This determination is made on an annual basis. Distributions that do exceed the individual's qualified disability expenses for the year will be taxable and will also be subject to a 10% tax.[24] Qualified disability expenses are those related to the individual's blindness or disability made for the benefit of the individual, including payments for education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses, which are approved by the Secretary of the Treasury under regulations and consistent with the statute. [25] The proposed regulations expand on this list and express more broadly the purpose of qualified expenses to include expenses "that are for the benefit of that designated beneficiary in maintaining or improving his or her health, independence, or quality of life. Further, the regulations provide that "qualified disability expenses include basic living expenses and are not limited to items for which there is a medical necessity or which solely benefit a disabled individual."[26] The inclusion of housing expenses is particularly relevant to ABLE account owners who receive SSI.

Any distribution for qualified disability expenses is to be disregarded for purposes of determining financial eligibility for any federal benefit, with one exception. Distributions for housing expenses will not be disregarded by SSI in determining financial eligibility.[27]

On February 18, 2015, the Social Security Administration (SSA) issued an Emergency Message, which stated that distributions from ABLE accounts for housing expenses would be treated as income for purposes of SSI eligibility.[28]

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[22] Section 103(b), ABLE Act of 2014.
[23] 26 U.S.C.S §529A(c)(1)(B); 26 C.F.R. §1.529A-3(a)
[24] 26 U.S.C.S §529A(c)(3)(A); 26 C.F.R. §1.529A-3(a),(d)
[25] 26 U.S.C.S §529A(e)(5)
[26] 26 CFR §1.529A-2(h); 26 C.F.R. §1.529A-2(h)
[27] Section 103(a)(1), ABLE Act of 2014.

SSA is expected to reverse this position as it has become more clear that the designated beneficiary is the account owner, hence any payment for housing expenses from an ABLE account would be made from the SSI recipient's own resources. As such, these distributions would not trigger treatment as in-kind support and maintenance.[29] In other words, SSA will view an ABLE account from a resource perspective, albeit it as an exempt resource for accounts under $100,000, and not from an income perspective. SSA is expected to publish new POMS instructions for ABLE accounts by the end of 2015.

D. Repayment to State Medicaid Program

The State is a creditor of the ABLE account. Upon the death of the designated beneficiary, and subject to any outstanding payments due for qualified disability expenses, funds remaining in the ABLE account are to be distributed to the State Medicaid program up to the amount of total medical assistance benefits paid on behalf of the designated beneficiary after the date the account was established.[30] These provisions are more generous than the payback requirements of self-settled special needs trust authorized at 42 U.S.C.S. §1396p(d)(4), which are interpreted by SSA to exclude payment of funeral expenses after the death of the beneficiary, and which requires the state to be repaid for medical assistance provided during the lifetime of the beneficiary, not just the period the trust was in place.

E. Changes in ABLE Accounts

Funds may be transferred from one ABLE account to another for the same beneficiary without tax consequences, provided that the original ABLE account is closed upon completion of the transfer.[31] This may occur, for example, if a beneficiary moves to another state. ABLE funds may be rolled over from one qualified beneficiary to another qualified beneficiary who is an eligible individual (meeting the same disability and onset of disability criteria) and who is a family member of the original beneficiary; the contribution to the new account must take place within sixty

[28] Social Security Administration Emergency Message EM-15006, 2/18/15, at #7.
https://secure.ssa.gov/apps10/reference.nsf/links/02182015024942PM

[29] Author's personal communication with Eric Skidmore, Director, Office of SSI and Program Integrity Policy, August 3, 2015.

[30] 26 U.S.C.S §529A(f); 26 C.F.R. §1.529A-2(p)

[31] 26 U.S.C.S §529A(c)(1)(C)(i); 26 C.F.R. §1.529A-1(b)(14); 26 C.F.R. §1.529A-3(b)(2)

days of the withdrawal from the original account to avoid tax consequences.[32] Such a rollover may only occur once in any twelve month period.[33] Note that, for ABLE accounts the definition of "family member" is limited to siblings, whether by blood or adoption, and including a brother, sister, stepbrother, stepsister, half-brother and half-sister.[34] This is a much more limited definition of family member than applies to 529 plans.

F. Requirements for State ABLE Programs

An ABLE program must be established and maintained by a state, or agency or instrumentality of the state.[35] A state may contract with another state to provide the contracting state's residents access to a qualified ABLE program, in lieu of establishing its own ABLE program.[36]

Each state's ABLE program must enforce the many rules applicable to these accounts. An ABLE program must have mechanisms to: limit a beneficiary to one account, confirm residence and disability; accept only cash contributions; provide separate accountings; limit changes to investments by the designated beneficiary, directly or indirectly, to no more than two times per year, prohibit any interest in an ABLE account to be pledged as security for a loan and protect against excess contributions.[37] Many of these requirements mirror the 529 college savings plan requirements, but others, particularly the disability verification, are new territory for state agencies which typically oversee that type of program. The Act also imposes significant reporting requirements on the states. For research purposes, state must be able to report aggregated data to the Secretary of the Treasury on the overall utilization of the ABLE accounts, e.g., by diagnosis, and other relevant characteristics.[38] In addition, the states must report to the Secretary on the establishment of accounts, contributions, distributions, and return of excess contributions.[39] The Act requires monthly electronic reporting to the Social Security Administration on relevant distributions and account balances.[40]

[32] 26 U.S.C.S §529A(c)(1)(C)(ii); 26 C.F.R. §1.529A-1(b)(17); 26 C.F.R. §1.529A-3(b)(1)
[33] 26 U.S.C.S §529A(c)(1)(C)(iii); 26 C.F.R. §1.529A-1(b)(17)
[34] 26 C.F.R. §1.529A-1(b)(13)
[35] 26 U.S.C.S §529A(b)(1); 26 C.F.R. §1.529A-2(b)
[36] 26 U.S.C.S §529A(e)(7); 26 C.F.R. §1.529A-1(b)(2)
[37] 26 U.S.C.S §529A(b); *generally*, 26 C.F.R. §1.529A-2
[38] 26 U.S.C.S §529A(d)(2)
[39] 26 U.S.C.S §529A(d)(1); 26 C.F.R. §1.529A-5; 26 C.F.R. §1.529A-6
[40] 26 U.S.C.S §529A(d)(3)

It is not clear from the Act or the proposed regulations if states or their agencies are expected to track the actual expenses for which distributions are made. Under the college savings plans, it is up to the taxpayer who established the account to provide verification of permitted college related expenses to the IRS; the entities which hold and administer the accounts have no obligation to verify the purpose of account distributions.

II. ABLE Planning Considerations for Practitioners

A. The Department of the Treasury holds a public hearing on proposed ABLE regulations on October 14, 2015. Over 200 comments have been submitted from organizations, state governments and individuals.[41] Many issues have been raised in the comments, which are expected to result in some changes to the proposed regulations. Among the proposed changes are to allow a Representative Payee to act on behalf of the designated beneficiary, to broaden the definition of "qualified disability expenses", and to provide more guidance on the treatment of expenses paid from an ABLE account at a time when the qualified beneficiary is no longer considered disabled.[42] A number of comments repeated the same message, urging that the rules for ABLE accounts be as simple as possible, to enable people with disabilities to use this savings vehicle easily.

In addition to anticipated action by the Department of the Treasury and the IRS, individual states will be implementing their own ABLE programs over the next two years. Hence there will undoubtedly be changes to the requirements of an ABLE program from what we have seen so far. Nonetheless, there are features of these accounts and circumstances for beneficiaries for which we can begin to plan now, such as:

1. **Coordination with family members**. As an individual may have only one ABLE account, coordination among extended family members and divorced parents will be essential to avoid multiple accounts.

2. **Support for beneficiaries**. Beneficiaries will be faced with new responsibilities such as filing income tax returns, saving documentation of expenses for tax filings, and managing their funds independently. If ABLE accounts operate similarly to 529 plans, the ABLE program may issue a check directly to the beneficiary in

[41] See listing of comments: http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=IRS-2015-0030

[42] See comments submitted by the Special Needs Alliance, September 21, 2015, at **ID:** IRS-2015-0030-0137, at the webpage listed in note 41.

response to a request. If these funds are not used promptly to pay for qualified disability expenses, retention of funds over time may result in countable resources that may affect ongoing eligibility.

B. When Will an ABLE Account Be a Good Fit?

An ABLE account will be another tool for planning for the future well-being of people who became disabled at birth or before the age of 26. They will be most useful to shelter funds that belong to the beneficiary. They can serve as a safety valve to receive excess earnings or accumulations for those individuals who do not spend their entire income every month. For an individual who receives a small personal injury settlement, the funds could be structured to pay into an ABLE account over time, keeping within the annual limit. For an individual with a Uniform Transfer to Minors Account (UTMA), these funds could be transferred to an ABLE account, with the consent of the beneficiary over 18 or by court order; this plan could be implemented over a period of years to deposit up to the annual contribution limit each year. Given the expected change to SSA's stated policy about treatment of housing expenses paid from an ABLE account, parents may subsidize the rent for a disabled child by depositing funds into an ABLE account which the child may then withdraw to pay his or her rent without SSI imposing the one-third deduction for in-kind support and maintenance.

The cost effectiveness of an ABLE account versus a self-settled special needs trust under 42 U.S.C. §1396p(d)(4)(A) and (C), may depend on factors such as whether the beneficiary requires a guardian. Under the proposed regulations, only an agent under a power of attorney, or a parent or legal guardian may act on behalf of the qualified beneficiary to establish and access an ABLE account. If the beneficiary lacks capacity to create a power of attorney, and there is no living parent, the costs involved in the appointment of a guardian and the ongoing reporting expenses may make the ABLE account ultimately less cost effective than a special needs trust.

If a third party contemplates funding an ABLE account, as with any other estate plan, there are many factors to consider. In addition to the basic ABLE eligibility criteria discussed above, other considerations are the donor's tax and financial circumstances, his or her overall plans and wishes, the circumstances and needs of the qualified beneficiary, the specific purpose of the ABLE account contribution, the annual and aggregate funding limitation and, of course, the payback required to the state Medicaid program which is typically not a consideration for a third party trust other than a "sole benefit trust" under 42 U.S.C. §1396p(c)(2)(B)(iii/iv). A third party special needs trust may overall be a better alternative, or the ABLE account may be a good complement to third party trust, e.g., if it is

expected that the ABLE account funds will be spent in a predictable manner, thus avoiding the payback issue, such as in the example noted above in which a parent would fund an ABLE account to cover the beneficiary's rent.

Special needs planning is always a multi-dimensional exercise; ABLE accounts give us a useful new tool to help meet the needs of our clients.

Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014.

DIVISION B—ACHIEVING A BETTER LIFE EXPERIENCE ACT OF 2014

SEC. 1. SHORT TITLE; ETC.

26 USC 1 note.

(a) SHORT TITLE.—This division may be cited as the "Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014" or the "Stephen Beck, Jr., ABLE Act of 2014".

(b) AMENDMENT OF 1986 CODE.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1986.

TITLE I—QUALIFIED ABLE PROGRAMS

26 USC 529A note.

SEC. 101. PURPOSES.

The purposes of this title are as follows:

(1) To encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life.

(2) To provide secure funding for disability-related expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, the Medicaid program under title XIX of the Social Security Act, the supplemental security income program under title XVI of such Act, the beneficiary's employment, and other sources.

SEC. 102. QUALIFIED ABLE PROGRAMS.

(a) IN GENERAL.—Subchapter F of chapter 1 is amended by inserting after section 529 the following new section:

26 USC 529A.

"SEC. 529A. QUALIFIED ABLE PROGRAMS.

"(a) GENERAL RULE.—A qualified ABLE program shall be exempt from taxation under this subtitle. Notwithstanding the preceding sentence, such program shall be subject to the taxes imposed by section 511 (relating to imposition of tax on unrelated business income of charitable organizations).

"(b) QUALIFIED ABLE PROGRAM.—For purposes of this section—

Definition.

"(1) IN GENERAL.—The term 'qualified ABLE program' means a program established and maintained by a State, or agency or instrumentality thereof—

"(A) under which a person may make contributions for a taxable year, for the benefit of an individual who is an eligible individual for such taxable year, to an ABLE account which is established for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account,

"(B) which limits a designated beneficiary to 1 ABLE account for purposes of this section,

"(C) which allows for the establishment of an ABLE account only for a designated beneficiary who is a resident of such State or a resident of a contracting State, and

"(D) which meets the other requirements of this section.

"(2) CASH CONTRIBUTIONS.—A program shall not be treated as a qualified ABLE program unless it provides that no contribution will be accepted—

"(A) unless it is in cash, or

"(B) except in the case of contributions under subsection (c)(1)(C), if such contribution to an ABLE account would result in aggregate contributions from all contributors to the ABLE account for the taxable year exceeding the amount in effect under section 2503(b) for the calendar year in which the taxable year begins.

For purposes of this paragraph, rules similar to the rules of section 408(d)(4) (determined without regard to subparagraph (B) thereof) shall apply.

Applicability.

"(3) SEPARATE ACCOUNTING.—A program shall not be treated as a qualified ABLE program unless it provides separate accounting for each designated beneficiary.

"(4) LIMITED INVESTMENT DIRECTION.—A program shall not be treated as a qualified ABLE program unless it provides that any designated beneficiary under such program may, directly or indirectly, direct the investment of any contributions to the program (or any earnings thereon) no more than 2 times in any calendar year.

"(5) NO PLEDGING OF INTEREST AS SECURITY.—A program shall not be treated as a qualified ABLE program if it allows any interest in the program or any portion thereof to be used as security for a loan.

"(6) PROHIBITION ON EXCESS CONTRIBUTIONS.—A program shall not be treated as a qualified ABLE program unless it provides adequate safeguards to prevent aggregate contributions on behalf of a designated beneficiary in excess of the limit established by the State under section 529(b)(6). For purposes of the preceding sentence, aggregate contributions include contributions under any prior qualified ABLE program of any State or agency or instrumentality thereof.

"(c) TAX TREATMENT.—

"(1) DISTRIBUTIONS.—

"(A) IN GENERAL.—Any distribution under a qualified ABLE program shall be includible in the gross income of the distributee in the manner as provided under section 72 to the extent not excluded from gross income under any other provision of this chapter.

"(B) DISTRIBUTIONS FOR QUALIFIED DISABILITY EXPENSES.—For purposes of this paragraph, if distributions from a qualified ABLE program—

"(i) do not exceed the qualified disability expenses of the designated beneficiary, no amount shall be includible in gross income, and

"(ii) in any other case, the amount otherwise includible in gross income shall be reduced by an amount which bears the same ratio to such amount as such expenses bear to such distributions.

"(C) CHANGE IN DESIGNATED BENEFICIARIES OR PROGRAMS.—

"(i) ROLLOVERS FROM ABLE ACCOUNTS.—Subparagraph (A) shall not apply to any amount paid or distributed from an ABLE account to the extent that the amount received is paid, not later than the 60th day after the date of such payment or distribution, into another ABLE account for the benefit of the same designated beneficiary or an eligible individual who is a family member of the designated beneficiary.

"(ii) CHANGE IN DESIGNATED BENEFICIARIES.—Any change in the designated beneficiary of an interest in a qualified ABLE program during a taxable year shall not be treated as a distribution for purposes of subparagraph (A) if the new beneficiary is an eligible individual for such taxable year and a member of the family of the former beneficiary.

Deadline.

"(iii) LIMITATION ON CERTAIN ROLLOVERS.—Clause (i) shall not apply to any transfer if such transfer occurs within 12 months from the date of a previous transfer to any qualified ABLE program for the benefit of the designated beneficiary.

"(D) OPERATING RULES.—For purposes of applying section 72—

"(i) except to the extent provided by the Secretary, all distributions during a taxable year shall be treated as one distribution, and

"(ii) except to the extent provided by the Secretary, the value of the contract, income on the contract, and investment in the contract shall be computed as of the close of the calendar year in which the taxable year begins.

"(2) GIFT TAX RULES.—For purposes of chapters 12 and 13—

"(A) CONTRIBUTIONS.—Any contribution to a qualified ABLE program on behalf of any designated beneficiary—

"(i) shall be treated as a completed gift to such designated beneficiary which is not a future interest in property, and

"(ii) shall not be treated as a qualified transfer under section 2503(e).

"(B) TREATMENT OF DISTRIBUTIONS.—In no event shall a distribution from an ABLE account to such account's designated beneficiary be treated as a taxable gift.

"(C) TREATMENT OF TRANSFER TO NEW DESIGNATED BENEFICIARY.—The taxes imposed by chapters 12 and 13 shall not apply to a transfer by reason of a change in the designated beneficiary under subsection (c)(1)(C).

"(3) ADDITIONAL TAX FOR DISTRIBUTIONS NOT USED FOR DISABILITY EXPENSES.—

"(A) IN GENERAL.—The tax imposed by this chapter for any taxable year on any taxpayer who receives a distribution from a qualified ABLE program which is includible in gross income shall be increased by 10 percent of the amount which is so includible.

"(B) EXCEPTION.—Subparagraph (A) shall not apply if the payment or distribution is made to a beneficiary (or to the estate of the designated beneficiary) on or after the death of the designated beneficiary.

"(C) CONTRIBUTIONS RETURNED BEFORE CERTAIN DATE.—Subparagraph (A) shall not apply to the distribution of any contribution made during a taxable year on behalf of the designated beneficiary if—

"(i) such distribution is received on or before the day prescribed by law (including extensions of time) for filing such designated beneficiary's return for such taxable year, and

"(ii) such distribution is accompanied by the amount of net income attributable to such excess contribution.

Any net income described in clause (ii) shall be included in gross income for the taxable year in which such excess contribution was made.

"(4) LOSS OF ABLE ACCOUNT TREATMENT.—If an ABLE account is established for a designated beneficiary, no account subsequently established for such beneficiary shall be treated as an ABLE account. The preceding sentence shall not apply in the case of an account established for purposes of a rollover described in paragraph (1)(C)(i) of this section if the transferor account is closed as of the end of the 60th day referred to in paragraph (1)(C)(i).

"(d) REPORTS.—

"(1) IN GENERAL.—Each officer or employee having control of the qualified ABLE program or their designee shall make such reports regarding such program to the Secretary and to designated beneficiaries with respect to contributions, distributions, the return of excess contributions, and such other matters as the Secretary may require.

Public information.

"(2) CERTAIN AGGREGATED INFORMATION.—For research purposes, the Secretary shall make available to the public reports containing aggregate information, by diagnosis and other relevant characteristics, on contributions and distributions from the qualified ABLE program. In carrying out the preceding sentence an item may not be made available to the public if such item can be associated with, or otherwise identify, directly or indirectly, a particular individual.

"(3) NOTICE OF ESTABLISHMENT OF ABLE ACCOUNT.—A qualified ABLE program shall submit a notice to the Secretary upon the establishment of an ABLE account. Such notice shall contain the name and State of residence of the designated beneficiary and such other information as the Secretary may require.

"(4) ELECTRONIC DISTRIBUTION STATEMENTS.—For purposes of section 4 of the Achieving a Better Life Experience Act of 2014, States shall submit electronically on a monthly basis to the Commissioner of Social Security, in the manner specified by the Commissioner, statements on relevant distributions and account balances from all ABLE accounts.

"(5) REQUIREMENTS.—The reports and notices required by paragraphs (1), (2), and (3) shall be filed at such time and in such manner and furnished to such individuals at such time and in such manner as may be required by the Secretary.

"(e) OTHER DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

"(1) ELIGIBLE INDIVIDUAL.—An individual is an eligible individual for a taxable year if during such taxable year—

"(A) the individual is entitled to benefits based on blindness or disability under title II or XVI of the Social Security Act, and such blindness or disability occurred before the date on which the individual attained age 26, or

"(B) a disability certification with respect to such individual is filed with the Secretary for such taxable year.

"(2) DISABILITY CERTIFICATION.—

"(A) IN GENERAL.—The term 'disability certification' means, with respect to an individual, a certification to the satisfaction of the Secretary by the individual or the parent or guardian of the individual that—

"(i) certifies that—

"(I) the individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months, or is blind (within the meaning of section 1614(a)(2) of the Social Security Act), and

"(II) such blindness or disability occurred before the date on which the individual attained age 26, and

"(ii) includes a copy of the individual's diagnosis relating to the individual's relevant impairment or impairments, signed by a physician meeting the criteria of section 1861(r)(1) of the Social Security Act.

"(B) RESTRICTION ON USE OF CERTIFICATION.—No inference may be drawn from a disability certification for purposes of establishing eligibility for benefits under title II, XVI, or XIX of the Social Security Act.

"(3) DESIGNATED BENEFICIARY.—The term 'designated beneficiary' in connection with an ABLE account established under a qualified ABLE program means the eligible individual who established an ABLE account and is the owner of such account.

"(4) MEMBER OF FAMILY.—The term 'member of the family' means, with respect to any designated beneficiary, an individual who bears a relationship to such beneficiary which is described in subparagraph section 152(d)(2)(B). For purposes of the preceding sentence, a rule similar to the rule of section 152(f)(1)(B) shall apply.

"(5) QUALIFIED DISABILITY EXPENSES.—The term 'qualified disability expenses' means any expenses related to the eligible individual's blindness or disability which are made for the benefit of an eligible individual who is the designated beneficiary, including the following expenses: education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses, which are approved by the Secretary under regulations and consistent with the purposes of this section.

"(6) ABLE ACCOUNT.—The term 'ABLE account' means an account established by an eligible individual, owned by such

eligible individual, and maintained under a qualified ABLE program.

"(7) CONTRACTING STATE.—The term 'contracting State' means a State without a qualified ABLE program which has entered into a contract with a State with a qualified ABLE program to provide residents of the contracting State access to a qualified ABLE program.

"(f) TRANSFER TO STATE.—Subject to any outstanding payments due for qualified disability expenses, upon the death of the designated beneficiary, all amounts remaining in the qualified ABLE account not in excess of the amount equal to the total medical assistance paid for the designated beneficiary after the establishment of the account, net of any premiums paid from the account or paid by or on behalf of the beneficiary to a Medicaid Buy-In program under any State Medicaid plan established under title XIX of the Social Security Act, shall be distributed to such State upon filing of a claim for payment by such State. For purposes of this paragraph, the State shall be a creditor of an ABLE account and not a beneficiary. Subsection (c)(3) shall not apply to a distribution under the preceding sentence.

"(g) REGULATIONS.—The Secretary shall prescribe such regulations or other guidance as the Secretary determines necessary or appropriate to carry out the purposes of this section, including regulations—

"(1) to enforce the 1 ABLE account per eligible individual limit,

"(2) providing for the information required to be presented to open an ABLE account,

"(3) to generally define qualified disability expenses,

"(4) developed in consultation with the Commissioner of Social Security, relating to disability certifications and determinations of disability, including those conditions deemed to meet the requirements of subsection (e)(1)(B),

"(5) to prevent fraud and abuse with respect to amounts claimed as qualified disability expenses,

"(6) under chapters 11, 12, and 13 of this title, and

"(7) to allow for transfers from one ABLE account to another ABLE account.".

(b) TAX ON EXCESS CONTRIBUTIONS.—

(1) IN GENERAL.—Subsection (a) of section 4973 (relating to tax on excess contributions to certain tax-favored accounts and annuities) is amended by striking "or" at the end of paragraph (4), by inserting "or" at the end of paragraph (5), and by inserting after paragraph (5) the following new paragraph:

26 USC 4973.

"(6) an ABLE account (within the meaning of section 529A),".

(2) EXCESS CONTRIBUTION.—Section 4973 is amended by adding at the end the following new subsection:

"(h) EXCESS CONTRIBUTIONS TO ABLE ACCOUNT.—For purposes of this section—

"(1) IN GENERAL.—In the case of an ABLE account (within the meaning of section 529A), the term 'excess contributions' means the amount by which the amount contributed for the taxable year to such account (other than contributions under section 529A(c)(1)(C)) exceeds the contribution limit under section 529A(b)(2)(B).

Applicability.

"(2) SPECIAL RULE.—For purposes of this subsection, any contribution which is distributed out of the ABLE account in a distribution to which the last sentence of section 529A(b)(2) applies shall be treated as an amount not contributed.".

26 USC 6693.

(c) PENALTY FOR FAILURE TO FILE REPORTS.—Section 6693(a)(2) is amended by striking "and" at the end of subparagraph (D), by redesignating subparagraph (E) as subparagraph (F), and by inserting after subparagraph (D) the following:

"(E) section 529A(d) (relating to qualified ABLE programs), and".

(d) RECORDS.—Section 552a(a)(8)(B) of title 5, United States Code, is amended—

(1) in clause (viii), by striking "or" at the end;

(2) in clause (ix), by adding "or" at the end; and

(3) by adding at the end the following new clause:

"(x) matches performed pursuant to section 3(d)(4) of the Achieving a Better Life Experience Act of 2014;".

(e) OTHER CONFORMING AMENDMENTS.—

(1) Section 26(b)(2) is amended by striking "and" at the end of subparagraph (W), by striking the period at the end of subparagraph (X) and inserting ", and", and by inserting after subparagraph (X) the following:

"(Y) section 529A(c)(3)(A) (relating to additional tax on ABLE account distributions not used for qualified disability expenses).".

(2) Section 877A is amended—

(A) in subsection (e)(2) by inserting "a qualified ABLE program (as defined in section 529A)," after "529),", and

(B) in subsection (g)(6) by inserting "529A(c)(3)," after "529(c)(6),".

(3) Section 4965(c) is amended by striking "or" at the end of paragraph (6), by striking the period at the end of paragraph (7) and inserting ", or", and by inserting after paragraph (7) the following new paragraph:

"(8) a program described in section 529A.".

26 USC prec. 529.

(4) The heading for part VIII of subchapter F of chapter 1 is amended by striking "HIGHER EDUCATION" and inserting "CERTAIN".

26 USC prec. 501.

(5) The item in the table of parts for subchapter F of chapter 1 relating to part VIII is amended to read as follows:

"PART VIII. CERTAIN SAVINGS ENTITIES.".

26 USC prec. 529.

(6) The table of sections for part VIII of subchapter F of chapter 1 is amended by inserting after the item relating to section 529 the following new item:

"Sec. 529A. Qualified ABLE programs.".

(7) Paragraph (4) of section 1027(g) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5517(g)(4)) is amended by inserting ", 529A" after "529".

5 USC 552a note.

(f) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to taxable years beginning after December 31, 2014.

26 USC 529A note.

(2) REGULATIONS.—The Secretary of the Treasury (or the Secretary's designee) shall promulgate the regulations or other

guidance required under section 529A(g) of the Internal Revenue Code of 1986, as added by subsection (a), not later than 6 months after the date of the enactment of this Act.

SEC. 103. TREATMENT OF ABLE ACCOUNTS UNDER CERTAIN FEDERAL PROGRAMS.

26 USC 529A note.

(a) ACCOUNT FUNDS DISREGARDED FOR PURPOSES OF CERTAIN OTHER MEANS-TESTED FEDERAL PROGRAMS.—Notwithstanding any other provision of Federal law that requires consideration of 1 or more financial circumstances of an individual, for the purpose of determining eligibility to receive, or the amount of, any assistance or benefit authorized by such provision to be provided to or for the benefit of such individual, any amount (including earnings thereon) in the ABLE account (within the meaning of section 529A of the Internal Revenue Code of 1986) of such individual, any contributions to the ABLE account of the individual, and any distribution for qualified disability expenses (as defined in subsection (e)(5) of such section) shall be disregarded for such purpose with respect to any period during which such individual maintains, makes contributions to, or receives distributions from such ABLE account, except that, in the case of the supplemental security income program under title XVI of the Social Security Act—

(1) a distribution for housing expenses (within the meaning of such subsection) shall not be so disregarded, and

(2) in the case of such program, any amount (including such earnings) in such ABLE account shall be considered a resource of the designated beneficiary to the extent that such amount exceeds $100,000.

(b) SUSPENSION OF SSI BENEFITS DURING PERIODS OF EXCESSIVE ACCOUNT FUNDS.—

(1) IN GENERAL.—The benefits of an individual under the supplemental security income program under title XVI of the Social Security Act shall not be terminated, but shall be suspended, by reason of excess resources of the individual attributable to an amount in the ABLE account (within the meaning of section 529A of the Internal Revenue Code of 1986) of the individual not disregarded under subsection (a) of this section.

(2) NO IMPACT ON MEDICAID ELIGIBILITY.—An individual who would be receiving payment of such supplemental security income benefits but for the application of paragraph (1) shall be treated for purposes of title XIX of the Social Security Act as if the individual continued to be receiving payment of such benefits.

(c) EFFECTIVE DATE.—This section shall take effect on the date of the enactment of this Act.

SEC. 104. TREATMENT OF ABLE ACCOUNTS IN BANKRUPTCY.

(a) EXCLUSION FROM PROPERTY OF THE ESTATE.—Section 541(b) of the title 11, United States Code, is amended—

(1) in paragraph (8), by striking "or" at the end;

(2) in paragraph (9), by striking the period at the end and inserting a semicolon and "or"; and

(3) by inserting after paragraph (9) the following:

"(10) funds placed in an account of a qualified ABLE program (as defined in section 529A(b) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but—

Deadline.

"(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

"(B) only to the extent that such funds—

"(i) are not pledged or promised to any entity in connection with any extension of credit; and

"(ii) are not excess contributions (as described in section 4973(h) of the Internal Revenue Code of 1986); and

Deadlines.

"(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $6,225.".

(b) DEBTOR'S MONTHLY EXPENSES.—Section 707(b)(2)(A)(ii)(II) of title 11, United States Code, is amended by adding at the end "Such monthly expenses may include, if applicable, contributions to an account of a qualified ABLE program to the extent such contributions are not excess contributions (as described in section 4973(h) of the Internal Revenue Code of 1986) and if the designated beneficiary of such account is a child, stepchild, grandchild, or stepgrandchild of the debtor.".

(c) RECORD OF DEBTOR'S INTEREST.—Section 521(c) of title 11, United States Code, is amended by inserting ", an interest in an account in a qualified ABLE program (as defined in section 529A(b) of such Code," after "Internal Revenue Code of 1986)".

11 USC 521 note.

(d) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to cases commenced under title 11, United States Code, on or after the date of the enactment of this Act.

SEC. 105. INVESTMENT DIRECTION RULE FOR 529 PLANS.

(a) AMENDMENTS RELATING TO INVESTMENT DIRECTION RULE FOR 529 PLANS.—

26 USC 529.

(1) Paragraph (4) of section 529(b) is amended by striking "may not directly or indirectly" and all that follows and inserting "may, directly or indirectly, direct the investment of any contributions to the program (or any earnings thereon) no more than 2 times in any calendar year.".

(2) The heading of paragraph (4) of section 529(b) is amended by striking "NO" and inserting "LIMITED".

26 USC 529 note.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2014.

TITLE II—OFFSETS

SEC. 201. CORRECTION TO WORKERS COMPENSATION OFFSET AGE.

(a) RETIREMENT AGE.—Section 224(a) of the Social Security Act (42 U.S.C. 424a(a)) is amended, in the matter preceding paragraph (1), by striking "the age of 65" and inserting "retirement age (as defined in section 216(l)(1))".

26 USC 424a note.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply with respect to any individual who attains 65 years of age on or after the date that is 12 months after the date of the enactment of this Act.

35602 Federal Register / Vol. 80, No. 119 / Monday, June 22, 2015 / Proposed Rules

airtraffic/air_traffic/publications/airspace_amendments/.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays at the office of the Eastern Service Center, Federal Aviation Administration, room 350, 1701 Columbia Avenue, College Park, Georgia 30337.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory circular No. 11–2A, Notice of Proposed Rulemaking distribution System, which describes the application procedure.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.9Y, Airspace Designations and Reporting Points, dated August 6, 2014, and effective September 15, 2014. FAA Order 7400.9Y is publicly available as listed in the **ADDRESSES** section of this proposed rule. FAA Order 7400.9Y lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to establish Class E airspace extending upward from 700 feet above the surface within a 6.8-mile radius of Poplarville-Pearl River County Airport, Poplarville, MS., providing the controlled airspace required to support the new RNAV (GPS) standard instrument approach procedures for Poplarville-Pearl River County Airport.

Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.9Y, dated August 6, 2014, and effective September 15, 2014, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal would be subject to an environmental analysis in accordance with FAA Order 1050.1E, "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

Lists of Subjects in 14 CFR Part 71:

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment:

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9Y, Airspace Designations and Reporting Points, dated August 6, 2014, effective September 15, 2014, is amended as follows:

Paragraph 6005. Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth

* * * * *

ASO MS E5 Poplarville, MS [Amended]

Poplarville-Pearl River County Airport
(lat. 30°47′13″ N., long. 89°30′16″ W.)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of Poplarville-Pearl River County Airport.

Issued in College Park, Georgia, on June 10, 2015.

Gerald E. Lynch,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2015–15133 Filed 6–19–15; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 25, 26, and 301

[REG–102837–15]

RIN 1545–BM68

Guidance Under Section 529A: Qualified ABLE Programs

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations under section 529A of the Internal Revenue Code that provide guidance regarding programs under The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014. Section 529A provides rules under which States or State agencies or instrumentalities may establish and maintain a new type of tax-favored savings program through which contributions may be made to the account of an eligible disabled individual to meet qualified disability expenses. These accounts also receive favorable treatment for purposes of certain means-tested Federal programs. In addition, these proposed regulations provide corresponding amendments to regulations under sections 511 and 513, with respect to unrelated business taxable income, sections 2501, 2503, 2511, 2642 and 2652, with respect to gift and generation-skipping transfer taxes, and section 6011, with respect to reporting requirements. This document also provides notice of a public hearing on these proposed regulations.

DATES: Comments must be received by September 21, 2015. Outlines of topics to be discussed at the public hearing scheduled for October 14, 2015, at 10 a.m., must be received by September 21, 2015.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–102837–15), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–102837–

15), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–102837–15). The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations under section 529A, Taina Edlund or Terri Harris, (202) 317–4541, or Sean Barnett, (202) 317–5800; concerning the proposed estate and gift tax regulations, Theresa Melchiorre, (202) 317–4643; concerning the reporting provisions under section 529A, Mark Bond, (202) 317–6844; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, call Regina Johnson, (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by August 21, 2015.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in the proposed regulations is in §§ 1.529A–2, 1.529A–5, 1.529A–6 and 1.529A–7. The collection of information flows from sections 529A(d)(1), (d)(2), (d)(3), (e)(1) and (e)(2) of the Internal Revenue Code (Code). Section 529A(d)(1) requires qualified ABLE programs to provide reports to the Secretary and to designated beneficiaries with respect to contributions, distributions, the return of excess contributions, and such other matters as the Secretary may require. Section 529(d)(2) provides that the Secretary shall make available to the public reports containing aggregate information, by diagnosis and other relevant characteristics, on contributions and distributions from the qualified ABLE program. Section 529(d)(3) requires qualified ABLE programs to provide notice to the Secretary upon the establishment of an ABLE account, containing the name and State of residence of the designated beneficiary and such other information as the Secretary may require. Section 529A(e)(1) requires that a disability certification with respect to certain individuals be filed with the Secretary. Section 529A(e)(2) provides that the disability certification include a certification to the satisfaction of the Secretary that the individual has a medically determinable physical or mental impairment that occurred before the date on which the individual attained age 26 and also include a copy of a physician's diagnosis. The burden under §§ 1.529A–5 and 1.529A–6 is reflected in the burden under the new Form 5498–QA, "ABLE Account Contribution Information," and the new Form 1099–QA, "Distributions from ABLE Accounts," respectively.

The expected recordkeepers are programs described in section 529A, established and maintained by a State or a State agency or instrumentality and individuals with ABLE accounts.

Estimated number of recordkeepers: 10,050.

Estimated average annual burden hours per recordkeeper: 1.6 hours.

Estimated total annual recordkeeping burden: 16,080.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and return information are confidential, as required by 26 U.S.C. 6103.

Background

The Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act of 2014, enacted on December 19, 2014, as part of The Tax Increase Prevention Act of 2014 (Pub. L. 113–295), added section 529A to the Internal Revenue Code. Congress recognized the special financial burdens borne by families raising children with disabilities and the fact that increased financial needs generally continue throughout the disabled person's lifetime. Section 101 of the ABLE Act confirms that one of the purposes of the Act is to "provide secure funding for disability-related expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits" otherwise available to those individuals, whether through private sources, employment, public programs, or otherwise. Prior to the enactment of the ABLE Act, various types of tax-advantaged savings arrangements existed, but none adequately served the goal of promoting saving for these financial needs. Section 529A allows the creation of a qualified ABLE program by a State (or agency or instrumentality thereof) under which a separate ABLE account may be established for a disabled individual who is the designated beneficiary and owner of that account. Generally, contributions to that account are subject to both an annual and a cumulative limit, and, when made by a person other than the designated beneficiary, are treated as non-taxable gifts to the designated beneficiary. Distributions made from an ABLE account for qualified disability expenses of the designated beneficiary are not included in the designated beneficiary's gross income. The earnings portion of distributions from the ABLE account in excess of the qualified disability expenses is includible in the gross income of the designated beneficiary. An ABLE account may be used for the long-term benefit and/or short-term needs of the designated beneficiary.

Section 103 of the ABLE Act, while not a tax provision, is critical to achieving the goal of the ABLE Act of providing financial resources for the benefit of disabled individuals. Because so many of the programs that provide essential financial, occupational, and other resources and services to disabled individuals are available only to persons whose resources and income do not exceed relatively low dollar limits, section 103 generally provides that a designated beneficiary's ABLE account (specifically, its account balance, contributions to the account, and

distributions from the account) is disregarded for purposes of determining the designated beneficiary's eligibility for and the amount of any assistance or benefit provided under certain means-tested Federal programs. However, in the case of the Supplemental Security Income program under title XVI of the Social Security Act, distributions for certain housing expenses are not disregarded, and the balance (including earnings) in an ABLE account is considered a resource of the designated beneficiary to the extent that balance exceeds $100,000. Section 103 also addresses the impact of an excess balance in an ABLE account on the designated beneficiary's eligibility under the Supplemental Security Income program and Medicaid.

Finally, section 104 of the ABLE Act addresses the treatment of ABLE accounts in bankruptcy proceedings.

Notice 2015–18, 2015–12 IRB 765 (March 23, 2015), provides that the section 529A guidance will confirm that the owner of the ABLE account is the designated beneficiary of the account, and that the person with signature authority over (if not the designated beneficiary of) the account may neither have nor acquire any beneficial interest in the ABLE account and must administer that account for the benefit of the designated beneficiary of that account. The Notice further provides that, in the event that state legislation creating ABLE programs enacted in accordance with section 529A prior to issuance of guidance does not fully comport with the guidance when issued, the Treasury Department and the IRS intend to provide transition relief to provide sufficient time to allow States to implement the changes necessary to avoid the disqualification of the program and of the ABLE accounts already established under the program.

The Treasury Department and the IRS reiterate that States that enact legislation creating an ABLE program in accordance with section 529A, and those individuals establishing ABLE accounts in accordance with such legislation, will not fail to receive the benefits of section 529A merely because the legislation or the account documents do not fully comport with the final regulations when they are issued. The Treasury Department and the IRS intend to provide transition relief to enable those State programs and accounts to be brought into compliance with the requirements in the final regulations, including providing sufficient time after issuance of the final regulations in order for changes to be implemented.

Explanation of Provisions

Qualification as an ABLE program

The proposed regulations provide guidance on the requirements a program must satisfy in order to be a qualified ABLE program described in section 529A. Specifically, in addition to other requirements, the program must: Be established and maintained by a State or a State's agency or instrumentality; permit the establishment of an ABLE account only for a designated beneficiary who is a resident of that State, or a State contracting with that State for purposes of the ABLE program; permit the establishment of an ABLE account only for a designated beneficiary who is an eligible individual; limit a designated beneficiary to only one ABLE account, wherever located; permit contributions to an ABLE account established to meet the qualified disability expenses of the account's designated beneficiary; limit the nature and amount of contributions that can be made to an ABLE account; require a separate accounting for the ABLE account of each designated beneficiary with an ABLE account in the program; limit the designated beneficiary to no more than two opportunities in any calendar year to provide investment direction, whether directly or indirectly, for the ABLE account; and prohibit the pledging of an interest in an ABLE account as security for a loan.

Because each qualified ABLE program will have significant administrative obligations beyond what is required for the administration of qualified tuition programs under section 529 (on which section 529A was loosely modeled), and because the frequency of distributions from the ABLE accounts is likely to be far greater than those made from qualified tuition accounts, the proposed regulations expressly allow a qualified ABLE program or any of its contractors to contract with one or more Community Development Financial Institutions (CDFIs) that commonly serve disabled individuals and their families to provide one or more required services. For example, a CDFI could provide screening and verification of disabilities, certification of the qualified purpose of distributions, debit card services to facilitate distributions, and social data collection and reporting. A CDFI also may be able to obtain grants to defray the cost of administering the program. In general, if certified by the Treasury Department, a CDFI may receive a financial assistance award from the CDFI Fund that was established within the Treasury Department in 1994 to promote community development in economically distressed communities through investments in CDFIs across the country.

Established and Maintained

The proposed regulations provide that a program is established by a State, or its agency or instrumentality, if the program is initiated by State statute or regulation, or by an act of a State official or agency with the authority to act on behalf of the State. A program is maintained by a State or its agency or instrumentality if: All the terms and conditions of the program are set by the State or its agency or instrumentality, and the State or its agency or instrumentality is actively involved on an ongoing basis in the administration of the program, including supervising all decisions relating to the investment of assets contributed to the program. The proposed regulations set forth factors that are relevant in determining whether a State, or its agency or instrumentality, is actively involved in the administration of the program. Included in the factors is the manner and extent to which it is permissible for the program to contract out for professional and financial services.

Establishment of an ABLE Account

The proposed regulations provide that, consistent with the definition of a designated beneficiary in section 529A(e)(3), the designated beneficiary of an ABLE account is the eligible individual who establishes the account or an eligible individual who succeeded the original designated beneficiary. The proposed regulations also provide that the designated beneficiary is the owner of that account.

The Treasury Department and the IRS recognize, however, that certain eligible individuals may be unable to establish an account themselves. Therefore, the proposed regulations clarify that, if the eligible individual cannot establish the account, the eligible individual's agent under a power of attorney or, if none, his or her parent or legal guardian may establish the ABLE account for that eligible individual. For purposes of these proposed regulations, because each of these individuals would be acting on behalf of the designated beneficiary, references to actions of the designated beneficiary, such as opening or managing the ABLE account, are deemed to include the actions of any other such individual with signature authority over the ABLE account. The proposed regulations also provide that, consistent with Notice 2015–18, a person other than the designated beneficiary with signature authority

over the account of the designated beneficiary may neither have, nor acquire, any beneficial interest in the account during the designated beneficiary's lifetime and must administer the account for the benefit of the designated beneficiary.

At the time an ABLE account is created for a designated beneficiary, the designated beneficiary must provide evidence that the designated beneficiary is an eligible individual as defined in section 529A(e)(1). Section 529A(e)(1) provides that an individual is an eligible individual for a taxable year if, during that year, either the individual is entitled to benefits based on blindness or disability under title II or XVI of the Social Security Act and the blindness or disability occurred before the date on which the individual attained age 26, or a disability certification meeting specified requirements is filed with the Secretary. If an individual is asserting he or she is entitled to benefits based on blindness or disability under title II or XVI of the Social Security Act and the blindness or disability occurred before the date on which the individual attained age 26, the proposed regulations provide that each qualified ABLE program may determine the evidence required to establish the individual's eligibility. For example, a qualified ABLE program could require the individual to provide a copy of a benefit verification letter from the Social Security Administration and allow the individual to certify, under penalties of perjury, that the blindness or disability occurred before the date on which the individual attained age 26.

Alternatively, the designated beneficiary must submit the disability certification when opening the ABLE account. Consistent with section 529A(e)(2), the proposed regulations provide that a disability certification is a certification by the designated beneficiary that he or she: (1) Has a medically determinable physical or mental impairment, which results in marked or severe functional limitations, and which (i) can be expected to result in death or (ii) has lasted or can be expected to last for a continuous period of not less than 12 months; or (2) is blind (within the meaning of section 1614(a)(2) of the Social Security Act) and that such blindness or disability occurred before the date on which the individual attained age 26. The certification must include a copy of the individual's diagnosis relating to the individual's relevant impairment or impairments, signed by a licensed physician (as defined in section 1861(r) of the Social Security Act, 42 U.S.C. 1395x(r)). Consistent with other IRS filing requirements, the proposed regulations also provide that the certification must be signed under penalties of perjury.

While evidence of an individual's eligibility based on entitlement to Social Security benefits should be objectively verifiable, the sufficiency of a disability certification that an individual is an eligible individual for purposes of section 529A might not be as easy to establish. Nevertheless, the Treasury Department and the IRS wish to facilitate an eligible individual's ability to establish an ABLE account without undue delay. Therefore, the proposed regulations provide that an eligible individual must present the disability certification, accompanied by the diagnosis, to the qualified ABLE program to demonstrate eligibility to establish an ABLE account. The proposed regulations further provide that the disability certification will be deemed to be filed with the Secretary once the qualified ABLE program has received the disability certification or a disability certification has been deemed to have been received under the rules of the qualified ABLE program, which information the qualified ABLE program, as discussed further below, will file with the IRS in accordance with the filing requirements under § 1.529A–5(c)(2)(iv).

Disability Determination

Consistent with section 529A(g)(4), the Treasury Department and the IRS have consulted with the Commissioner of Social Security regarding disability certifications and determinations of disability. For purposes of the disability certification, the proposed regulations provide that the phrase "marked and severe functional limitations" means the standard of disability in the Social Security Act for children claiming benefits under the Supplemental Security Income for the Aged, Blind, and Disabled (SSI) program based on disability, but without regard to the age of the individual. This phrase refers to a level of severity of an impairment that meets, medically equals, or functionally equals the listings in the Listing of Impairments (the listings) in appendix 1 of subpart P of 20 CFR part 404. (*See* 20 CFR 416.906, 416.924 and 416.926a). This listing developed and used by the Social Security Administration describes for each of the major body systems impairments that cause marked and severe functional limitations. Most body system sections are in two parts: an introduction, followed by the specific listings. The introduction contains information relevant to the use of the listings with respect to that body system, such as examples of common impairments in the body system and definitions used in the listings for that body system. The introduction may also include specific criteria for establishing a diagnosis, confirming the existence of an impairment, or establishing that an impairment satisfies the criteria of a particular listing with respect to the body system. The specific listings that follow the introduction for each body system specify the objective medical and other findings needed to satisfy the criteria of that listing. Most of the listed impairments are permanent or expected to result in death, although some listings state a specific period of time for which an impairment will meet the listing.

An impairment is medically equivalent to a listing if it is at least equal in severity and duration to the severity and duration of any listing. An impairment that does not meet or medically equal any listing may result in limitations that functionally equal the listings if it results in marked limitations in two domains of functioning or an extreme limitation in one domain of functioning, as explained in 20 CFR 416.926a. In addition, the proposed regulations provide that certain conditions, specifically those listed in the Compassionate Allowances Conditions list maintained by the Social Security Administration, are deemed to meet the requirements of an impairment sufficient for a disability certification without a physician's diagnosis, provided that the condition was present before the date on which the individual attained age 26. The proposed regulations also provide the flexibility from time to time to identify additional impairments that will be deemed to meet these requirements. The Treasury Department and the IRS request comments on what other conditions should be deemed to meet the requirements of section 529A(e)(2)(A)(i).

Change in Eligible Individual Status

The Treasury Department and the IRS recognize that there may be circumstances in which a designated beneficiary ceases to be an eligible individual but subsequently regains that status. Consequently, the Treasury Department and the IRS believe that it is appropriate to permit continuation of the ABLE account (albeit with some changes in the applicable rules) during the period in which a designated beneficiary is not an eligible individual as long as the designated beneficiary was an eligible individual when the account was established. Therefore, if at any time a designated beneficiary no longer meets the definition of an eligible

individual, his or her ABLE account remains an ABLE account to which all of the provisions of the ABLE Act continue to apply, and no (taxable) distribution of the account balance is deemed to occur. However, the proposed regulations provide that, beginning on the first day of the taxable year following the taxable year in which the designated beneficiary ceased to be an eligible individual, no contributions to the ABLE account may be accepted. If the designated beneficiary subsequently again becomes an eligible individual, then additional contributions may be accepted subject to the applicable annual and cumulative limits. In this way, the Treasury Department and the IRS intend to prevent a deemed distribution of the ABLE account (and preserve the account's qualification as an ABLE account for all purposes) if, for example, the disease that caused the impairment goes into a temporary remission, and to preserve the ABLE account with its tax-free distributions for qualified disability expenses if the impairment resumes and once again qualifies the designated beneficiary as an eligible individual. Note that expenses will not be qualified disability expenses if they are incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of § 1.529A–1(b)(9)(A) or § 1.529A–2(e)(1)(i).

The proposed regulations provide flexibility regarding annual recertifications. A qualified ABLE program generally must require annual recertifications that the designated beneficiary continues to satisfy the definition of an eligible individual. However, a qualified ABLE program may deem an annual recertification to have been provided in appropriate circumstances. For example, a qualified ABLE program may permit certification by an individual that he or she has a permanent disability to be considered to meet the annual requirement to present a certification to the qualified ABLE program. In other cases, a program may require all of the same evidence needed for the initial disability certification when the account was established, may require a statement under penalties of perjury that nothing has changed that would change the original disability certification, or may incorporate some other method of ensuring that the designated beneficiary continuously qualifies as an eligible individual. Alternatively, a qualified ABLE program may identify certain impairments or categories of impairments for which recertifications will be deemed to have been made annually to the qualified ABLE program unless and until the qualified ABLE program provides otherwise (for example, if a cure is discovered for a disease that causes an impairment). An initial certification or recertification that meets the requirements of the qualified ABLE program will be deemed to have met the requirement of section 529A(e)(1)(B). The Treasury Department and the IRS request comments regarding how a qualified ABLE program will be able to demonstrate eligibility in subsequent years if it allows deemed recertifications.

Contributions to an ABLE Account

The proposed regulations provide that, as a general rule, all contributions to an ABLE account must be made in cash. The proposed regulations provide that a qualified ABLE program may accept cash contributions in the form of cash or a check, money order, credit card payment, or other similar method of payment. In addition, the proposed regulations provide that the total contributions to an ABLE account in the designated beneficiary's taxable year, other than amounts received in rollovers and program-to-program transfers, must not exceed the amount of the annual per-donee gift tax exclusion under section 2503(b) in effect for that calendar year (currently $14,000) in which the designated beneficiary's taxable year begins. Finally, a qualified ABLE program must provide adequate safeguards to ensure that total contributions to an ABLE account (including the proceeds from a preexisting ABLE account) do not exceed that State's limit for aggregate contributions under its qualified tuition program.

To implement these requirements, the proposed regulations provide that a qualified ABLE program must return contributions in excess of the annual gift tax exclusion (excess contributions) to the contributor(s), along with all net income attributable to those excess contributions. Similarly, the proposed regulations also require the return of all contributions, along with all net income attributable to those contributions, that caused an ABLE account to exceed the limit established by the State for its qualified tuition program (excess aggregate contributions). If an excess contribution or excess aggregate contribution is returned to a contributor other than the designated beneficiary, the qualified ABLE program must notify the designated beneficiary of such return at the time of the return. The proposed regulations further provide that such returns of excess contributions and excess aggregate contributions must be received by the contributor(s) on or before the due date (including extensions) of the designated beneficiary's income tax return for the year in which the excess contributions were made or in the year the excess aggregate contributions caused amounts in the ABLE account to exceed the limit in effect under section 529A(b)(6), respectively. The proposed regulations provide rules for determining the net income attributable to a contribution made to an ABLE account, and also provide that these excess contributions and excess aggregate contributions must be returned to contributors on a last-in, first-out basis. In the case of contributions that exceed the annual gift tax exclusion, a failure to return such excess contributions within the time period discussed in this paragraph will result in the imposition on the designated beneficiary of a 6 percent excise tax under section 4973(a)(6) on the amount of excess contributions. As part of a planned revision of IRA regulations, the Treasury Department and the IRS intend to propose regulations under section 4973 to reflect that ABLE accounts are subject to section 4973.

Application of Gift Tax to Contributions to an ABLE Account

Gift tax consequences may arise from contributions to an ABLE account even though the aggregate amount of such contributions to an ABLE account from all contributors may not exceed the annual exclusion amount under section 2503(b) applicable to any single contributor. Specifically, if a contributor makes other gifts to a designated beneficiary in addition to the gift to the designated beneficiary's ABLE account, the contributor's total gifts made to the designated beneficiary in that year could give rise to a gift tax liability.

Contributions may be made by any person. The term *person* is defined in section 7701(a)(1) to include an individual, trust, estate, partnership, association, company, or corporation. Therefore, for purposes of section 529A(b)(1)(A), a person would include an individual and each of the entities described in section 7701(a)(1). Under section 2501(a)(1), the gift tax applies only to gifts by individuals, but it also applies to gifts made directly or indirectly. As a result, a gift made by a trust, estate, association, company, corporation, or partnership is treated as having been made by the owner(s) of that entity. For example, a gift from a corporation to a designated beneficiary is treated as a gift from the shareholders of the corporation to the designated beneficiary. *See Example (1)* of

§ 25.2511–1(h). Accordingly, the proposed regulations provide that, for purposes of sections 529A(b)(1)(A) and 529A(c)(1)(C), a contribution by a corporation is treated as a gift by its shareholders and a contribution by a partnership is treated as a gift by its partners. This rule also applies to trusts, estates, associations, and companies. *See* section 2511 and § 25.2511–1(c).

The legislative history of section 529A suggests that a "person" described in section 529A(b)(1)(A) includes the designated beneficiary of an ABLE account. *See* 160 Cong. Rec. H7051, H8317, H8318, H8321, H8322 (2014). A person may transfer his or her property into an account, such as a bank account or a trust, for his or her benefit and retain dominion and control over the property transferred. Because an individual cannot make a transfer of property to himself or herself and a transfer of property is a fundamental requirement for a completed gift, this type of transfer from a person's own property cannot be treated as a completed gift for tax purposes. *See* § 25.2511–2(b) and (c). Therefore, the proposed regulations provide that any contribution by a designated beneficiary to a qualified ABLE program benefitting the designated beneficiary is not treated as a completed gift. Because the designated beneficiary remains the owner of the account for purposes of chapter 12, if the designated beneficiary transfers the funds in the account to another person as permitted under these proposed regulations, the designated beneficiary making the transfer is the donor for purposes of chapter 12 and the transferor for generation-skipping transfer tax purposes of chapter 13.

Distributions

If distributions from an ABLE account do not exceed the designated beneficiary's qualified disability expenses, no amount is includible in the designated beneficiary's gross income. Otherwise, the earnings portion of the distributions from the ABLE account as determined in the manner provided under section 72, reduced by the product of such earnings portion and the ratio of the amount of the distributions for qualified disability expenses to total distributions, is includible in the gross income of the designated beneficiary to the extent not otherwise excluded from gross income. As required by section 529A(c)(1)(D), the proposed regulations provide that, for purposes of applying section 72 to amounts distributed from an ABLE account: (1) all distributions during a taxable year are treated as one distribution; and (2) the value of the contract, income on the contract, and investment in the contract are computed as of the close of the calendar year in which the designated beneficiary's taxable year begins.

The proposed regulations also provide that, in addition to the income tax on the portion of a distribution included in gross income, an additional tax of 10 percent of the amount includible in gross income is imposed. This additional tax does not apply, however, to distributions on or after the designated beneficiary's death or to returns of excess contributions, excess aggregate contributions, or contributions to additional purported ABLE accounts made by the due date (including extensions) of the designated beneficiary's tax return for the year in which the relevant contributions were made.

Section 529A(c)(1)(C) addresses the tax consequences of the rollover of an ABLE account to an ABLE account for the same designated beneficiary maintained under a different State's qualified ABLE program, as well as a change of designated beneficiary. The proposed regulations describe with respect to these two situations the circumstances in which amounts will not be includible in income. The first is any change of designated beneficiary if the new designated beneficiary is both (1) an eligible individual for his or her taxable year in which the change is made and (2) a sibling of the former designated beneficiary. For purposes of these proposed regulations, a sibling also includes step-siblings and half-siblings, whether by blood or by adoption. The proposed regulations provide that a qualified ABLE program must permit a change of designated beneficiary, as long as the change is made prior to the death of the former designated beneficiary and as long as the successor designated beneficiary is an eligible individual. Because the designated beneficiary will be subject to gift and/or generation-skipping transfer tax if the successor designated beneficiary is not a sibling of the designated beneficiary, the Treasury Department and the IRS request comments regarding whether the final regulations should permit States to require that a successor designated beneficiary also must be a sibling of the designated beneficiary.

The second situation in which a distribution is not included in gross income arises if a distribution to the designated beneficiary of the ABLE account is paid, not later than the 60th day after the date of the distribution, to another (or the same) ABLE account for the benefit of the designated beneficiary or for the benefit of an eligible individual who is a sibling of the designated beneficiary. However, the preceding sentence does not apply to such a distribution that occurs within 12 months of a previous rollover to another ABLE account for the same designated beneficiary.

The Treasury Department and the IRS have been asked whether a qualified tuition account under section 529 may be rolled into an ABLE account for the same designated beneficiary free of tax. Because such a distribution to the ABLE account would not constitute a qualified higher education expense under section 529, the Treasury Department and the IRS do not believe they have the authority to allow such a transfer on a tax-free basis.

In addition, the proposed regulations authorize a qualified ABLE program to allow program-to-program transfers to effectuate a change of qualified ABLE program or a change of designated beneficiary to another eligible individual. Such a direct transfer is neither a distribution taxed in accordance with section 72 nor an excess contribution. A program-to-program transfer also could be accomplished, if permitted by the qualified ABLE program, through a check delivered to the designated beneficiary but negotiable only by the qualified State program under which the new ABLE account is being established.

The Treasury Department and the IRS recognize that moving funds by use of a program-to-program transfer may be preferable to moving them by a rollover because a rollover, even if made within the permissible 60-day period, may jeopardize the designated beneficiary's eligibility for certain benefits under various means-tested programs. Moreover, a direct program-to-program transfer could facilitate the efficient transfer of all relevant information regarding the application of contribution limits and the total amount of accumulated earnings that will also apply to the new account. The Treasury Department and the IRS request comments as to whether and to what extent a qualified ABLE program should be permitted to require that funds from another State's ABLE program be accepted only through program-to-program transfers.

Qualified Disability Expenses

Section 529A(e)(5) defines a *qualified disability expense.* Consistent with that subsection, the proposed regulations provide that qualified disability expenses are expenses that relate to the designated beneficiary's blindness or disability and are for the benefit of that

designated beneficiary in maintaining or improving his or her health, independence, or quality of life. Such expenses include, but are not limited to, expenses for education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses that may be identified from time to time in future guidance published in the Internal Revenue Bulletin. As previously stated, expenses incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of the proposed regulations are not qualified disability expenses.

In order to implement the legislative purpose of assisting eligible individuals in maintaining or improving their health, independence, or quality of life, the Treasury Department and the IRS conclude that the term "qualified disability expenses" should be broadly construed to permit the inclusion of basic living expenses and should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to the eligible individual. For example, expenses for common items such as smart phones could be considered qualified disability expenses if they are an effective and safe communication or navigation aid for a child with autism. The Treasury Department and the IRS request comments regarding what types of expenses should be considered qualified disability expenses and under what circumstances. The proposed regulations authorize the identification of additional types of qualified disability expenses in guidance published in the Internal Revenue Bulletin. *See* § 601.601(d)(2). A qualified ABLE program must establish safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions, and to permit the identification of the amounts distributed for housing expenses as that term is defined for purposes of the Supplemental Security Income program of the Social Security Administration.

Limitation on Number of ABLE Accounts of a Designated Beneficiary

Section 529A(c)(4) generally provides that, except with respect to certain rollovers, once an ABLE account has been established for a designated beneficiary, no account subsequently established for that same designated beneficiary may qualify as an ABLE account. The proposed regulations provide that, except with respect to rollovers and program-to-program transfers, no designated beneficiary may have more than one ABLE account in existence at the same time, but provides that a prior ABLE account that has been closed does not prohibit the subsequent creation of another ABLE account for the same designated beneficiary. A qualified ABLE program must obtain a verification from the eligible individual, signed under penalties of perjury, that he or she has no other ABLE account (except in the case of a rollover or program-to-program transfer). The proposed regulations provide that, in the event that any additional ABLE account is opened for a designated beneficiary with an ABLE account already in existence, only the first such account created for that designated beneficiary qualifies as an ABLE account, and each other account is treated for all purposes as being an account of the designated beneficiary that is not an ABLE account under a qualified ABLE program. The proposed regulations also provide, however, that a return, in accordance with the rules that apply to returns of excess contributions and excess aggregate contributions under § 1.529A–2(g)(4), of the entire balance of a second or other subsequent account received by the contributor(s) on or before the due date (including extensions) for filing the designated beneficiary's income tax return for the year in which the account was opened and contributions to the second or subsequent account were made will not be treated as a gift or distribution to the designated beneficiary for purposes of section 529A.

The prohibition of multiple ABLE accounts, however, does not apply to prevent a timely rollover or program-to-program transfer of the designated beneficiary's account to an ABLE account under a different qualified ABLE program.

Residency Requirements

Consistent with section 529A(b)(1)(C), the proposed regulations require that an ABLE account for a designated beneficiary may be established only under the qualified ABLE program of the State in which that designated beneficiary is a resident or with which the State of the designated beneficiary's residence has contracted for the provision of ABLE accounts. If a State does not establish and maintain a qualified ABLE program, it may contract with another State to provide an ABLE program for its residents. The statute is silent as to whether a designated beneficiary must move his or her existing ABLE account when the designated beneficiary changes his or her residence. The Treasury Department and the IRS are concerned about imposing undue administrative burdens and costs on designated beneficiaries who frequently change State residency, such as members of military families. Therefore, the proposed regulations provide that a qualified ABLE program may permit a designated beneficiary to continue to maintain his or her ABLE account that was created in that State, even after the designated beneficiary is no longer a resident of that State. However, in order to enforce the one ABLE account limitation and in accordance with section 529A(g)(1), the proposed regulations provide that, other than in the case of a rollover or a program-to-program transfer of a designated beneficiary's ABLE account, a qualified ABLE program must require the designated beneficiary to verify, under penalties of perjury, when creating an ABLE account that the account being established is the designated beneficiary's only ABLE account. For example, the eligible individual could be required to check a box providing such verification on a form used to establish the account. The Treasury Department and the IRS are concerned that without such safeguards individuals could inadvertently establish two accounts with adverse tax consequences due to the loss of ABLE account status for the second account and expect qualified ABLE programs to establish safeguards to ensure that the required limit of one ABLE account per designated beneficiary is not violated.

Investment Direction

Section 529A(b)(4) states that a program shall not be treated as a qualified ABLE program unless it provides that the designated beneficiary may directly or indirectly direct the investment of any contributions to the program or any earnings thereon no more than two times in any calendar year. A program will not violate this requirement merely because it permits a designated beneficiary or a person with signature authority over a designated beneficiary's account to serve as one of the program's board members or employees, or as a board member or employee of a contractor that the program hires to perform administrative services.

Cap on Contributions

Section 529A(b)(6) provides that a qualified ABLE program must provide adequate safeguards to prevent aggregate

contributions on behalf of a designated beneficiary in excess of the limit established by the State under section 529(b)(6) relating to Qualified State Tuition Programs. The proposed regulations provide a safe harbor that permits a qualified ABLE program to satisfy this requirement regarding total cumulative contributions if the program prohibits any additional contributions to an account as soon as the account balance reaches the specified contribution limit under such State's program established under section 529. Once the account balance falls below the prescribed limit, contributions may resume, subject to the same limitation. The Treasury Department and the IRS believe that recommencement of contributions is appropriate based on the nature and purposes of the ABLE program.

Gift and Generation-Skipping Transfer (GST) Taxes

The proposed regulations provide that contributions to an ABLE account by a person other than the designated beneficiary are treated as completed gifts to the designated beneficiary of the account, and that such gifts are neither gifts of a future interest nor a qualified transfer under section 2503(e). Accordingly, no distribution from an ABLE account to the designated beneficiary of that account is treated as a taxable gift. Finally, neither gift nor GST taxes apply to the change of designated beneficiary of an ABLE account, as long as the new designated beneficiary is an eligible individual who is a sibling of the former designated beneficiary.

Distribution on Death

The proposed regulations provide that, upon the death of the designated beneficiary, all amounts remaining in the ABLE account are includible in the designated beneficiary's gross estate for purposes of the estate tax. *See* section 2031. Further, the proposed regulations cross-reference section 2053 for purposes of determining the deductibility by the designated beneficiary's estate of amounts payable from the ABLE account to satisfy claims by creditors such as a State and also cross-reference section 2652(a)(1) for treatment of the deceased designated beneficiary as the transferor of any property remaining in the ABLE account that may pass to a beneficiary.

Pursuant to section 529A(f), a qualified ABLE program must provide that, upon the designated beneficiary's death, any State may file a claim (either with the person with signature authority over the ABLE account or the executor of the designated beneficiary's estate as defined in section 2203) for the amount of the total medical assistance paid for the designated beneficiary under the State's Medicaid plan after the establishment of the ABLE account. The amount paid in satisfaction of such a claim is not a taxable distribution from the ABLE account. Further, the amount is to be paid only after the payment of all outstanding payments due for the qualified disability expenses of the designated beneficiary and is to be reduced by the amount of all premiums paid by or on behalf of the designated beneficiary to a Medicaid Buy-In program under that State's Medicaid plan.

Unrelated Business Taxable Income and Filing Requirements

A qualified ABLE program generally is exempt from income taxation. A qualified ABLE program, however, is subject to the taxes imposed by section 511 relating to the imposition of tax on unrelated business taxable income ("UBTI"). For purposes of this tax, certain administrative and other fees do not constitute unrelated business income to the ABLE program. A qualified ABLE program is not required to file Form 990, "Return of Organization Exempt From Income Tax," but will be required to file Form 990–T, "Exempt Organization Business Income Tax Return," if a filing would be required under the rules of §§ 1.6012–2(e) and 1.6012–3(a)(5) if the ABLE program were an organization described in those sections.

Reporting Requirements

The proposed regulations set forth recordkeeping and reporting requirements. A qualified ABLE program must maintain records that enable the program to account to the Secretary with respect to all contributions, distributions, returns of excess contributions or additional accounts, income earned, and account balances for any designated beneficiary's ABLE account. In addition, a qualified ABLE program must report to the Secretary the establishment of each ABLE account, including the name and residence of the designated beneficiary, and other relevant information regarding the account that is included on the new Form 5498–QA, "ABLE Account Contribution Information." It is anticipated that the qualified ABLE program will report if the eligible individual has presented an adequate disability certification, accompanied by a diagnosis, to demonstrate eligibility to establish an account. Information regarding distributions will be reported on the new Form 1099–QA, "Distributions from ABLE Accounts." The proposed regulations contain more detail on how the information must be reported.

In addition, section 529A(b)(3) requires that a qualified ABLE program provide separate accounting for each designated beneficiary. Separate accounting requires that contributions for the benefit of a designated beneficiary, as well as earnings attributable to those contributions, are allocated to that designated beneficiary's account. Whether or not a program ordinarily provides each designated beneficiary an annual account statement showing the income and transactions related to the account, the program must give this information to the designated beneficiary upon request.

Section 529A(d)(4) provides that States are required to submit electronically to the Commissioner of Social Security, on a monthly basis and in the manner specified by the Commissioner of Social Security, statements on relevant distributions and account balances from all ABLE accounts. The report of the Committee on Ways and Means (H.R. Rep. No. 113–614, pt. 1, at 15 (2014)) indicates that States should work with the Commissioner of Social Security to identify data elements for the monthly reports, including the type of qualified disability expenses.

Effective Date/Applicability Date

These regulations are proposed to be effective as of the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. These rules, when adopted as final regulations, will apply to taxable years beginning after December 31, 2014. The reporting requirements of §§ 1.529A–5 through 1.529A–7 will apply to information returns required to be filed, and payee statements required to be furnished, after December 31, 2015. Until the issuance of final regulations, taxpayers and qualified ABLE programs may rely on these proposed regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation and, because the regulation does not impose a collection of information on small

entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. This regulation, if adopted, would primarily affect states and individuals and therefore would not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are timely submitted to the IRS as prescribed in this preamble under the "Addresses" heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available at *www.regulations.gov* or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written or electronic comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

A public hearing has been scheduled for October 14, 2015, beginning at 10:00 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written comments by September 21, 2015, and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by September 21, 2015. Submit a signed paper original and eight (8) copies or an electronic copy. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these regulations are Terri Harris and Sean Barnett, Office of Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the Treasury Department and the IRS participated in the development of these regulations.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 25

Gift taxes, Reporting and recordkeeping requirements.

26 CFR Part 26

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1, 25, 26 and 301 are proposed to be amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *

Sections 1.529A–1 through 1.529A–7 also issued under 26 U.S.C. 529A(g). * * *

■ **Par. 2.** Section 1.511–2 is amended by adding paragraph (e) to read as follows:

§ 1.511–2 Organizations subject to tax.

* * * * *

(e) *ABLE programs*—(1) *Unrelated business taxable income.* A qualified ABLE program described in section 529A generally is exempt from income taxation, but is subject to taxes imposed by section 511 relating to the imposition of tax on unrelated business income. A qualified ABLE program is required to file Form 990–T, "Exempt Organization Business Income Tax Return," if such filing would be required under the rules of §§ 1.6012–2(e) and 1.6012–3(a)(5) if the ABLE program were an organization described in those sections.

(2) *Effective/applicability dates.* This paragraph (e) applies to taxable years beginning after December 31, 2014.

■ **Par. 3.** Section 1.513–1 is amended by adding *Example 4* to paragraph (d)(4)(i) to read as follows:

§ 1.513–1 Definition of unrelated trade or business.

* * * * *

(d) * * *

(4) * * *

(i) * * *

Example 4. P is a qualified ABLE program described in section 529A. P receives amounts in order to open or maintain ABLE accounts, as administrative or maintenance fees and other similar fees including service charges. Because the payment of these amounts are essential to the operation of a qualified ABLE program, the income generated from the activity does not constitute gross income from an unrelated trade or business.

* * * * *

■ **Par. 4.** An undesignated center heading is added immediately following § 1.528–10 and §§ 1.529A–0 through 1.529A–7 are added to read as follows:

Sec.

* * * * *

Qualified Able Programs

1.529A–0 Table of contents.
1. 529A–1 Exempt status of qualified ABLE program and definitions.
1.529A–2 Qualified ABLE program.
1.529A–3 Tax treatment.
1.529A–4 Gift, estate, and generation-skipping transfer taxes.
1.529A–5 Reporting of the establishment of and contributions to an ABLE account.
1.529A–6 Reporting of distributions from and termination of an ABLE account.
1.529A–7 Electronic furnishing of statements to designated beneficiaries and contributors.

* * * * *

§ 1.529A–0 Table of contents.

This section lists the following captions contained in §§ 1.529A–1 through 1.529A–7.

§ 1.529A–1 Exempt status of qualified ABLE program and definitions.

(a) In general.
(b) Definitions.
(1) ABLE account.
(2) Contracting State.
(3) Contribution.
(4) Designated beneficiary.
(5) Disability certification.
(6) Distribution.
(7) Earnings.
(8) Earnings ratio.
(9) Eligible individual.
(10) Excess contribution.
(11) Excess aggregate contribution.
(12) Investment in the account.
(13) Member of the family.
(14) Program-to-program transfer.
(15) Qualified ABLE program.
(16) Qualified disability expenses.
(17) Rollover.

(c) Effective/applicability date.

§ 1.529A–2 Qualified ABLE program.

(a) In general.
(b) Established and maintained by a State or agency or instrumentality of a State.
(1) Established.
(2) Maintained.
(3) Community Development Financial Institutions (CDFIs).
(c) Establishment of an ABLE account.
(1) In general.
(2) Only one ABLE account.
(3) Beneficial interest.
(d) Eligible individual.
(1) In general.
(2) Frequency of recertification.
(3) Loss of qualification as an eligible individual.
(e) Disability certification.
(1) In general.
(2) Marked and severe functional limitations.
(3) Compassionate allowance list.
(4) Additional guidance.
(5) Restriction on use of certification.
(f) Change of designated beneficiary.
(g) Contributions.
(1) Permissible property.
(2) Annual contributions limit.
(3) Cumulative limit.
(4) Return of excess contributions and excess aggregate contributions.
(h) Qualified disability expenses.
(1) In general.
(2) Example.
(i) Separate accounting.
(j) Program-to-program transfers.
(k) Carryover of attributes.
(l) Investment direction.
(m) No pledging of interest as security.
(n) No sale or exchange.
(o) Change of residence.
(p) Post-death payments.
(q) Reporting requirements.
(r) Effective/applicability date.

§ 1.529A–3 Tax treatment.

(a) Taxation of distributions.
(b) Additional exclusions from gross income.
(1) Rollover.
(2) Program-to-program transfers.
(3) Change in designated beneficiary.
(4) Payments to creditors post-death.
(c) Computation of earnings.
(d) Additional tax on amounts includible in gross income.
(1) In general.
(2) Exceptions.
(e) Tax on excess contributions.
(f) Filing requirements.
(g) Effective/applicability date.

§ 1.529A–4 Gift, estate, and generation-skipping transfer taxes.

(a) Contributions.
(1) In general.
(2) Generation-skipping transfer (GST) tax.
(3) Designated beneficiary as contributor.
(b) Distributions.
(c) Change of designated beneficiary.
(d) Transfer tax on death of designated beneficiary.
(e) Effective/applicability date.

§ 1.529A–5 Reporting of the establishment of and contributions to an ABLE account.

(a) In general.
(b) Additional definitions.
(1) Filer.
(2) TIN.
(c) Requirement to file return.
(1) Form of return.
(2) Information included on return.
(3) Time and manner of filing return.
(d) Requirement to furnish statement.
(1) In general.
(2) Time and manner of furnishing statement.
(3) Copy of Form 5498–QA.
(e) Request for TIN of designated beneficiary.
(f) Penalties.
(1) Failure to file return.
(2) Failure to furnish TIN.
(g) Effective/applicability date.

§ 1.529A–6 Reporting of distributions from and termination of an ABLE account.

(a) In general.
(b) Requirement to file return.
(1) Form of return.
(2) Information included on return.
(3) Time and manner of filing return.
(c) Requirement to furnish statement.
(1) In general.
(2) Time and manner of furnishing statement.
(3) Copy of Form 1099–QA.
(d) Request for TIN of contributor(s).
(e) Penalties.
(1) Failure to file return.
(2) Failure to furnish TIN.
(f) Effective/applicability date.

§ 1.529A–7 Electronic furnishing of statements to designated beneficiaries and contributors.

(a) Electronic furnishing of statements.
(1) In general.
(2) Consent.
(3) Required disclosures.
(4) Format.
(5) Notice.
(6) Access period.
(b) Effective/applicability date.

§ 1.529A–1 Exempt status of qualified ABLE program and definitions.

(a) *In general.* A qualified ABLE program described in section 529A is exempt from income tax, except for the tax imposed under section 511 on the unrelated business taxable income of that program.

(b) *Definitions.* For purposes of section 529A, this section and §§ 1.529A–2 through 1.529A–7—

(1) *ABLE account* means an account established under a qualified ABLE program and owned by the designated beneficiary of that account.

(2) *Contracting State* means a State without a qualified ABLE program of its own, which, in order to make ABLE accounts available to its residents who are eligible individuals, contracts with another State having such a program.

(3) *Contribution* means any payment directly allocated to an ABLE account for the benefit of a designated beneficiary.

(4) *Designated beneficiary* means the individual who is the owner of the ABLE account and who either established the account at a time when he or she was an eligible individual or who has succeeded the former designated beneficiary in that capacity (successor designated beneficiary). If the designated beneficiary is not able to exercise signature authority over his or her ABLE account or chooses to establish an ABLE account but not exercise signature authority, references to the designated beneficiary with respect to his or her actions include actions by the designated beneficiary's agent under a power of attorney or, if none, a parent or legal guardian of the designated beneficiary.

(5) *Disability certification* means a certification deemed sufficient by the Secretary to establish a certain level of physical or mental impairment that meets the requirements described in § 1.529A–2(e).

(6) *Distribution* means any payment from an ABLE account. A *program-to-program transfer* is not a distribution.

(7) *Earnings* attributable to an account are the excess of the total account balance on a particular date over the *investment in the account* as of that date.

(8) *Earnings ratio* means the amount of earnings attributable to the account as of the last day of the calendar year in which the designated beneficiary's taxable year begins, divided by the total account balance on that same date, after taking into account all distributions made during that calendar year and all contributions received during that same year other than those (if any) returned in accordance with § 1.529A–2(g)(4).

(9) *Eligible individual* for a taxable year means an individual who either:

(i) Is entitled during that taxable year to benefits based on blindness or disability under title II or XVI of the Social Security Act, provided that such

blindness or disability occurred before the date on which the individual attained age 26 (and, for this purpose, an individual is deemed to attain age 26 on his or her 26th birthday); or

(ii) Is the subject of a disability certification filed with the Secretary for that taxable year.

(10) *Excess contribution* means the amount by which the amount contributed during the taxable year of the designated beneficiary to an ABLE account exceeds the limit in effect under section 2503(b) for the calendar year in which the taxable year of the designated beneficiary begins.

(11) *Excess aggregate contribution* means the amount contributed during the taxable year of the designated beneficiary that causes the total of amounts contributed since the establishment of the ABLE account (or of an ABLE account for the same designated beneficiary that was rolled into the current ABLE account) to exceed the limit in effect under section 529(b)(6). In the context of the safe harbor in § 1.529A–2(g)(3), however, excess aggregate contribution means a contribution that causes the account balance to exceed the limit in effect under section 529(b)(6).

(12) *Investment in the account* means the sum of all contributions made to the account, reduced by the aggregate amount of contributions included in distributions, if any, made from the account. In the case of a rollover into an ABLE account the amount included as investment in the recipient account is not the full amount of the rollover contribution, but instead is equal to the amount of the rollover contribution that constituted the investment in the account from which the rollover was made.

(13) *Member of the family* means a sibling, whether by blood or by adoption. Such term includes a brother, sister, stepbrother, stepsister, half-brother, and half-sister.

(14) *Program-to-program transfer* means the direct transfer of the entire balance of an ABLE account into an ABLE account of the same designated beneficiary in which the transferor ABLE account is closed upon completion of the transfer, or of part or all of the balance to an ABLE account of another eligible individual who is a member of the family of the former designated beneficiary, without any intervening distribution or deemed distribution to the designated beneficiary.

(15) *Qualified ABLE program* means a program established and maintained by a State, or agency or instrumentality of a State, under which an ABLE account may be established by and for the benefit of the account's designated beneficiary who is an eligible individual, and that meets the requirements described in § 1.529A–2.

(16) *Qualified disability expenses* means any expenses incurred at a time when the designated beneficiary is an eligible individual that relate to the blindness or disability of the designated beneficiary of an ABLE account, including expenses that are for the benefit of the designated beneficiary in maintaining or improving his or her health, independence, or quality of life. *See* § 1.529A–2(h). Any expenses incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of § 1.529–1(b)(9)(A) or § 1.529–2(e)(1)(i) are not qualified disability expenses.

(17) *Rollover* means a contribution to an ABLE account of a designated beneficiary (or of an eligible individual who is a member of the family of the designated beneficiary) of all or a portion of an amount withdrawn from the designated beneficiary's ABLE account, provided the contribution is made within 60 days of the date of the withdrawal and, in the case of a rollover to the designated beneficiary's ABLE account, no rollover has been made to an ABLE account of the designated beneficiary within the prior 12 months.

(c) *Effective/applicability date.* This section applies to taxable years beginning after December 31, 2014.

§ 1.529A–2 Qualified ABLE program.

(a) *In general.* A qualified ABLE program is a program established and maintained by a State, or an agency or instrumentality of a State, that satisfies all of the requirements of this section and under which—

(1) An ABLE account may be established for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account;

(2) The designated beneficiary must be a resident of such State or a resident of a Contracting State (as residence is determined under the law of the State of the designated beneficiary's residence);

(3) A designated beneficiary is limited to only one ABLE account at a time except as otherwise provided with respect to program-to-program transfers and rollovers;

(4) Any person may make contributions to such an ABLE account, subject to the limitations described in paragraph (g) of this section; and

(5) Distributions (other than rollovers and returns of contributions as described in paragraph (g)(4) of this section) may be made only to or for the benefit of the designated beneficiary of the ABLE account.

(b) *Established and maintained by a State or agency or instrumentality of a State*—(1) *Established.* A program is established by a State or its agency or instrumentality if the program is initiated by State statute or regulation or by an act of a State official or agency with the authority to act on behalf of the State.

(2) *Maintained.* A program is maintained by a State or an agency or instrumentality of a State if—

(i) The State or its agency or instrumentality sets all of the terms and conditions of the program, including but not limited to who may contribute to the program, who may be a designated beneficiary of the program, and what benefits the program may provide; and

(ii) The State or its agency or instrumentality is actively involved on an ongoing basis in the administration of the program, including supervising the implementation of decisions relating to the investment of assets contributed under the program. Factors that are relevant in determining whether a State or its agency or instrumentality is actively involved in the administration of the program include, but are not limited to: Whether the State or its agency or instrumentality provides services to designated beneficiaries that are not provided to persons who are not designated beneficiaries; whether the State or its agency or instrumentality establishes detailed operating rules for administering the program; whether officials of the State or its agency or instrumentality play a substantial role in the operation of the program, including selecting, supervising, monitoring, auditing, and terminating the relationship with any private contractors that provide services under the program; whether the State or its agency or instrumentality holds the private contractors that provide services under the program to the same standards and requirements that apply when private contractors handle funds that belong to the State or its agency or instrumentality or provide services to the State or its agency or instrumentality; whether the State or its agency or instrumentality provides funding for the program; and whether the State or its agency or instrumentality acts as trustee or holds program assets directly or for the benefit of the designated beneficiaries. For example, if the State or its agency or instrumentality thereof exercises the same authority over the funds invested in the program as it does over the investments in or pool of funds of a State employees' defined benefit pension plan, then the

State or its agency or instrumentality will be considered actively involved on an ongoing basis in the administration of the program.

(3) *Community Development Financial Institutions (CDFIs).* Some or all of the services described in paragraphs (b)(2)(i) and (ii) of this section may be performed by one or more Community Development Financial Institutions (CDFIs) with whom the State (or its agency or instrumentality) contracts for that purpose.

(c) *Establishment of an ABLE account*—(1) *In general.* Except as otherwise provided in this paragraph (c), a qualified ABLE program must provide that an ABLE account may be established only for an eligible individual under a qualified ABLE program of the State in which the eligible individual is a resident. The qualified ABLE program also may allow the establishment of an ABLE account for an eligible individual who is a resident of a *Contracting State* as defined in § 1.529A–1(b)(2). If an eligible individual is unable to establish an ABLE account on his or her own behalf, the ABLE account may be established on behalf of the eligible individual by the eligible individual's agent under a power of attorney or, if none, by a parent or legal guardian of the eligible individual.

(2) *Only one ABLE account*—(i) *In general.* Except in the case of rollovers or program-to-program transfers, a designated beneficiary is limited to one ABLE account at a time, regardless of where located. To ensure that this requirement is met, a qualified ABLE program must obtain a verification, signed under penalties of perjury, that the eligible individual has no other existing ABLE account (other than an ABLE account that will terminate with the rollover or program-to-program transfer into the new ABLE account) before that program can permit the establishment of an ABLE account for that eligible individual. In the case of a rollover, the ABLE account from which amounts were rolled must be closed as of the 60th day after the amount was distributed from the ABLE account in order for the account that received the rollover to be treated as an ABLE account.

(ii) *Treatment of additional accounts.* Except in the case of rollovers or program-to-program transfers, if an ABLE account is established for a designated beneficiary who already has an ABLE account in existence, an additional account will not be treated as an ABLE account. However, if all contributions made to that account are returned in accordance with the rules that apply to excess contributions and excess aggregate contributions under paragraph (g)(4) of this section, the additional account will be treated as never having been established.

(3) *Beneficial interest.* The eligible individual for whose benefit an ABLE account is established is the designated beneficiary of the account. A person other than the designated beneficiary with signature authority over the account of the designated beneficiary may neither have nor acquire any beneficial interest in the account during the lifetime of the designated beneficiary and must administer the account for the benefit of the designated beneficiary of the account.

(d) *Eligible individual*—(1) *In general.* Whether an individual is an eligible individual (as defined in § 1.529A–1(b)(9)) is determined for each taxable year, and that determination applies for the entire year. A qualified ABLE program must specify the documentation that an individual must provide, both at the time an ABLE account is established for that individual and thereafter, in order to ensure that the designated beneficiary of the ABLE account is, and continues to be, an eligible individual. For purposes of determining whether an individual is an eligible individual, a disability certification will be deemed to be filed with the Secretary once the qualified ABLE program has received the disability certification (as described in paragraph (e) of this section) or a disability certification has been deemed to have been received under the rules of the qualified ABLE program, which information the qualified ABLE program will file in accordance with the filing requirements under § 1.529A–5(c)(2)(iv).

(2) *Frequency of recertification*—(i) *In general.* A qualified ABLE program may choose different methods of ensuring a designated beneficiary's status as an eligible individual and may impose different periodic recertification requirements for different types of impairments.

(ii) *Considerations.* In developing its rules on recertification, a qualified ABLE program may take into consideration whether an impairment is incurable and, if so, the likelihood that a cure may be found in the future. For example, a qualified ABLE program may provide that the initial certification will be deemed to be valid for a stated number of years, which may vary with the type of impairment. If the qualified ABLE program imposes an enforceable obligation on the designated beneficiary or other person with signature authority over the ABLE account to promptly report changes in the designated beneficiary's condition that would result in the designated beneficiary's failing to satisfy the definition of eligible individual, the program also may provide that a certification is valid until the end of the taxable year in which the change in the designated beneficiary's condition occurred.

(3) *Loss of qualification as an eligible individual.* If the designated beneficiary of an ABLE account ceases to be an eligible individual, then for each taxable year in which the designated beneficiary is not an eligible individual, the account will continue to be an ABLE account, the designated beneficiary will continue to be the designated beneficiary of the ABLE account (and will be referred to as such), and the ABLE account will not be deemed to have been distributed. However, beginning on the first day of the designated beneficiary's first taxable year for which the designated beneficiary does not satisfy the definition of an eligible individual, additional contributions to the designated beneficiary's ABLE account must not be accepted by the qualified ABLE program. Additionally, no amounts incurred during that year and each subsequent year in which the designated beneficiary does not satisfy the definition of an eligible individual will be qualified disability expenses. If the designated beneficiary subsequently again becomes an eligible individual, contributions to the designated beneficiary's ABLE account again may be accepted subject to the contribution limits under section 529A, and expenses incurred that meet the definition of a qualified disability expense will be qualified disability expenses.

(e) *Disability certification*—(1) *In general.* Except as provided in paragraph (e)(3) of this section or additional guidance described in paragraph (e)(4) of this section, a disability certification with respect to an individual is a certification signed under penalties of perjury by the individual, or by the other individual establishing (or with signature authority over) the ABLE account for the individual, that—

(i) The individual—

(A) Has a medically determinable physical or mental impairment that results in marked and severe functional limitations (as defined in paragraph (e)(2) of this section), and that—

(*1*) Can be expected to result in death; or

(*2*) Has lasted or can be expected to last for a continuous period of not less than 12 months; or

(B) Is blind (within the meaning of section 1614(a)(2) of the Social Security Act);

(ii) Such blindness or disability occurred before the date on which the individual attained age 26 (and, for this purpose, an individual is deemed to attain age 26 on his or her 26th birthday); and

(iii) Includes a copy of the individual's diagnosis relating to the individual's relevant impairment or impairments, signed by a physician meeting the criteria of section 1861(r)(1) of the Social Security Act (42 U.S.C. 1395x(r)).

(2) *Marked and severe functional limitations.* For purposes of paragraph (e)(1) of this section, the phrase "marked and severe functional limitations" means the standard of disability in the Social Security Act for children claiming Supplemental Security Income for the Aged, Blind, and Disabled (SSI) benefits based on disability (*see* 20 CFR 416.906). Specifically, this is a level of severity that meets, medically equals, or functionally equals the severity of any listing in appendix 1 of subpart P of 20 CFR part 404, but without regard to age. (*See* 20 CFR 416.906, 416.924 and 416.926a.) Such phrase also includes any impairment or standard of disability identified in future guidance published in the Internal Revenue Bulletin (*see* § 601.601(d)(2) of this chapter). Consistent with the regulations of the Social Security Administration, the level of severity is determined by taking into account the effect of the individual's prescribed treatment. (*See* 20 CFR 416.930.)

(3) *Compassionate allowance list.* Conditions listed in the "List of Compassionate Allowances Conditions" maintained by the Social Security Administration (at *www.socialsecurity.gov/compassionateallowances/conditions.htm*) are deemed to meet the requirements of section 529A(e)(1)(B) regarding the filing of a disability certification, if the condition was present before the date on which the individual attained age 26. To establish that an individual with such a condition meets the definition of an eligible individual, the individual must identify the condition and certify to the qualified ABLE program both the presence of the condition and its onset prior to age 26, in a manner specified by the qualified ABLE program.

(4) *Additional guidance.* Additional guidance on conditions deemed to meet the requirements of section 529A(e)(1)(B) may be identified in future guidance published in the Internal Revenue Bulletin. *See* § 601.601(d)(2) of this chapter.

(5) *Restriction on use of certification.* No inference may be drawn from a disability certification described in this paragraph (e) for purposes of establishing eligibility for benefits under title II, XVI, or XIX of the Social Security Act.

(f) *Change of designated beneficiary.* A qualified ABLE program must permit a change in the designated beneficiary of an ABLE account, but only during the life of the designated beneficiary. At the time of the change, the successor designated beneficiary must be an eligible individual.

(g) *Contributions*—(1) *Permissible property.* Except in the case of program-to-program transfers, contributions to an ABLE account may only be made in cash. A qualified ABLE program may allow cash contributions to be made in the form of a check, money order, credit card, electronic transfer, or similar method.

(2) *Annual contributions limit.* A qualified ABLE program must provide that no contribution to an ABLE account will be accepted to the extent such contribution, when added to all other contributions (whether from the designated beneficiary or one or more other persons) to that ABLE account made during the designated beneficiary's taxable year causes the total of such contributions to exceed the amount in effect under section 2503(b) for the calendar year in which the designated beneficiary's taxable year begins. For this purpose, contributions do not include rollovers or program-to-program transfers.

(3) *Cumulative limit*—(i) *In general.* A qualified ABLE program maintained by a State or its agency or instrumentality must provide adequate safeguards to prevent aggregate contributions on behalf of a designated beneficiary in excess of the limit established by that State under section 529(b)(6). For purposes of the preceding sentence, aggregate contributions include contributions to any prior ABLE account maintained by any State or its agency or instrumentality for the same designated beneficiary or any prior designated beneficiary.

(ii) *Safe harbor.* A qualified ABLE program maintained by a State or its agency or instrumentality satisfies the requirement in paragraph (g)(3)(i) of this section if it refuses to accept any additional contribution to an ABLE account once the balance in that account reaches the limit established by that State under section 529(b)(6). Once the account balance falls below such limit, additional contributions again may be accepted, subject to the limits under this paragraph (g)(3)(i) of this section.

(4) *Return of excess contributions and excess aggregate contributions.* If an excess contribution as defined in § 1.529A–1(b)(10) or an excess aggregate contribution as defined in § 1.529A–1(b)(11) is allocated to or deposited into the ABLE account of a designated beneficiary, a qualified ABLE program must return that excess contribution or excess aggregate contribution, including all net income attributable to that excess contribution or excess aggregate contribution, as determined under the rules set forth in § 1.408–11 (treating an IRA as an ABLE account and returned contributions under section 408(d)(4) as excess contributions or excess aggregate contributions), to the person or persons who made that contribution. An excess contribution or excess aggregate contribution must be returned to its contributor(s) on a last-in-first-out basis until the entire excess contribution or excess aggregate contribution, along with all net income attributable to such contribution, has been returned. Returned contributions must be received by the contributor(s) on or before the due date (including extensions) for the Federal income tax return of the designated beneficiary for the taxable year in which the excess contribution or excess aggregate contribution was made. *See* § 1.529A–3(e) for income tax considerations for the contributor(s). If an excess contribution or excess aggregate contribution and the net income attributable to the excess contribution or excess aggregate contribution are returned to a contributor other than the designated beneficiary, the qualified ABLE program must notify the designated beneficiary of such return at the time of the return.

(h) *Qualified disability expenses*—(1) *In general.* Qualified disability expenses, as defined in § 1.529A–1(b)(16), are expenses incurred that relate to the blindness or disability of the designated beneficiary of the ABLE account and are for the benefit of that designated beneficiary in maintaining or improving his or her health, independence, or quality of life. Such expenses include, but are not limited to, expenses related to the designated beneficiary's education, housing, transportation, employment training and support, assistive technology and related services, personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, and funeral and burial expenses, as well

as other expenses that may be identified from time to time in future guidance published in the Internal Revenue Bulletin. *See* § 601.601(d)(2) of this chapter. Qualified disability expenses include basic living expenses and are not limited to items for which there is a medical necessity or which solely benefit a disabled individual. A qualified ABLE program must establish safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions, and to permit the identification of the amounts distributed for housing expenses as that term is defined for purposes of the Supplemental Security Income program of the Social Security Administration.

(2) *Example.* The following example illustrates this paragraph (h):

Example. B, an individual, has a medically determined mental impairment that causes marked and severe limitations on her ability to navigate and communicate. A smart phone would enable B to navigate and communicate more safely and effectively, thereby helping her to maintain her independence and to improve her quality of life. Therefore, the expense of buying, using, and maintaining a smart phone that is used by B would be considered a qualified disability expense.

(i) *Separate accounting.* A program will not be treated as a qualified ABLE program unless it provides separate accounting for each ABLE account. Separate accounting requires that contributions for the benefit of a designated beneficiary and any earnings attributable thereto must be allocated to that designated beneficiary's account. Whether or not a program provides each designated beneficiary an annual account statement showing the total account balance, the investment in the account, the accrued earnings, and the distributions from the account, the program must give this information to the designated beneficiary upon request.

(j) *Program-to-program transfers.* A qualified ABLE program may permit a change of qualified ABLE program or a change of designated beneficiary by means of a program-to-program transfer as defined in § 1.529A–1(b)(14). In that event, subject to any contrary provisions or limitations adopted by the qualified ABLE program, rules similar to the rules of § 1.401(a)(31)–1, Q&A–3 and 4 (which apply for purposes of a direct rollover from a qualified plan to an eligible retirement plan) apply for purposes of determining whether an amount is paid in the form of a program-to-program transfer.

(k) *Carryover of attributes.* Upon a rollover or program-to-program transfer, all of the attributes of the former ABLE account relevant for purposes of calculating the investment in the account and applying the annual and cumulative limits on contributions are applicable to the recipient ABLE account. The portion of the rollover or transfer amount that constituted investment in the account from which the distribution or transfer was made is added to investment in the recipient ABLE account. Similarly, the portion of the rollover or transfer amount that constituted earnings of the account from which the distribution or transfer was made is added to the earnings of the recipient ABLE account.

(l) *Investment direction.* A program will not be treated as a qualified ABLE program unless it provides that the designated beneficiary of an ABLE account established under such program may direct, whether directly or indirectly, the investment of any contributions to the program (or any earnings thereon) no more than two times in any calendar year.

(m) *No pledging of interest as security.* A program will not be treated as a qualified ABLE program unless the terms of the program, or a state statute or regulation that governs the program, prohibit any interest in the program or any portion thereof from being used as security for a loan. This restriction includes, but is not limited to, a prohibition on the use of any interest in the ABLE program as security for a loan used to purchase such interest in the program.

(n) *No sale or exchange.* A qualified ABLE program must ensure that no interest in an ABLE account may be sold or exchanged.

(o) *Change of residence.* A qualified ABLE program may continue to maintain the ABLE account of a designated beneficiary after that designated beneficiary changes his or her residence to another State.

(p) *Post-death payments.* A qualified ABLE program must provide that a portion or all of the balance remaining in the ABLE account of a deceased designated beneficiary must be distributed to a State that files a claim against the designated beneficiary or the ABLE account itself with respect to benefits provided to the designated beneficiary under that State's Medicaid plan established under title XIX of the Social Security Act. The payment of such claim (if any) will be made only after providing for the payment from the designated beneficiary's ABLE account of all outstanding payments due for his or her qualified disability expenses, and will be limited to the amount of the total medical assistance paid for the designated beneficiary after the establishment of the ABLE account (the date on which the ABLE account, or any ABLE account from which amounts were rolled or transferred to the ABLE account of the same designated beneficiary, was opened) over the amount of any premiums paid, whether from the ABLE account or otherwise by or on behalf of the designated beneficiary, to a Medicaid Buy-In program under any such State Medicaid plan.

(q) *Reporting requirements.* A qualified ABLE program must comply with all applicable reporting requirements, including without limitation those described in §§ 1.529A–5 through 1.529A–7.

(r) *Effective/applicability dates.* This section applies to taxable years beginning after December 31, 2014.

§ 1.529A–3 Tax treatment.

(a) *Taxation of distributions.* Each distribution from an ABLE account consists of earnings (computed in accordance with paragraph (c) of this section) and investment in the account. If the total amount distributed from an ABLE account to or for the benefit of the designated beneficiary of that ABLE account during his or her taxable year does not exceed the qualified disability expenses of the designated beneficiary for that year, no amount distributed is includible in the gross income of the designated beneficiary for that year. If the total amount distributed from an ABLE account to or for the benefit of the designated beneficiary of that ABLE account during his or her taxable year exceeds the qualified disability expenses of the designated beneficiary for that year, the distributions from the ABLE account, except to the extent excluded from gross income under this section or any other provision of chapter 1 of the Internal Revenue Code, must be included in the gross income of the designated beneficiary in the manner provided under this section and section 72. In such a case, the earnings portion of the distribution includible in gross income is equal to the earnings portion of the distribution reduced by an amount that bears the same ratio to the earnings portion as the amount of qualified disability expenses during the year bears to the total distributions during the year. For this purpose, all amounts relevant under section 72 are determined as of December 31 of the year in which the designated beneficiary's taxable year begins, and all amounts distributed from an ABLE account to or for the benefit of the designated beneficiary during his or her taxable year are treated as one distribution. If an excess contribution or excess aggregate contribution is

returned within the time period required in § 1.529A–2(g)(4), any net income distributed is includible in the gross income of the contributor(s) in the taxable year in which the excess contribution or excess aggregate contribution was made.

(b) *Additional exclusions from gross income*—(1) *Rollover.* A rollover as defined in § 1.529A–1(b)(17) is not includible in gross income under paragraph (a) of this section.

(2) *Program-to-program transfers.* A program-to-program transfer as defined in § 1.529A–1(b)(14) is not a distribution and is not includible in gross income under paragraph (a) of this section.

(3) *Change of designated beneficiary*—(i) *In general.* A change of designated beneficiary of an ABLE account is not treated as a distribution for purposes of section 529A, and is not includible in gross income under paragraph (a) of this section, if the successor designated beneficiary is—

(A) An eligible individual for such calendar year; and

(B) A member of the family of the former designated beneficiary.

(ii) *Other designated beneficiary changes.* In the case of any change of designated beneficiary not described in paragraph (b)(3)(i) of this section, the former designated beneficiary of that ABLE account will be treated as having received a distribution of the fair market value of the assets in that ABLE account on the date on which the change is made to the new designated beneficiary.

(4) *Payments to creditors post-death.* Distributions made after the death of the designated beneficiary in payment of outstanding obligations due for qualified disability expenses of the designated beneficiary are not includible in the gross income of the designated beneficiary or his or her estate. Included among these obligations is the post-death payment of any part of a claim filed against the designated beneficiary or the ABLE account by a State under a State Medicaid plan.

(c) *Computation of earnings.* The earnings portion of a distribution is equal to the product of the amount of the distribution and the earnings ratio, as defined in § 1.529A–1(b)(8). The balance of the distribution (the amount of the distribution minus the earnings portion of that distribution) is the portion of that distribution that constitutes the return of investment in the account.

(d) *Additional tax on amounts includible in gross income*—(1) *In general.* If any amount of a distribution from an ABLE account is includible in the gross income of a person for any taxable year under paragraph (a) of this section (the "includible amount"), the tax imposed on that person by Chapter 1 of the Internal Revenue Code shall be increased by an amount equal to 10 percent of the includible amount.

(2) *Exceptions*—(i) *Distributions on or after the death of the designated beneficiary.* Paragraph (d)(1) of this section does not apply to any distribution made from the ABLE account on or after the death of the designated beneficiary to the estate of the designated beneficiary, to an heir or legatee of the designated beneficiary, or to a creditor described in paragraph (b)(4) of this section.

(ii) *Returned excess contributions and additional accounts.* Paragraph (d)(1) of this section does not apply to any return made in accordance with § 1.529A–2(g)(4) of an excess contribution, excess aggregate contribution, or additional account.

(e) *Tax on excess contributions.* Under section 4973(h), a contribution to an ABLE account in excess of the annual contributions limit described in § 1.529A–2(g)(2) is subject to an excise tax in an amount equal to 6 percent of the excess contribution. However, if the excess contribution is returned in accordance with the provisions of § 1.529A–2(g)(4), it is treated as an amount not contributed.

(f) *Filing requirements.* A qualified ABLE program is not required to file Form 990, "Return of Organization Exempt From Income Tax," Form 1041, "U.S. Income Tax Return for Estates and Trusts," or Form 1120, "U.S. Corporation Income Tax Return." However, a qualified ABLE program is required to file Form 990–T, "Exempt Organization Business Income Tax Return," if such filing would be required under the rules of §§ 1.6012–2(e) and 1.6012–3(a)(5) if the ABLE program were an organization described in those sections.

(g) *Effective/applicability dates.* This section applies to taxable years beginning after December 31, 2014.

§ 1.529A–4 Gift, estate, and generation-skipping transfer taxes.

(a) *Contributions*—(1) *In general.* Each contribution by a person to an ABLE account other than by the designated beneficiary of that account is treated as a completed gift to the designated beneficiary of the account for gift tax purposes. Under the applicable gift tax rules, a contribution from a corporation, partnership, trust, estate, or other entity is treated as a gift by the shareholders, partners, or other beneficial owners in proportion to their respective ownership interests in the entity. *See* § 25.2511–1(c) and (h). A gift into an ABLE account is not treated as either a gift of a future interest in property, or a qualified transfer under section 2503(e). To the extent a contributor's gifts to the designated beneficiary, including gifts paid into the designated beneficiary's ABLE account, do not exceed the annual limit in section 2503(b), the contribution is not subject to gift tax. This provision, however, does not change any other provision applicable to the transfer. For example, a contribution by the employer of the designated beneficiary's parent continues to constitute earned income to the parent and then a gift by the parent to the designated beneficiary.

(2) *Generation-skipping transfer (GST) tax.* To the extent the contribution into an ABLE account is a nontaxable gift for gift tax purposes, the inclusion ratio for purposes of the GST tax will be zero pursuant to section 2642(c)(1).

(3) *Designated beneficiary as contributor.* A designated beneficiary may make a contribution to fund his or her own ABLE account. That contribution is not a gift. However, in the event of any change of designated beneficiary, the portion of the then fair market value of the ABLE account attributable to that contribution and any earnings attributable to that contribution will constitute a gift by the designated beneficiary to the successor designated beneficiary, and the usual gift and GST tax rules will apply.

(b) *Distributions.* No distribution from an ABLE account to or for the benefit of the designated beneficiary is treated as a taxable gift to that designated beneficiary.

(c) *Change of designated beneficiary.* Neither gift tax nor generation-skipping transfer tax applies to a change of designated beneficiary if the successor designated beneficiary is both an eligible individual and a member of the family (as described in § 1.529A–1(b)(13)) of the designated beneficiary. The previous sentence does not apply to any other change of designated beneficiary.

(d) *Transfer tax on death of designated beneficiary.* Upon the death of the designated beneficiary, the designated beneficiary's ABLE account is includible in his or her gross estate for estate tax purposes under section 2031. The payment of outstanding qualified disability expenses and the payment of certain claims made by a State under its Medicaid plan may be deductible for estate tax purposes if the requirements of section 2053 are satisfied.

(e) *Effective/applicability date.* This section applies to taxable years beginning after December 31, 2014.

§ 1.529A–5 Reporting of the establishment of and contributions to an ABLE account.

(a) *In general.* A filer defined in paragraph (b)(1) of this section must, with respect to each ABLE account—

(1) File an annual information return, as described in paragraph (c) of this section, with the Internal Revenue Service; and

(2) Furnish an annual statement, as described in paragraph (d) of this section, to the designated beneficiary of the ABLE account.

(b) *Additional definitions.* In addition to the definitions in § 1.529A–1(b), the following definitions also apply for purposes of this section—

(1) *Filer* means the State or its agency or instrumentality that establishes and maintains the qualified ABLE program under which an ABLE account is established. The filing may be done by either an officer or employee of the State or its agency or instrumentality having control of the qualified ABLE program, or the officer's or employee's designee.

(2) *TIN* means taxpayer identification number as defined in section 7701(a)(41).

(c) *Requirement to file return*—(1) *Form of return.* For purposes of reporting the information described in paragraph (c)(2) of this section, the filer must file Form 5498–QA, "ABLE Account Contribution Information," or any successor form, together with Form 1096, "Annual Summary and Transmittal of U.S. Information Returns."

(2) *Information included on return.* With respect to each ABLE account, the filer must include on the return—

(i) The name, address, and TIN of the designated beneficiary of the ABLE account;

(ii) The name, address, and TIN of the filer;

(iii) Information regarding the establishment of the ABLE account, as required by the form and its instructions;

(iv) Information regarding the disability certification or other basis for eligibility of the designated beneficiary, as required by the form and its instructions. For further information regarding eligibility and disability certification, *see* § 1.529A–2(d) and (e), respectively;

(v) The total amount of any contributions made with respect to the ABLE account during the calendar year;

(vi) The fair market value of the ABLE account as of the last day of the calendar year; and

(vii) Any other information required by the form, its instructions, or published guidance. *See* §§ 601.601(d) and 601.602 of this chapter.

(3) *Time and manner of filing return*—(i) *In general.* Except as provided in paragraph (c)(3)(ii) of this section, the information returns required under this paragraph must be filed on or before May 31 of the year following the calendar year with respect to which the return is being filed, in accordance with the forms and their instructions.

(ii) *Extensions of time. See* §§ 1.6081–1 and 1.6081–8 of this chapter for rules relating to extensions of time to file information returns required in this section.

(iii) *Electronic filing. See* § 301.6011–2 of this chapter for rules relating to electronic filing.

(iv) *Substitute forms.* The filer may file the returns required under this paragraph (c) on a substitute form. A substitute form must comply with applicable revenue procedures (*see* § 601.601(d)(2) of this chapter) or other guidance published by the IRS, including Publication 1179, "General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns."

(d) *Requirement to furnish statement*—(1) *In general.* The filer must furnish a statement to the designated beneficiary of the ABLE account for which it is required to file a Form 5498–QA (or any successor form). The statement must include—

(i) The information required under paragraph (c)(2) of this section;

(ii) A legend that identifies the statement as important tax information that is being furnished to the Internal Revenue Service; and

(iii) The name and address of the office or department of the filer that is the information contact for questions regarding the ABLE account to which the Form 5498–QA relates.

(2) *Time and manner of furnishing statement*—(i) *In general.* Except as provided in paragraph (d)(2)(ii) of this section, the filer must furnish the statement described in paragraph (d)(1) of this section to the designated beneficiary on or before March 15 of the year following the calendar year with respect to which the statement is being furnished. If mailed, the statement must be sent to the designated beneficiary's last known address. The statement may be furnished electronically, as provided in § 1.529A–7.

(ii) *Extensions of time.* The Internal Revenue Service may grant an extension of time to furnish statements required in this section upon a showing of good cause. *See* the instructions to Form 5498–QA.

(3) *Copy of Form 5498–QA.* The filer may satisfy the requirement of this paragraph (d) by furnishing either a copy of Form 5498–QA (or successor form) or another document that contains the information required by paragraph (d)(1) of this section, if the document complies with applicable revenue procedures (*see* § 601.601(d)(2) of this chapter) or other guidance published by the IRS relating to substitute statements, including Publication 1179, "General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns."

(e) *Request for TIN of designated beneficiary.* The filer must request the TIN of the designated beneficiary at the time the ABLE account is opened if the filer does not already have a record of the designated beneficiary's correct TIN. The filer must clearly notify the designated beneficiary that the law requires the designated beneficiary to furnish a TIN so that it may be included on an information return to be filed by the filer. The designated beneficiary may provide his or her TIN in any manner including orally, in writing, or electronically. If the TIN is furnished in writing, no particular form is required. Form W–9, "Request for Taxpayer Identification Number and Certification," may be used, or the request may be incorporated into the forms related to the establishment of the ABLE account.

(f) *Penalties*—(1) *Failure to file return.* The section 6693 penalty may apply to the filer that fails to file information returns at the time and in the manner required by this section, unless it is shown that such failure is due to reasonable cause. *See* section 6693 and the regulations thereunder.

(2) *Failure to furnish TIN.* The section 6723 penalty may apply to any designated beneficiary who fails to furnish his or her TIN to the filer. *See* section 6723, and the regulations thereunder, for rules relating to the penalty for failure to furnish a TIN.

(g) *Effective/applicability date.* The rules of this section apply to information returns required to be filed, and payee statements required to be furnished, after December 31, 2015.

§ 1.529A–6 Reporting of distributions from and termination of an ABLE account.

(a) *In general.* The filer as defined in § 1.529A–5(b)(1) must, with respect to each ABLE account from which any distribution is made or which is terminated during the calendar year—

(1) File an annual information return, as described paragraph (b) of this section, with the Internal Revenue Service; and

(2) Furnish an annual statement, as described in paragraph (c) of this

section, to the designated beneficiary of the ABLE account and to each contributor who received a returned contribution in accordance with § 1.529A–2(g)(4) attributable to the calendar year.

(b) *Requirement to file return*—(1) *Form of return.* For purposes of reporting the information in paragraph (b)(2) of this section, the filer must file Form 1099–QA, "Distributions from ABLE Accounts," or any successor form, together with Form 1096, "Annual Summary and Transmittal of U.S. Information Returns."

(2) *Information included on return.* The filer must include on the return—

(i) The name, address, and TIN of the designated beneficiary of the ABLE account or of any contributor who received a returned contribution in accordance with § 1.529A–2(g)(4) attributable to the calendar year, as applicable;

(ii) The name, address, and TIN of the filer;

(iii) The aggregate amount of distributions from the ABLE account during the calendar year;

(iv) Information as to basis and earnings with respect to such distributions or returns of contributions;

(v) Information regarding termination (if any) of the ABLE account;

(vi) Information regarding each rollover and any program-to-program transfer to or from the ABLE account during the designated beneficiary's taxable year;

(vii) Whether the return is being furnished to the designated beneficiary or to a contributor; and

(viii) Any other information required by the form, its instructions, or published guidance. *See* §§ 601.601(d) and 601.602 of this chapter.

(3) *Time and manner of filing return*—(i) *In general.* Except as provided in paragraph (b)(3)(ii) of this section, the Forms 1099–QA and 1096 must be filed on or before February 28 (March 31 if filing electronically) of the year following the calendar year with respect to which the return is being filed, in accordance with the forms and their instructions.

(ii) *Extensions of time. See* §§ 1.6081–1 and 1.6081–8 of this chapter for rules relating to extensions of time to file information returns required in this section.

(iii) *Electronic filing. See* § 301.6011–2 of this chapter for rules relating to electronic filing.

(iv) *Substitute forms.* The filer may file the return required under this paragraph (b) on a substitute form. A substitute form must comply with applicable revenue procedures (*see* § 601.601(d)(2) of this chapter) or other guidance published by the IRS, including Publication 1179, "General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns."

(c) *Requirement to furnish statement*—(1) *In general.* The filer must furnish a statement to the designated beneficiary and each contributor (if any) of the ABLE account for which it is required to file a Form 1099–QA (or any successor form). The statement must include—

(i) The information required under paragraph (b)(2) of this section.

(ii) A legend that identifies the statement as important tax information that is being furnished to the Internal Revenue Service;

(iii) The name and address of the office or department of the filer that is the information contact for questions regarding the ABLE account to which the Form 1099–QA relates.

(2) *Time and manner of furnishing statement*—(i) *In general.* Except as provided in paragraph (c)(2)(ii) of this section, a filer must furnish the statement described in paragraph (c)(1) of this section to the designated beneficiary on or before January 31 of the year following the calendar year with respect to which the statement is being furnished. If mailed, the statement must be sent to the recipient's last known address. The statement may be furnished electronically, as provided in § 1.529A–7.

(ii) *Extensions of time.* The Internal Revenue Service may grant an extension of time to furnish statements required in this section upon a showing of good cause. *See* the instructions to Form 1099–QA.

(3) *Copy of Form 1099–QA.* A filer may satisfy the requirement of this paragraph (c) by furnishing either a copy of Form 1099–QA (or successor form) or another document that contains the information required by paragraph (c)(1) of this section and that complies with applicable revenue procedures (*see* § 601.601(d)(2) of this chapter) or other guidance published by the IRS relating to substitute statements, including Publication 1179, "General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns."

(d) *Request for TIN of contributor(s).* A filer must request the TIN for each contributor to the ABLE account at the time a contribution is made, if the filer does not already have a record of that person's correct TIN. The filer must clearly notify each contributor to the account that the law requires that person to furnish a TIN so that it may be included on an information return to be filed by the filer. The contributor may provide his or her TIN in any manner including orally, in writing, or electronically. If the TIN is furnished in writing, no particular form is required. Form W–9, "Request for Taxpayer Identification Number and Certification," may be used, or the request may be incorporated into the forms related to the establishment of the ABLE account.

(e) *Penalties*—(1) *Failure to file return.* The section 6693 penalty may apply to a filer that fails to file information returns at the time and in the manner required by this section, unless it is shown that such failure is due to reasonable cause. *See* section 6693 and the regulations thereunder.

(2) *Failure to furnish TIN.* The section 6723 penalty may apply to any contributor who fails to furnish his or her TIN to the filer. *See* section 6723, and the regulations thereunder, for rules relating to the penalty for failure to furnish a TIN.

(f) *Effective/applicability date.* The rules of this section apply to information returns required to be filed, and payee statements required to be furnished, after December 31, 2015.

§ 1.529A–7 Electronic furnishing of statements to designated beneficiaries and contributors.

(a) *Electronic furnishing of statements*—(1) *In general.* A filer required under § 1.529A–5 or § 1.529A–6 of this chapter to furnish a written statement to a designated beneficiary of or contributor to an ABLE account may furnish the statement in an electronic format in lieu of a paper format. A filer who meets the requirements of paragraphs (a)(2) through (6) of this section is treated as furnishing the required statement.

(2) *Consent*—(i) *In general.* The recipient of the statement must have affirmatively consented to receive the statement in an electronic format. The consent may be made electronically in any manner that reasonably demonstrates that the recipient can access the statement in the electronic format in which it will be furnished to the recipient. Alternatively, the consent may be made in a paper document if it is confirmed electronically.

(ii) *Withdrawal of consent.* The consent requirement of this paragraph (a)(2) is not satisfied if the recipient withdraws the consent and the withdrawal takes effect before the statement is furnished. The filer may provide that a withdrawal of consent takes effect either on the date it is received by the filer or on another date

no more than 60 days later. The filer also may provide that a request for a paper statement will be treated as a withdrawal of consent.

(iii) *Change in hardware or software requirements.* If a change in the hardware or software required to access the statement creates a material risk that the recipient will not be able to access the statement, the filer must, prior to changing the hardware or software, provide the recipient with a notice. The notice must describe the revised hardware and software required to access the statement and inform the recipient that a new consent to receive the statement in the revised electronic format must be provided to the filer if the recipient does not want to withdraw the consent. After implementing the revised hardware and software, the filer must obtain from the recipient, in the manner described in paragraph (a)(2)(i) of this section, a new consent or confirmation of consent to receive the statement electronically.

(iv) *Examples.* For purposes of the following examples that illustrate the rules of this paragraph (a)(2), assume that the requirements of § 1.529A–7(a)(3) have been met:

Example 1. Filer F sends Recipient R a letter stating that R may consent to receive statements required under § 1.529A–5 or § 1.529A–6 electronically on a Web site instead of in a paper format. The letter contains instructions explaining how to consent to receive the statements electronically by accessing the Web site, downloading the consent document, completing the consent document, and emailing the completed consent back to F. The consent document posted on the Web site uses the same electronic format that F will use for the electronically furnished statements. R reads the instructions and submits the consent in the manner provided in the instructions. R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

Example 2. Filer F sends Recipient R an email stating that R may consent to receive statements required under § 1.529A–5 or § 1.529A–6 electronically instead of in a paper format. The email contains an attachment instructing R how to consent to receive the statements electronically. The email attachment uses the same electronic format that F will use for the electronically furnished statements. R opens the attachment, reads the instructions, and submits the consent in the manner provided in the instructions. R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

Example 3. Filer F posts a notice on its Web site stating that Recipient R may receive statements required under § 1.529A–5 or § 1.529A–6 electronically instead of in a paper format. The Web site contains instructions on how R may access a secure Web page and consent to receive the statements electronically. By accessing the secure Web page and giving consent, R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

(3) *Required disclosures*—(i) *In general.* Prior to, or at the time of, a recipient's consent, the filer must provide to the recipient a clear and conspicuous disclosure statement containing each of the disclosures described in paragraphs (a)(3)(ii) through (viii) of this section.

(ii) *Paper statement.* The recipient must be informed that the statement will be furnished on paper if the recipient does not consent to receive it electronically.

(iii) *Scope and duration of consent.* The recipient must be informed of the scope and duration of the consent. For example, the recipient must be informed whether the consent applies to statements furnished every year after the consent is given until it is withdrawn in the manner described in paragraph (a)(3)(v)(A) of this section, or only to the statement required to be furnished on or before the due date immediately following the date on which the consent is given.

(iv) *Post-consent request for a paper statement.* The recipient must be informed of any procedure for obtaining a paper copy of the recipient's statement after giving the consent and whether a request for a paper statement will be treated as a withdrawal of consent.

(v) *Withdrawal of consent.* The recipient must be informed that—

(A) The recipient may withdraw a consent by writing (electronically or on paper) to the person or department whose name, mailing address, and email address is provided in the disclosure statement;

(B) The filer will confirm, in writing (either electronically or on paper), the withdrawal and the date on which it takes effect; and

(C) A withdrawal of consent does not apply to a statement that was furnished electronically in the manner described in this paragraph (a) before the date on which the withdrawal of consent takes effect.

(vi) *Notice of termination.* The recipient must be informed of the conditions under which a filer will cease furnishing statements electronically to the recipient.

(vii) *Updating information.* The recipient must be informed of the procedures for updating the information needed by the filer to contact the recipient. The filer must inform the recipient of any change in the filer's contact information.

(viii) *Hardware and software requirements.* The recipient must be provided with a description of the hardware and software required to access, print, and retain the statement, and the date when the statement will no longer be available on the Web site.

(4) *Format.* The electronic version of the statement must contain all required information and comply with applicable revenue procedures or other guidance published by the IRS relating to substitute statements to recipients, including Publication 1179, "General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns."

(5) *Notice*—(i) *In general.* If the statement is furnished on a Web site, the filer must notify the recipient that the statement is posted on a Web site. The notice may be delivered by mail, electronic mail, or in person. The notice must provide instructions on how to access and print the statement. The notice must include the following statement in capital letters, "IMPORTANT TAX RETURN DOCUMENT AVAILABLE." If the notice is provided by electronic mail, the foregoing statement must be on the subject line of the electronic mail.

(ii) *Undeliverable electronic address.* If an electronic notice described in paragraph (a)(5)(i) of this section is returned as undeliverable, and the correct electronic address cannot be obtained from the filer's records or from the recipient, then the filer must furnish the notice by mail or in person within 30 days after the electronic notice is returned.

(iii) *Corrected statements.* If the filer has corrected a recipient's statement that was furnished electronically, the filer must furnish the corrected statement to the recipient electronically. If the recipient's statement was furnished though a Web site posting and the filer has corrected the statement, the filer must notify the recipient that it has posted the corrected statement on the Web site within 30 days of such posting in the manner described in paragraph (a)(5)(i) of this section. The corrected statement or the notice must be furnished by mail or in person if—

(A) An electronic notice of the Web site posting of an original statement or the corrected statement was returned as undeliverable; and

(B) The recipient has not provided a new email address.

(6) *Access period.* Statements furnished on a Web site must be retained on the Web site through October 15 of the year following the

calendar year to which the statements relate (or the first business day after such October 15 if October 15 falls on a Saturday, Sunday, or legal holiday). The filer must maintain access to corrected statements that are posted on the Web site through October 15 of the year following the calendar year to which the statements relate (or the first business day after such October 15 if October 15 falls on a Saturday, Sunday, or legal holiday) or the date 90 days after the corrected statements are posted, whichever is later. The rules in this paragraph (a)(6) do not replace the filer's obligation to keep records under section 6001 and § 1.6001–1(a) of this chapter.

(b) *Effective/applicability date.* This section applies to statements required to be furnished after December 31, 2015.

PART 25—GIFT TAXES

■ **Par. 5.** The authority citation for part 25 continues to read in part as follows:

Authority: 26 U.S.C. 7805* * *

■ **Par. 6.** Section 25.2501–1 is amended by adding a sentence at the end of paragraph (a)(1) to read as follows:

§ 25.2501–1 Imposition of Tax.

(a) * * *

(1) * * * For gift tax rules related to an ABLE account established under section 529A, *see* regulations promulgated thereunder.

* * * * *

■ **Par. 7.** Section 25.2503–3 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§ 25.2503–3 Future interests in property.

(a) * * * A contribution to an ABLE account established under section 529A is not a future interest.

* * * * *

■ **Par. 8.** Section 25.2503–6 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§ 25.2503–6 Exclusion for certain qualified transfers to tuition or medical expenses.

(a) * * * A contribution to an ABLE account established under section 529A is not a qualified transfer.

* * * * *

■ **Par. 9.** Section 25.2511–2 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§ 25.2511–2 Cessation of donor's dominion and control.

(a) * * * For gift tax rules related to an ABLE account established under section 529A, *see* regulations promulgated thereunder.

* * * * *

PART 26—ESTATE TAXES

■ **Par. 10.** The authority citation for part 26 continues to read in part as follows:

Authority: 26 U.S.C. 7805* * *

■ **Par. 11.** Section 26.2642–1 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§ 26.2642–1 Inclusion ratio.

(a) * * * For generation-skipping transfer tax rules related to an ABLE account established under section 529A, *see* regulations promulgated thereunder.

* * * * *

■ **Par. 12.** Section 26.2652–1 is amended by adding a sentence at the end of paragraph (a)(1) to read as follows:

§ 26.2652–1 Transferor defined; other definitions.

(a) * * *

(1) * * * For generation-skipping transfer tax rules related to an ABLE account established under section 529A, *see* regulations promulgated thereunder.

* * * * *

PART 301—REPORTING AND RECORDKEEPING REQUIREMENTS

■ **Par. 13.** The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805* * *

§ 301.6011–2 [Amended]

■ **Par. 14.** Section 301.6011–2 is amended by adding the word "series" after "5498" in the first sentence of paragraph (b)(1).

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2015–15280 Filed 6–19–15; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 334

West Arm Behm Canal, Naval Surface Warfare Center, Ketchikan Alaska; Restricted Areas.

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of proposed amendment and request for comments.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is proposing to amend existing regulations for an existing restricted area near Ketchikan, Alaska to correct inaccuracies in regards to flashing beacon light descriptions, point of contact changes, and restrictive area distances for small craft.

DATES: Written comments must be submitted on or before July 22, 2015.

ADDRESSES: You may submit comments, identified by docket number COE–2015–0009, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Email: david.b.olson@usace.army.mil. Include the docket number, COE–2015–0009, in the subject line of the message.

Mail: U.S. Army Corps of Engineers, Attn: CECW–CO (David B. Olson), 441 G Street NW., Washington, DC 20314–1000.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE–2015–0009. All comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or email. The regulations.gov Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to the Corps without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to *www.regulations.gov.* All documents in the docket are listed. Although listed in

OVERVIEW OF THE ABLE ACT OF 2014

KEY FEATURES OF ABLE ACCOUNTS

- One account per person
- Designated beneficiary = owner
- Disability onset before age of 26
- Can hold first and third party money
- Account balance not counted towards SSI and Medicaid eligibility until balance reaches $100,000 then SSI suspended but Medicaid continues
- State sets maximum contribution limits
- Payback to Medicaid for benefits provided since account established.

STATES HAVE THEIR HANDS FULL

- 41 states have ABLE legislation enacted or pending
- Complex oversight and reporting requirements in federal statute and regulations
- Final federal regulations not expected for another year
- Implementation will require multi-agency coordination
- Unknown costs and projected utilization
- Target date in each state?

- Most useful to hold beneficiary's funds, due to payback
- Excess income not routinely spent each month
- Structured settlement in personal injury case
- Transition UTMA accounts
- Small inheritance or insurance settlement
- In tandem with other planning, e.g., third party SNT

HOW WILL ABLE BE HELPFUL?

- SSA expected to change position on treatment of ABLE distributions for housing - **these will not be ISM**
- Parents can contribute funds to ABLE account to be used for child's rent without reduction in SSI.

ABLE WILL BE **GREAT** FOR HOUSING NEEDS OF PEOPLE ON SSI

- Jamie, age 21, capable man with cerebral palsy, on SSI, inherits $5,000 from grandmother's estate, estate opened in 2015
- Alternative: inherits $50,000 from grandmother's estate
- Alternative: Jamie is not capable, parents are living

CASE STUDY #1

- Marilyn, age 30, with Down Syndrome, on SSDI, works 20 hours a week, client of Arc, resides in alternate living unit, rarely spends her monthly income.
- Lacks capacity for power of attorney, no living parents, no guardian.
- Alternative: living parents.

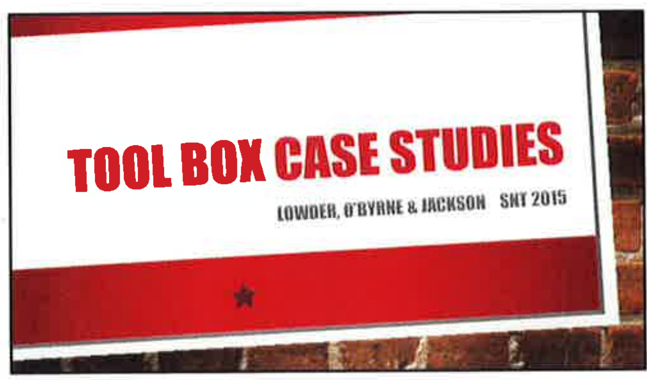
CASE STUDY #2

- Louie, age 16, with severe autism, resides with parents, with $75,000 in UTMA account contributed by grandparents.
- Alternative: funds in account come from an insurance settlement for injury to Louie.

CASE STUDY #3

- ANGELA, age 45, with schizophrenia, onset at 19, lives in community, struggles to pay rent; parents can afford to help but ISM reduction too much for ANGELA.
- Alternative: Disability onset at 25.
- Alternative: Father plans retirement shortly and will collect SS.

CASE STUDY #4



ANGELA'S MENTAL HEALTH

- ANGELA IS 45 AND HAS BEEN DIAGNOSED WITH SCHIZOPHRENIA
- ONSET OF HER ILLNESS WAS AT AGE 19
- SHE LIVES IN THE COMMUNITY
- STRUGGLES TO PAY RENT
- PARENTS CAN AFFORD TO HELP, BUT
- ISM REDUCTION IS TOO MUCH FOR ANGELA

CHANGE ANGELA'S FACTS

- ONSET OF ILLNESS AGE 25
- FATHER PLANS TO RETIRE SOON AN WILL COLLECT SOCIAL SECURITY RETIREMENT BENEFITS

JACK TURNS 18

- AGE 17, WILL BE 18 IN TWO MONTHS
- DAD DECEASED
- MOM WANTS TO APPLY FOR MEDICAID
- GRANDPARENTS ESTABLISHED UTMA – BALANCE $54,000
- IS JACK OVER ASSET LIMIT FOR MEDICAID?

OLIVER'S SETTLEMENT

- OLIVER IS A 24 YEAR-OLD PARAPLEGIC
- CAR ACCIDENT 24 MONTHS EARLIER
- MENTALLY COMPETENT, AND 1 HOUR PERSONAL ASSISTANCE IN AM AND PM.
- IN WHEELCHAIR, BUT INDEPENDENT DURING THE DAY
- SSDI - $560 PER MONTH ON HIS OWN WORK HISTORY; MEDICAID, MEDICARE ELIGIBLE IN 5 MONTHS.
- OLIVER IS RECEIVING A SETTLEMENT OF $200,000 FROM THE ACCIDENT,
- WHAT DO YOU RECOMMEND? WHAT QUESTIONS DO YOU NEED TO ASK? WOULD YOUR ADVICE DIFFER IF THE SETTLEMENT WAS $2 MILLION?

ANN'S RETIREMENT

- RETIRED TEACHER, DIVORCED
- DIAGNOSED WITH MS; PROGRESSIVE DECLINE
- RECEIVES TEACHER'S PENSION AND HEALTH INSURANCE COVERAGE
- APPLIED FOR SSDI; NEVER PAID INTO MEDICARE
- INVESTMENT ACCOUNT BALANCE $ 230,000; HOME FREE AND CLEAR: $132,000
- NEEDS COVERAGE FOR LTCSS; PREFERS HCBS; MAY NEED SKILLED NURSING CARE

WILLIE AND WANNA

- Willie Work and his fiancée Wanna Waite are a couple with disabilities
- Willie is a former truck driver (high PIA) now receiving $2200 SSDI; Medicare in 11 months
- Wanna former part-time waitress (low PIA, so concurrent CDB/SSI benefits of $450 monthly, $303 SSI dual eligible Medicare/Medicaid)
- Who both suffered injuries in a terrible accident at the highway truck stop when Willie's brakes failed and he plowed into the restaurant.
- Willie was badly injured in the accident. Wanna, who has a severe learning disability, was determined disabled prior to accident
- Insufficient work history so CDB. Less severely injured, suffers from severe anxiety since the accident. She continues to receive her CDB benefits plus $303 in SSI
- Wanna has two minor children. The elder child, Ted, also has a learning disability and receives SSI of $730/month and is on disability Medicaid.
- Daughter, Sally receives Healthy Start Medicaid benefits.

MORE W&W

- Willie and Wanna to met during rehab,
- Want to get married
- Each to receive a settlement from a products liability case
- Plan to get back to work, use settlement to buy house and raise Wanna's children.
- Assume that a used semi-truck, modified so that Willie can drive it, would cost $55,000.
- Wanna does not need any accommodations to return to work but won't be able to work more than 4 hours at a time. She thinks she can work 20 hours a week, with earnings of $4.00 per hour + tips, which average another $4 per hour.

PHILIP AND ANNE

- Philip, age 61, spouse Anne, age 63
- Recently moved to Florida from Vermont
- Early onset dementia diagnosed 4 years ago, physically healthy
- Cannot take medications and wanders; now in assisted living; receives Medicare
- Income: SSDI: $1305; Ann's income: $2010 net monthly
- Homestead $275,000; mortgage $100,000; joint savings account $265,000
- Spousal planning?

Basics of Special Needs Trusts

Thursday, October 15, 2015

Breakout Session 1
1:15 P.M. – 2:15 P.M.

Veterans Benefits and the Person with Special Needs

Presenters:
Michael Allen
Associate Dean and Professor of Law
Stetson University College of Law
Gulfport, FL
and
Kelly A. Thompson
Attorney at Law
Thompson Wildhack PLC
Arlington, VA

- Materials
- PowerPoint

Stetson University College of Law presents:
2015 SPECIAL NEEDS TRUSTS
THE NATIONAL CONFERENCE
October 14-16, 2015
The Vinoy Renaissance Resort & Golf Club
St. Petersburg, Florida

STETSON UNIVERSITY
Center for Excellence in Elder Law
ACCESS AND JUSTICE FOR ALL®

2015 Special Needs Trusts National Conference
October 15, 2015

Veterans Benefits and the Person With Special Needs

Issues for Military Children with Special Needs

Kelly A. Thompson
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Topics:

Disabled Military Child Protection Act
Access to Medicaid Waiver Services & ECHO
Education Issues

DISABLED MILITARY CHILD PROTECTION ACT

On December 19, 2014 President Obama signed the Disabled Military Child Protection Act. This law (10 U.S. Code 1450 text at Appendix A) allows a military parent to provide a survivor benefit for a disabled child and to have it paid to a special needs trust for that child's benefit. Until this law was passed, military parents of children with disabilities faced a serious dilemma at retirement - whether or not to irrevocably choose the military Survivor Benefits Plan (called "SBP") retirement option for their children. The dilemma was that the benefit could not be assigned to a special needs trust and could potentially interfere with the child's eligibility for government benefit programs such as Supplemental Security Income (SSI) or Medicaid.

Survivor Benefits Plan

Members of the military can elect several options to provide for a spouse or dependent child at the military member's retirement or death. The SBP will pay up to 55% of the military member's retirement pay to a spouse and/or dependent child when the retiree dies. The member can also select a lesser benefit at a lesser cost. The military member can select between coverage for a spouse only, a spouse and children, or children only. The member takes a reduction of about 6.5% in retirement pay for SBP for a spouse and only about $20/month for dependent children, including adult disabled children.

The existing law provided that the SBP could only be paid to a "person" and the Defense Department took the position that "person" did not include a trust for a child with disabilities.

Effect on SSI and Medicaid Eligibility

In addition to (or in place of) the survivor benefit, a military member can provide an array of benefits for a child with a disability. In most cases a disabled child over age 18 can be designated as an Incapacitated Dependent (DD Form 137-5) and be permanently eligible for military post privileges as well as TRICARE health benefits. However, these military benefits do not include supportive living programs or vocational opportunities. SBP and TRICARE benefits are often not enough to pay for all the help that may be needed by an adult child with a disability so the military family may need to look to other programs to provide for a child's needs.

If the disabled child over age 18 has assets of less than $2,000 and minimal income, the child will usually be eligible for SSI and Medicaid. Medicaid may duplicate TRICARE's health benefits but Medicaid "waiver" programs pay for a wide variety of services that TRICARE does not. Medicaid waiver benefits pay for supported living programs, in-home caregivers, mental health support services, day activity programs, job coaching and other services. TRICARE and Medicaid provide a complementary mix of health care benefits and support services needed by many adults with disabilities.

SSI pays a monthly cash benefit ($733 per month in most states in 2015) and any unearned income over $20 offsets SSI income dollar-for-dollar. In many states a person's income must be less than three times the SSI benefit amount ($2,199 per month in 2015) to qualify for Medicaid waiver services.

SBP income payments paid directly to a disabled child will offset the SSI benefit as unearned income. If the military member elected SBP for his or her disabled child, the child will receive as much as 55% of the parent's income. If the SBP payment exceeds the SSI benefit amount, the child with a disability will lose SSI and as a result may also lose Medicaid health care and community support benefits. In my home state of Virginia and in many states, if an individual's income exceeds $2,199 per month, all supported living assistance, job coaching, respite care and other services provided under Medicaid waiver programs are lost.

A recent example from my practice is Tom, a 52 year old man with an intellectual disability who had lived in a group home for 18 years and attended a day program for individuals with disabilities. Tom's only income was SSI and as a result he qualified for Medicaid to pay for his group home program and all related health services. When Tom's father, a retired Navy officer, died, Tom began to receive military SBP in an amount just above three times the SSI benefit amount. This SBP payment made him ineligible for Medicaid waiver services. The private pay cost of the programs and services Tom was receiving prior to his father's death was $10,400 per month, almost five times his SBP payment. Tom lost his group home placement, as well as his day program, and was transferred to a board and care home that was little more than a homeless shelter.

Legislative Solution

If military parents could have the SBP benefit for their disabled child paid to a special needs trust instead of paid

directly to the child, SSI and Medicaid benefits would be protected. To change the allowed beneficiary of the SBP seemed like a simple fix. The author, with the assistance of the Special Needs Alliance, began lobbying on this issue in 2007, leading to legislation being introduced in 2009. Various members of Congress agreed with the advocates for this change but the "fix" proved to be complicated. After many false starts, a military advocacy organization, the Military Coalition, made this a part of their legislative agenda. Various disability advocacy organizations, the American Bar Association and the National Academy of Elder Law Attorneys also publicly supported the measure.

The Disabled Military Child Act specifically authorizes military parents to elect that the SBP benefits for a disabled child be assigned to a supplemental or special needs trust. The trust must be a first party or self-settled special needs trust that includes provisions to reimburse the Medicaid program on the death of the disabled child for Medicaid benefits the child received during his or her lifetime.

Regulations still need to be adopted to implement this new law. It is not clear whether parents who previously declined an SBP benefit for a disabled child can now revise their election given this new option to have the benefit paid to a trust. It is also not yet clear whether SBP benefits already being paid directly to disabled individuals can be assigned to a special needs trust. The author has been told by Defense Department sources that there will likely be an "open season" to revise elections and make the assignment to a trust in the coming months, but it is unclear what revisions, elections and assignments will be permitted. It will also be important to make clear to SBP recipients that the benefit must be assigned to a first party special needs trust. This will be difficult, as it is anticipated that most families will not understand the difference and the cost of preparing a second special needs trust may be prohibitive for many families. JAG and legal services officers at military bases are not permitted to draft any type of special needs trust for service members or retirees.

There is another benefit available to dependents of service members - Dependency and Indemnification Compensation (DIC). This is paid to dependents of service members killed on active duty. It cannot be assigned to a trust, but it is typically a lower benefit and does not interfere with Medicaid waiver eligibility as the SBP does. In addition, this benefit is more along the lines of Social Security or similar benefits and, arguably, should not be excluded from countability as income.

ACCESS TO MEDICAID WAIVER SERVICES & ECHO

A major issue confronting military families who have a child with special needs is their constant moves - in military parlance "PCS" or permanent change of station. A typical station lasts only 3 years and can be much shorter if the station is a training assignment. For military families trying to access Medicaid waiver services, this constant moving means either 1) never making it to the top of a waiting list before moving to the next station, or 2) if they are receiving Medicaid waiver services, facing the choice to leave the military or leave the child behind to continue to receive those services.

In November 2013 West Virginia University published the results of a comprehensive study on military families and access to Medicaid and Medicaid waiver services commissioned by the Office of Community Support for Military Families with Special Needs, Department of Defense. That study quotes multiple families interviewed who say that they need services but there is no point in applying as they will never receive services before moving to the next station. Texas, California and Virginia all have very large military populations and are also among the states with the longest waiting lists for services - often much longer than 3 years. In addition, there is the challenge of finally receiving Medicaid waiver services but then being moved and starting on another wait list.

The West Virginia University study suggests that there be some agreement or legislation providing that service members be granted the same services in the new duty station state or at least the same priority on the wait list. However, the study acknowledges that this is not very practical - a child receiving a developmental disability waiver in Virginia may move to Massachusetts where there is no comparable waiver program. Every state also runs their waiting list in different ways, categorizing with different levels of urgent needs or not categorizing by urgency at all. The study therefore suggests that the Department of Defense should consider expanding the Tricare ECHO program which provides expanded services for children with special needs.

Tricare, the health insurance program for service members, retirees, and their dependents, also has a program for active duty family members with special needs called ECHO (Extended Health Care Option). ECHO covers most categories of disability, including Autism Spectrum Disorder. However it covers the child only while a full time student with a maximum age of 23. It also does not cover a dependent child once the service member has retired. ECHO provides durable medical equipment, rehabilitative services, home health care up to 40 hours per week, transportation, and respite care of 16 hours per month. There is a cap of $36,000 per year per recipient for services. There is also a monthly cost share for families, based on the service members pay grade, of $25 to $250 per month. See www.tricare.mil/echo. In 2013 only 8,094 Tricare beneficiaries were enrolled in ECHO, or about 6% of all families enrolled in the Exceptional Family Member Program which is available to all service members with a special needs child. The great majority of the families using ECHO in 2013 used it for home health care or respite services, and ABA therapy. (See Military Times, March 3, 2015 "Panel: Improve Benefits for Severely Disabled Children")

Until recently ECHO also provided ABA (Applied Behavior Analysis) therapy for children with autism. ABA therapy is now provided exclusively under the Autism Care Demonstration (ACD) - a program that started in July 2014 and scheduled to be maintained as a demonstration program until the end of 2018. Eligibility is more liberal under ACD versus ECHO and retired service members may access these benefits for dependents. See www.tricare.mil/acd.

So it appears that the military is working to provide "in house" benefits for children under age 22 to replace Medicaid waiver services. However, this does not address the plight of the service member who has a child over age 22 who is receiving or close to receiving Medicaid waiver services. I have had several client families in my practice who have chosen to retire or leave service short of retirement because a move would endanger an adult child's benefits. In making that decision they have to weigh the lost Survivor Benefit Program versus a lost Medicaid waiver benefit. I also frequently encounter the military family who is in the Washington DC area as their last duty station prior to retirement but plan to retire to their home state. The retirement often coincides with a child reaching adulthood and accessing Medicaid waiver benefits. The heartbreaking decision is sometimes to leave the child in Virginia where they have a group home placement and benefits, rather than move with the family to the home state where there would be a long wait for equivalent placement and benefits.

Another remedy that has been introduced in Congress is the ACE (Advancing Care for Exceptional Kids) Act of 2015 (HR 546). This is not aimed at military families in particular, but includes provisions to simplify obtaining care across state lines.

EDUCATION ISSUES

The same issues with frequent moves are present in education. Most children of service members attend school in their community and not on the military base. Children covered by IDEA (Individuals With Disabilities Education Improvement Act) will have an Individual Education Plan (IEP) and that must be transferred to the new station when a family moves. While both IDEA and the Interstate Compact on Educational Opportunities for Military Children mandate that a child with an IEP should receive comparable services at the new school, that can be a challenge to enforce. IEP's are often prepared at the end of the school year and not implemented until the following school year. Military family moves most often occur over the summer. So the most recent IEP is just a "plan" and not "services" that must be comparable, and the receiving school often tries to implement the one year old services rather than the updated plan.

The other challenge in education is just finding a school system or individual school that can meet a child's needs. I have many non-military clients who spend a great deal of time during their child's preschool years finding just the right school choice for them. Military families do not have this luxury. They typically have 60 days to do the entire move and often little choice as to schools. If they have on base housing then their school choice is made for them. If they are off base then affordability will be a major factor even with research time available.

CONCLUSION

Families of service members face many challenges but if there is a special needs child those are compounded. Some policies of both the military and broader government are outright discriminatory and others simply put a major burden on families who are required to relocate on a regular basis.

APPENDIX A

10 U.S. Code § 1450 - Payment of annuity: beneficiaries

1 Current through Pub. L. 114-19

(a) In General.— Effective as of the first day after the death of a person to whom section 1448 of this title applies (or on such other day as that person may provide under subsection (j)), a monthly annuity under section 1451 of this title shall be paid to the person's beneficiaries under the Plan, as follows:

(1) Surviving spouse or former spouse.— The eligible surviving spouse or the eligible former spouse.

(2) Surviving children.— The surviving dependent children in equal shares, if the eligible surviving spouse or the eligible former spouse is dead, dies, or otherwise becomes ineligible under this section.

(3) Dependent children.— The dependent children in equal shares if the person to whom section 1448 of this title applies (with the concurrence of the person's spouse, if required under section 1448(a)(3) of this title) elected to provide an annuity for dependent children but not for the spouse or former spouse.

(4) Special needs trusts for sole benefit of certain dependent children.— Notwithstanding subsection (i), a supplemental or special needs trust established under subparagraph (A) or (C) of section 1917(d)(4) of the Social Security Act (42

U.S.C. 1396p(d)(4)) for the sole benefit of a dependent child considered disabled under section 1614(a)(3) of that Act (42 U.S.C. 1382c(a)(3)) who is incapable of self-support because of mental or physical incapacity.

(5) Natural person designated under “insurable interest” coverage.— The natural person designated under section 1448(b)(1) of this title, unless the election to provide an annuity to the natural person has been changed as provided in subsection (f).

SNT Conference: October 15 | St. Petersburg, Florida

Veterans Benefits and the Person with Special Needs

Michael P. Allen
Associate Dean, Professor of Law &
Director, Veterans Law Institute

STETSON UNIVERSITY COLLEGE OF LAW
October 15, 2015

Veterans' Benefits: Why Should You Care?

- A Word to the Wise: A Little Knowledge Can Be a Dangerous Thing. But . . . .
- When advising clients, you could be leaving important benefits on the table:
  - Pensions, including aid and attendance
  - Disability Compensation
  - Priority access to VA Medical Care

STRUCTURE OF BENEFITS SYSTEM

VA REGIONAL OFFICE → NOD → SOC → FORM 9 → BOARD OF VETERANS APPEALS → UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS → UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT → SUPREME COURT OF THE UNITED STATES

SYSTEM FEATURES

Regional Offices

- 57 located in the U.S. & Philippines
- Part of the "Veterans Benefits Administration"
  - Distinct from health care (Veterans Health Administration)
- Non-lawyers

Board of Veterans' Appeals

- Chairman; Vice-chairman; Approx. 65 Veterans Law Judges/Board Members
- Four Regional Decision Teams
- A separate entity within VA -Not part of Veterans Benefits Administration

SYSTEM FEATURES CONTINUED...

- Board and Regional Offices comprise the Administrative portion of the system.
- Administrative System is "non-adversarial" and pro-claimant.
  - Duty to Notify (38 U.S.C. § 5103)
  - Duty to Assist (38 U.S.C. § 5103A)
  - Benefit of Doubt Rule (38 U.S.C. § 5107)
  - May introduce new evidence at any point
- Problem: Delays & The "Hamster Wheel"

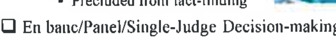
SYSTEM FEATURES CONTINUED...

Judicial System

- The judicial process is adversarial. No pro-claimant features.

CAVC

- Article I Court
  - Presidential Appointments
  - 15 Year Terms
- Appellate Body
  - Precluded from fact-finding
- En banc/Panel/Single-Judge Decision-making



SYSTEM FEATURES CONTINUED...

Judicial System (Cont.)

Federal Circuit

- Article III Court
- Limited Jurisdiction

SCOTUS

- 4 cases in history from system

SYSTEM WORKLOAD

Massive System

- Nearly 1/3 of U.S. population eligible for some benefit.
- Nearly $25 billion spent annually in compensation & pension.
- Over 1,000,000 new claims filed each year for the past 5 years.
- FY 2014 set a record with 1.3 million disability claims alone.
- Approximately 200,000 claims in the "backlog."

BENEFITS

- Wide Array of Benefits, For Example:
  - Burial
  - Health Care
  - Educational / Rehabilitation
  - Home Loans
  - Insurance
  - Disability Compensation – Most Common
  - Pensions
  - Dependency and Indemnity Compensation

SERVICE-CONNECTED DISABILITY CLAIM

Various ways to have a disability deemed "Service-Connected"

- ❑ Direct Service Connection
- ❑ Secondary Service Connection
- ❑ 38 U.S.C. § 1151- VA Medical Malpractice
- ❑ Presumptions
  - Specialized such as Agent Orange
  - Presumption of soundness, 38 U.S.C. § 1132
  - Presumption of aggravation, 38 U.S.C. § 1153

ELEMENTS OF SERVICE-CONNECTION CLAIMS

1. "Veteran" Status – 38 U.S.C. § 101(2)

   "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable"

2. Current Disability – 38 U.S.C. § § 1110, 1131
   - ❑ Medical Evidence / VA Exams
   - ❑ Lay Evidence

ELEMENTS OF SERVICE-CONNECTION CLAIM CONTINUED…

3. In-Service Event or Occurrence
   - ❑ Evidentiary Issues
   - ❑ Buddy Statements

4. NEXUS – Or connection between current disability & in service events.
   - ❑ Medical Opinions
   - ❑ Presumptions
   - ❑ Critical Role of Lawyers

ELEMENTS OF SERVICE-CONNECTION CLAIM CONTINUED…

5. Rating
- ❑ Schedule – 0% - 100% in 10% increments
- ❑ Extra-scheduler ratings
- ❑ TDIU ("Total Disability Based on Individual Unemployability")

6. Effective Date

PENSIONS

- ❑ VA Pension benefits are distinct from service-connected disability compensation.
  - Defined by 38 U.S.C. § § 1501-1562
  - Keep in context: 3.3 million comp claims vs. 325,000 pension claims
- ❑ As distinct from compensation benefits, pensions <u>are</u> mean-tested
- ❑ A person may <u>not</u> receive both service-connected disability compensation and pension benefits.
- ❑ A pension's goal is to account for the lifetime loss of earning potential in the private sector due to "wartime" military service.
- ❑ **<u>IMPORTANT: Proposed Regulations will likely change the way the law operates in this area in significant ways.</u>**

PENSIONS CONTINUED…

Basics for Establishing Entitlement to a Pension:

- ❑ Veteran generally must have 24 months of continuous/active-duty service, 90 days of which generally must be during a period of congressionally defined "wartime."
  - Veteran must also have been discharged under other than dishonorable conditions.
- ❑ Veteran must be permanently and totally disabled (and not service-connected) and the disability must not be the result of "willful misconduct." OR
- ❑ Age 65 years or older.
- ❑ For <u>both</u>: Demonstrated Need – "MEANS TESTING"
- ❑ Currently, there is NO look back period. **IMPORTANTLY, this is likely to change under the proposed regulations.**

PENSIONS CONTINUED…

More on Mean Testing

- ❑ Complicated & Technical
  - But remember: Means testing does not apply to the far more common benefit of disability compensation
- ❑ Considers both income and net worth of veterans, spouses, and dependent children
  - Case-by-case assessment. This may change in pending regulations to have a set amount
  - Generally, VA will not deny a pension for a veteran with a net worth less than $80,000, although age and life expectancy factor into the analysis. This too may change

PENSIONS CONTINUED…

- ❑ The means testing is based on projections of an annualized 12-month period from the date of the claim.
- ❑ Examples of things that are excluded or deductible from income (only examples):
  - Public and private "welfare"
  - Casualty insurance payments
  - Profit from sales of real or personal property
  - Money in jointly held accounts that are acquired as the result of the death of the other account holder
  - Medical expenses, which includes the cost of nursing home care
  - Accrued interest on retirement accounts
  - Some trust income dependent largely on control over trust

PENSIONS CONTINUED…

- ❑ A veteran without dependents who is receiving Medicaid-covered nursing home care will have pension benefits reduced to $90/month for any period after the third full calendar month following admission.
  - 38 U.S.C. § 5503(a)(1)
- ❑ A Word About "Aid & Attendance"
  - Aid & Attendance allows for greater benefits as a result of a veteran being so impaired that he or she requires assistance from another person to perform the functions required by everyday living
    - 38 U.S.C. § 1502(b)
    - Greater than being "housebound," which also allows increased benefits
      - 38 U.S.C. § 1502(c)

QUESTIONS?

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Basics of Special Needs Trusts

Thursday, October 15, 2015

Breakout Session 1
1:15 P.M. – 2:15 P.M.

Tax Types and Why You Care:

The Relationship Between Income Tax, Capital Gain Tax, Gift Tax and Federal Estate Tax

Presenter:
Nell Graham Sale
Attorney at Law,
Pregenzer, Baysinger, Wideman & Sale
Albuquerque, NM

- Materials
- PowerPoint

Stetson University College of Law presents:
2015 SPECIAL NEEDS TRUSTS
THE NATIONAL CONFERENCE
October 14-16, 2015
The Vinoy Renaissance Resort & Golf Club
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Center for Excellence in Elder Law

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TAX TYPES AND WHY YOU CARE: THE RELATIONSHIP BETWEEN INCOME TAX, CAPITAL GAINS TAX, GIFT TAX AND FEDERAL ESTATE TAX

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TAX TYPES AND WHY YOU CARE: THE RELATIONSHIP BETWEEN INCOME TAX, CAPITAL GAINS TAX, GIFT TAX AND FEDERAL ESTATE TAX

I. Income Tax

A. Individual Income Tax. When making decisions for clients regarding Medicaid and special needs planning, one must keep in mind that there may be individual income tax consequences to those decisions.

1. Qualified Income Trusts. Medicaid rules differ from state to state, but one way or another, the monthly income of a Medicaid recipient is taken into account. If the income is determined to be too much for eligibility, the states have invented methods to allow eligibility while reducing countable income. Now federal law provides for these "qualified income trusts."[1] When a qualified income trust is funded, it is common practice for all of the income of the Medicaid recipient to be directed into the trust. Once a month, the Trustee issues checks. In some states, these checks are for a precalculated amount of income that represents the maximum allowable amount to be deemed to be available to the Medicaid recipient. In other states, this amount is the entire corpus of the trust. This amount is used to pay for the cost of care at the nursing home, the personal needs allowance and any allowable trustee fees, among other things. Either the balance of the income remains in the trust or the entire amount is spent. At the death of the Medicaid recipient, the balance in the trust, if any, is paid to Medicaid to reimburse Medicaid for any monies that have been expended by Medicaid for the care of the recipient.

[1] 42 USC § 1396p d(4)(B)

If the Medicaid recipient has sufficient income, he or she may have an income tax liability on the income diverted to the trust. However, even though the income that is being directed into the trust may be taxable income, there is no provision in the qualified income trust arrangement for any money to be set aside to pay an income tax liability. For single Medicaid recipients, even after taking a medical deduction for the funds paid to the nursing home, if there is an income tax liability, the only solution is for a family member to contribute the funds that may be required to pay the income tax liability.

For a married Medicaid recipient, one solution to this problem is to have the income of the Medicaid recipient be deposited first into a joint account. The community spouse can then issue a check from that account each month to the qualified income trust. On the joint individual income tax return, the community spouse can report the joint income, and take a medical deduction for the amount used from the joint income of the couple for the cost of care of the Medicaid recipient, thus reducing the taxable income of both taxpayers. If there is any income tax liability, it can be paid from the income of the community spouse.

2. Timing of Liquidation of Retirement Plans. If a retirement plan such as an IRA has to be liquidated in order for the Medicaid recipient to be eligible, it is important to consider the timing of that liquidation so as to minimize the income tax liability on that liquidation. What is advisable is to have the liquidation occur after the Medicaid applicant has entered a skilled nursing facility but before eligibility for Medicaid. The cost of the skilled nursing facility will be an income tax deduction for medical care which can be taken against the taxable income realized by the liquidation of the IRA.

Additionally, one must take into account the income tax consequences of annuitizing an IRA, which is a safe harbor under the Deficit Reduction Act of 2005.[2] All distributions from IRA's are ordinary income. Therefore, when an IRA is annuitized in order to obtain Medicaid eligibility, one must take into account that each regular payment from an IRA to the spouse of a Medicaid recipient will be included in his or her taxable income as ordinary income.

B. Fiduciary Income Tax. Trusts are commonly used for Medicaid planning. It is important to know about the income taxation of trusts so that one does not overlook planning opportunities that may be available.

1. Income Only Trusts. If a trust has been established for the benefit of the Medicaid recipient that by its terms may only distribute income to or for the benefit of the Medicaid recipient, the trust itself will not owe income tax, because all of its income will be distributed currently. This is called a Simple Trust. (The trust may owe capital gains tax if it has realized a gain on the sale of an appreciated asset, and by its terms is not required to distribute that gain as income to the beneficiary.) The trust will need to file an income tax return, which is filed on Form 1041, U.S. Income Tax Return for Estates and Trusts. The trustee reports how much income was earned by the trust and that the trust has distributed all of its income, and along with the return, the trustee files a Schedule K-1 that reports the amount of income that was distributed during the previous tax year to the beneficiary of the trust. Federal fiduciary income tax returns are due on April 15 of the year following the tax year. All trusts use the calendar year as their tax year.

2. Discretionary Trusts. Special Needs Trusts as well as traditional support trusts will result in many people being beneficiaries of discretionary trusts. Because there is no

[2] 42 USC §§ 5001 *et. seq.*

requirement that income be distributed currently, these are called Complex Trusts. As with Simple Trusts, the Trustee must file an income tax return that reports the amount of income, if any, that was earned and distributed during the tax year. This is called distributable net income ("DNI") and it can be one of the most confusing concepts in fiduciary accounting. In addition, if the trustee distributes principal, but the trust earned income during the tax year, the value of the principal, up to the amount of the accounting income of the trust for that year, will be considered to be a distribution of income. A simple way to explain this is to state that any principal distribution "drags out" income up to the value of the principal distributed. For example, if the trustee purchases an elephant for the beneficiary, which is worth $20,000, and the trust earned $18,000 in income in the tax year, the trustee would report that it distributed $18,000 in distributable net income to the beneficiary, and the trust would have no income to report that it retained. For that tax year, the trust would be a simple trust. If the earned income of the trust was higher than $20,000, and the trustee made no other distributions during the tax year, the trust would report that it distributed $20,000 income to the beneficiary and retained the balance of the income over $20,000, minus a $100 exemption that is available to complex trusts. The trust would owe income tax on that balance, and would also file a Schedule K-1 reporting a $20,000 distribution of income to the beneficiary. The beneficiary, who received an elephant, would have to file an income tax return reporting the $20,000 distribution as taxable income.

Trusts pay income tax at the same rates as individuals. However, the brackets of trusts are very compressed. For 2015, the projected rates and brackets are as follows:

2015: If Taxable Income Is:	***The Tax Is:***
Not over $2,500	15% of the taxable income
Over $2,500 but not over $5,900	$375 plus 25% of the excess over $2,500
Over $5,900 but not over $9,050	$1,225 plus 28% of the excess over $5,900

Over $9,050 but not over $12,300	$2,107 plus 33% of the excess over $9,050
Over $12,300	$3,179.50 plus 39.6% of the excess over + 3.8% Medicare Surtax

As you can see, a trust that retains $20,000 in earned income will pay $6,514 in federal fiduciary income tax at the 39.6% rate plus the Medicare surtax, after taking the $100 exemption allowed. In comparison, a single individual reporting $20,000 of taxable income will pay tax at the maximum 15% rate, which will be further reduced by the individual exemption of $4,000 in 2015. The tax bill that results from the distribution of the elephant to the individual beneficiary will be 0. All the more reason for the trustee to purchase an elephant for the beneficiary! For an individual to pay income tax at the highest rate of 39.6%, the taxable income must be higher than $413,201.

3. Special Needs Trusts. Special Needs Trusts are complex trusts, because the trustee must use its discretion before distributing income or principal. Being a complex trust, any time that the trustee distributes principal, the value of the principal distributed "drags out" the value of any earned income in the trust and there is a distribution of income to the beneficiary. This seems anomalous, when we know that beneficiaries of special needs trusts are usually receiving means based benefits, such as Supplemental Security Income, and are not allowed to receive income. One must remember that the definition of income for Social Security and Medicaid purposes is different than the definition of taxable income. Using the example of the distribution of an elephant, which is arguably not a countable resource as a pet or household item, it would not affect the income limitations of the beneficiary. However, because it "drags out" income from the trust, there is taxable income reported to the Internal Revenue Service for the beneficiary. The Trustee of a special needs trust will commonly arrange for the preparation

of an income tax return for the beneficiary, pay the expense of the preparation, and pay any income tax liability of the beneficiary.

If a special needs trust retains income, the Internal Revenue Code ("IRC") provides an exception for some special needs trust beneficiaries.[3] It was introduced in the Victims of Terrorism Tax Relief Act of January, 2002. It provides for a higher exemption if the trust is what is defined as a Qualified Disability Trust ("QDT"), that is, one that is established solely for the benefit of an individual under 65 who is disabled. A trust is a QDT even if a remainder beneficiary is not disabled. A special needs trust for a person over age 65 that was funded after age 65 would not qualify as a QDT. For a trust that meets the definition of a QDT, the exemption that is allowed for the trust is the allowable personal exemption for the individual beneficiary. In 2015, the personal exemption is $4,000. Therefore, if a QDT retains $5,000 of earned income, after the exemption amount, it would report $1,000 taxable income, and pay $150 income tax. A complex trust that is not a QDT would have only a $100 exemption, and thus would report $4,900 taxable income and pay $975 in tax.

4. Grantor Trusts. In our practices, we usually associate the term "Grantor" with the person who creates a trust. We understand that this term can be substituted with the terms "Trustor" or "Settlor." However in the IRC, the term "grantor" has a specific meaning that is somewhat broader than what we are accustomed to. In Treasury Regulation Section 1.671-2(e)(1), the term "grantor" for the purposes of the grantor trust rules can be a person who creates a trust (a meaning with which we are comfortable) or a person who makes a gratuitous transfer to a trust, directly or indirectly.[4] Therefore, a person who creates a trust and has the title of Grantor according to our common meaning of the term might fit one of the

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[3] IRC § 642(b)(2)(C)(i), (ii)
[4] Treas. Reg. § 1.671-2€(1)

definitions of grantor under the IRC. However, there can be additional grantors under the IRC who are persons who gratuitously transfer anything into that trust. The additional grantors can become such by either a direct transfer or an indirect transfer. What would that look like? Let's say that a parent created an irrevocable trust for a child. The parent is of course the Grantor or creator of the trust. Somewhat later, a grandparent decides to make a gift to the trust for the benefit of the child. The grandparent may also be a grantor, even though the grandparent did not create the trust.

Under the IRC, once a person has become a possible grantor by creating the trust or donating to the trust, if the terms of the trust establish sufficient control in such person, then the person is deemed to be the owner of the trust property, not the trust. Thus the grandparent who transferred property in the above example could be treated as the continuing owner of the transferred property, depending on the terms of the trust. For income tax purposes, the grantor is taxed on the income earned by the property in the trust of which the grantor is deemed to be the owner. The trust is ignored for income tax purposes and the income is treated as if it were distributed to the grantor, even if it is not actually distributed to the grantor. In the example of the transfer from the grandparent, if the grandparent is a grantor, the income earned by the assets in the trust that were contributed by the grandparent is attributed to the grandparent for income tax purposes. Therefore, if a drafter wants income to be attributed to the person who establishes a trust, or to persons who contribute assets to the trust but who did not create the trust, then the drafter needs to make sure that the terms of the trust agreement provide sufficient control in the grantor to establish a grantor trust.

The Grantor Trust Rules are found at Sections 671 to 678 in the Code and in the accompanying Treasury Regulations at Sections 1.671-1 to 1.678-(a)1 *et.seq*..

5. Estates. An estate can also earn income. If an estate earns more than $600 of gross income during any fiscal year, it will need to file an income tax return. Estates generally will distribute all income at the end of administration, but may or may not distribute income during administration. Estates have the same income tax rates as trusts. However, estates have great flexibility to determine fiscal years. Depending on the circumstances, the Personal Representative may determine that the appropriate fiscal year for an estate may be a short year for the first year, and/or a short year for the final year. The only parameters guiding the choice of fiscal year are that it cannot be longer than the period from the date of death until the end of the month in the next year that immediately precedes the month of death. For example, if a decedent died on November 15, 2013, the maximum length fiscal year would be from November 15, 2013 until October 31, 2014. It is not uncommon for the Personal Representative to elect a short first fiscal year, in order to make maximum use of deductions that the estate can take that are not available to the beneficiaries, such as the expenses of administration.

II. Capital Gains Tax

A. Basis of Property Transferred by Sale. Property often must be liquidated as part of the spenddown to prepare for Medicaid eligibility or a trustee many need to sell property. The practitioner must be aware that a sale of appreciated property will realize capital gain. If the property has been held for more than 12 months, it will be subject to long term capital gain tax. The capital gain is calculated by subtracting the adjusted basis from the adjusted sale price. For real property, the adjusted basis is the amount that was paid for the property when it was purchased by the taxpayer (cost basis), reduced by any depreciation taken during the time that the property was held, and increased by the cost of any capital improvements made to the property. The adjusted sale price is the price paid for the property by the buyer reduced by any

costs of sale that were paid by the taxpayer. For sales of long-term capital gain property in 2015, if the seller is in the 10% or 15% income tax bracket, the capital gains tax rate is 0%. If the seller is in the 25% to 35% income tax bracket, the capital gains tax rate is 15%. If the seller is in the 39.6% income tax bracket, the maximum capital gains rate is 20%. The rates are the same for individuals as well as trusts.

B. Basis of Property Transferred by Gift At Death. When an appreciated asset transfers as a result of the death of the owner, the basis steps up to the fair market value as of date of death.[5] Therefore, anyone who inherits appreciated property will also receive a new basis in the property. In community property states, the basis of the entire property will step up if community property is inherited by a surviving spouse.[6]

C. Basis of Property Transferred by Gift During Lifetime. A spend down plan may include making transfers of appreciated property to another person. When a person makes a gift of appreciated property to another person, the basis of the property transfers with the property. Therefore, whatever was the adjusted basis of the transferor becomes the carryover basis of the transferee. For example, father transfers a rental house to daughter. The value of the house when father bought the property was $50,000. While he owned the property, he took depreciation in a total amount of $10,000. He added an addition on the house for $5,000. Therefore, his adjusted basis in the property is

$ 50,000	cost of purchase
- 10,000	depreciation
+ 5,000	capital improvements
$ 45,000	adjusted basis

[5] IRC § 1014(b)
[6] IRC § 1014(b)(6)

If daughter holds the property, she may continue depreciation, but she must use her father's basis. When daughter sells the property, she will realize capital gain and pay tax on the difference between her adjusted sale price and her adjusted basis. If she sells the property for $100,000, with costs of sale of $5,000, and having taken $5,000 in depreciation, her gain will be $45,000.

$100,000	sale price
- 5,000	cost of sale
$ 95,000	adjusted sale price

$ 45,000	carryover basis
- 5,000	depreciation
$ 40,000	adjusted basis

$ 95,000	adjusted sale price
- 40,000	adjusted basis
$ 45,000	taxable gain

What if father transfers real property to himself and daughter as joint tenants with the right of survivorship? The Internal Revenue Service and Medicaid consider this to be a completed gift from father to daughter of one-half of the property, because once the deed is executed and delivered to daughter, father cannot sell the property without her permission. Daughter's carryover basis in her one-half of the property is one-half of father's basis. If father dies, his one-half interest will pass to daughter, and she will obtain a stepped-up basis for father's one-half. If the property value is $100,000 at the time of the gift and at father's death, and father's basis was $45,000 at the time of the gift, and there were no subsequent adjustments to basis during his lifetime, daughter's basis at her father's death is $72,500, that is, $50,000 (father's new basis) plus $22,500 (daughter's basis in one-half of property).

D. Inheriting a Life Estate. Dad dies, leaving his home to his daughter. However, he had a surviving spouse, and the law of his state provides that the surviving spouse, who is daughter's stepmother, receives a life estate in the home, and daughter obtains only a remainder interest. At the death of stepmother, what is the value of daughter's basis in the house?

The section of the IRC that applies is Section 1001(e)(1), which states that in determining the gain or loss from the sale or other disposition of a term interest which is obtained as a result of another's death, the adjusted basis of that term interest shall be disregarded. In plain English, this means that although the basis of a term interest can be determined upon receipt using actuarial tables, if it is sold or if it passes as a result of the life tenant's death, the basis is zero. The regulations pertaining to this IRC section (Treas. Reg. 1-1001-1(f)(4)) refer to another place in the Regulations for examples, Treas. Reg. 1.1014-5(c). Looking at these examples, except for one exception, we find that a disposition of a term interest that is acquired as a result of a gift at death or during lifetime, results in a basis of zero. Thus, the result for our example is that daughter's basis is the value of her remainder interest in the property at the time of her father's death.

There is an exception to calculating gain or loss with a zero basis for a term interest acquired by death or gift. If the owner of the life interest and the owner of the remainder interest later dispose of the entire property to a third party, then the basis of the term interest does have a value of more than zero.[7] But the value of the basis is calculated not as of the time of receipt, but as of the time of the disposition, because the age of the life tenant has increased. This is called the Shifting Basis Rule, and can be found in the Regulations at Sections 1-1014-5(a) and

[7] See IRC § 1001(e)(3)

1-1015-1(b). What we learn here is that when one receives a term interest either from a decedent (Section 1014) or by gift during lifetime (Section 1015), the value of that interest is calculated using actuarial factors based on the life tenant's age.

Therefore, when our stepmother obtained her life interest, the basis of her life interest was a percentage of the total value, calculated using factors to determine the present interest based on her age at the time of dad's death. The value of the daughter's remainder interest, and thus her basis, is calculated by subtracting the value of stepmother's life interest from the total value. But as stepmother aged, the value of her basis shifted at time passed. Once again, if stepmother disposed of her interest during her lifetime to a third party, or if she died without disposing of her life interest, the basis is calculated as zero. But if stepmother and daughter decided to sell their combined interests, then stepmother could use her basis to calculate gain or loss, and she would determine her basis using the factor for her age at the time of the sale multiplied against the value of the property when she acquired her interest. Thus the value of the basis in a term interest "shifts" as the life tenant ages, and the value of the basis of the owner of the remainder interest is increased.[8]

E. Principal Residence Exclusion from Capital Gain. Section 121 of the IRC states that an individual taxpayer can exclude from income up to $250,000 of gain from the sale of a home owned and used by the taxpayer as a principal residence for at least 2 of the 5 years before the sale. The full exclusion does not apply if, within the 2-year period ending on the sale date, the exclusion was applied to another home sale by the taxpayer.

A married couple filing jointly for the year of the sale may exclude up to $500,000 of home-sale gain if (1) either spouse owned the home for at least 2 of the 5 years before the sale,

[8] See examples (3) and (4) in Treas. Reg. 1-1014-5(c)

(2) both spouses used the home as a principal residence for at least 2 of the 5 years before the sale, and (3) neither spouse is ineligible for the full exclusion because of the once-every-2-year limit.

III. Federal Gift Tax

The IRC imposes a tax on certain gratuitous transfers, meaning transfers during lifetime for which the donor receives nothing in return.[9] The gift tax is an excise tax assessed on the net value of the gift on the date of the gift. Not all gifts are taxable. Gifts which are not taxable include: annual gifts of a present interest valued at no more than $14,000; gifts to spouses who are United States citizens; gifts to charities; tuition paid for someone else if paid directly to the educational institution; medical expenses paid directly to the provider; and, gifts to political organizations. For a gift tax to be imposed, a transfer must be a completed gift, that is, out of the control of the transferor. The rate for gift tax in 2015 is 40%. When a lifetime transfer of appreciated property is made, the basis of the property transfers with the property.[10]

A. Direct Lifetime Transfers of Gifts. A gift of $14,000 or less of a present interest to a donee in a calendar year is not taxable or required to be reported. A person can make a series of non-taxable gifts to any number of individuals in the same calendar year. A married couple can make a non-taxable gift of up to $28,000 to an individual. A married couple can make a gift to another married couple, such as their child and his or her spouse, which can total up to $56,000 without the gift being taxable or reportable.

[9] See IRC §§ 2501-2524
[10] IRC § 1015(a)

When a person makes a taxable gift, however, the IRC requires that a gift tax return be filed using Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return. Unless the total cumulative taxable gifts made by a donor exceed $5,430,000 in 2015, no gift tax must be paid even though filing a return is required. Therefore, a person can give up to $5,444,000 ($5,430,000 + $14,000) to another person in one year and still not have to pay gift tax. Gift tax returns are due by April 15 of the year following the year in which the gift was made. Gift tax is payable by the donor.

B. Transfers of Gifts to Trusts.

1. Gifts of Future Interests. If a gift has a condition on it, or if it cannot be spent currently by the donee of the gift, it is a gift of a future interest rather than a present interest. The $14,000 annual exclusion for non-taxable gifts only applies to gifts of a present interest, that is, a gift that has no conditions and that can be used immediately by the donee. Gifts to irrevocable trusts are usually gifts of a future interest, that is, the gift will not be immediately distributable to the beneficiary but will be distributed at a future date according to the terms of the trust. For example, a transfer to a trust for the benefit of a minor is a gift of a future interest, because the minor will not have a power to demand distributions until attaining a certain age. Transfers to trusts in which the trustee has discretionary power over all distributions will always be transfers of a future interest. Therefore, transfers in any amount, even less than $14,000, to discretionary trusts, are taxable gifts.

2. Crummey Powers. In 1968, a couple named Mr. and Mrs. Crummey challenged the IRS on this issue of transfers to trusts being future interests.[11] Mr. and Mrs. Crummey had made transfers to an irrevocable trust for their children, two of whom were

[11] *Crummey v. Commissioner*, 397 F. 2d 82 (9th Circuit, 1968).

minors. The trust was governed by California law. California law at the time provided that a beneficiary of a trust had until the end of the calendar year of the year of the gift to withdraw that transfer, and that after the end of the calendar year, the gift became part of the trust. The IRS took the position that the transfers to the trust were gifts of future interests. Mr. and Mrs. Crummey argued that for the period of time that the child had the right to withdraw the gift, it was a gift of a present interest. Since this period began at the time of the transfer and lasted until the end of the year, then at the time of the gift, it was a present interest. The court agreed with the Crummeys. As a result of that case, when a transfer to an irrevocable trust is made, the trustee can be directed to notify the beneficiaries of the trust that they have a certain limited period of time in which they have the right to withdraw the amount transferred, or a pro rata portion of it. This is now called a Crummey notice. The power conferred to the beneficiaries is called a Crummey power. If the beneficiary does not exercise the Crummey power, then the gift remains in the trust and becomes subject to the discretion or other powers of the trustee.

A subsequent case gave these withdrawal powers to persons other than the present beneficiary of the trust.[12] Ms. Cristofani gave the power to withdraw contributions to her two children and also to five grandchildren, and the grandchildren were only remainder beneficiaries of the trust. The Tax Court agreed that the gifts to the trust were not taxable.

3. Transfers to Special Needs Trusts. Special needs trusts are commonly used to protect assets that either belonged to a disabled recipient or that are given to a trust by someone other than the recipient to provide for his or her special needs.

a. Transfers to d(4)(A) Special Needs Trusts. A d(4)(A) special needs trust is funded with assets that belong to the beneficiary, and thus is considered a grantor

[12] *Estate of Cristofani v. Commissioner*, 97 T.C. 74 (1991)

trust. These trusts are also called "payback trusts," because at the death of the beneficiary, Medicaid is entitled to be reimbursed from the remaining assets in the trust up to the amount spent by Medicaid for his or her care during the lifetime of the beneficiary. Because the transfer into the trust is of the beneficiary's own assets, and the beneficial interest in the trust is retained by the beneficiary, the trust is a grantor trust and there is not a completed gift to the trust that occurs. Therefore, there are not gift tax considerations for d(4)(A) trusts.

b. Transfers to Third Party Settled Trusts. Transfers by third parties to special needs trusts are gifts of a future interest, because the trustee is prohibited from distributing income or principal except for the beneficiary's special needs. Furthermore, because the beneficiary has severe restrictions on the amount of income that he or she can receive during any month, as well as restrictions on the amount of resources that can be owned by the beneficiary, the beneficiary cannot have a present right to demand a withdrawal of any asset of the trust. Therefore, a Crummey power cannot be given to the beneficiary of a special needs trust. Therefore, any transfers of any amount to a special needs trust will be a gift of a future interest, which is a taxable gift that must be reported on a gift tax return.

One way to overcome this problem is to name other members of the family as additional beneficiaries of the trust for Crummey power purposes only. A special needs trust must have only one beneficiary. Therefore, the trust must be drafted so that it excludes the disabled beneficiary from having a Crummey power but lists other beneficiaries who are available to withdraw transfers to the trust. Furthermore, the trust could provide that while all of the named beneficiaries may receive discretionary distributions as long as the disabled beneficiary is not eligible for or receiving public benefits, when the disabled beneficiary is eligible for or receiving public benefits, he or she is to be the sole beneficiary of the trust. Alternatively, the trust

document could establish separate subtrusts for each of the beneficiaries, and direct the trustee to fund the subtrust for the disabled beneficiary with most of the assets of the trust. After the period for Crummey powers has elapsed, the subtrust for the disabled beneficiary would of course be a special needs trust. Using either of these methods would result in Crummey powers being available for transfers to the trust, and thus the transfers would be gifts of present interests.

In 2015, the gift tax exemption is unified with the federal estate tax exemption. This means that if one does make a taxable gift, even though there may be no gift tax to be paid, one has used up some of the exemption. For example, if one funds a third party-settled special need trust with $100,000, all of which its taxable, and files a Form 709 reporting that gift, the consequence is that the federal gift tax exemption remaining has been reduced by $100,000 to $5,330,000. This exemption amount is now also the amount remaining for federal estate tax purposes.

One issue to consider is whether or not the client even wants to make a completed gift to a third party-settled trust, because the client wants to pay all of the income taxes of the trust, meaning that the client wants the trust to be a grantor trust. Generally, a transfer to a grantor trust is not a completed gift, because the grantor retains control of the trust assets. However, if a client also wants to reduce his or her taxable estate for federal estate tax purposes, and the trust is being considered as a vehicle for gifting assets from the client to others, then the best advice is for the client to make a completed gift to a trust that would exclude the assets from his or her federal taxable estate at death. There is a hybrid use of grantor trust status that can accomplish both goals, that is, having transfers to the trust be completed gifts for gift tax purposes and retaining grantor trust status for income tax purposes. These trusts are referred to with the odd name, Intentionally Defective Grantor Trusts ("IDGT"). The trust is a grantor trust, often

containing the administrative power of the grantor to substitute trust property of equal value. All other aspects of the trust provide for complete separation of control by the grantor. Thus the grantor trust is "defective," because control by the grantor is so limited. A gift to an IDGT is a completed gift. Using an IDGT, which can be a special needs trust, can enable a grantor to pay the income tax liability for the trust as well as treat the trust assets as entirely separate from the grantor's taxable estate for federal estate and gift tax purposes.

IV. Generation-Skipping Transfer Tax

A subset of the federal gift tax and the federal estate tax is the Generation-Skipping Transfer Tax ("GST").[13] This is an extra tax on lifetime gifts or gifts from a decedent if the gift transfers to a "skip person," meaning to a person in a generation below another living person. For example, if grandpa wants to give a gift to grandchild, and the parent of grandchild who is a child of grandpa is alive, grandchild is a skip person. In this example, if the gifts exceeds the value of the remaining gift tax exemption amount available to grandpa, then there will be gift tax as well as GST tax assessed. The exemption amount for the GST tax is the same amount as the gift and estate tax exemption.

V. Federal Estate Tax

The federal estate tax is an excise tax assessed on property that passes at the death of the owner to his or her beneficiaries.[14] Property that is subject to the federal estate tax is that property over which the decedent had control at death or held a power that gave him or her sufficient control to cause inclusion in the federal taxable estate. Similar to the gift tax, there are some transfers that are exempt from tax, notably transfers to a spouse and to charities. The rate

[13] IRC §§ 2601-2664
[14] IRC §§ 2001-2058

for the federal estate tax in 2015 is 40%, assessed on the net value of the assets as of the date of death. The exemption amount for the federal estate tax is $5,430,000 in 2015, meaning that an estate valued at less than that is not subject to the tax.[15] Although the exemption amount is very high, there are circumstances when one should take the federal estate tax rules into account. For example, even if an estate value is below the exemption amount, when appreciated property transfers as a result of death, the basis "steps up" to the value of the property at the date of death, thus reducing capital gains tax on inherited assets.[16]

A. Special Needs Trusts.

1. Self-settled d(4)(A) Special Needs Trusts. It is not uncommon for a plaintiff to obtain a settlement of a significant amount as a result of injuries sustained by someone's negligence. In these cases, if the plaintiff has been permanently disabled as a result of the incident and will require substantial medical care for the rest of his or her life, it is appropriate to direct the settlement recovery to a special needs trust in order to secure eligibility for Medicaid for the plaintiff. Under Medicaid rules, funds received in a recovery are deemed to belong to the plaintiff. Therefore, the only kind of special needs trust that can be used in this planning is a d(4)(A) trust as long as the plaintiff is disabled and under age 65. For tax purposes, this trust is includable in the plaintiff's taxable estate, because he or she transferred the funds while retaining an interest in the funds, even though that interest is subject to the discretion of the trustee. Because of the payback requirement to Medicaid, however, if the medical needs of the beneficiary are substantial, it is likely that the corpus of the trust will be reduced significantly at the death of the beneficiary in order to pay the debt to Medicaid. While this may be the case,

[15] The Taxpayer Relief Act of 2013 provided for a new concept called "portability" by which any leftover exemption amount in the estate of one spouse can be transferred to the surviving spouse.
[16] IRC 1014; Treas. Reg. 1.1014-1

however, it is important that the practitioner not overlook traditional estate planning techniques to reduce federal estate tax when drafting a special needs trust that will hold a recovery over $5,430,000 in 2015.

2. Third Party Settled Special Needs Trusts. A special needs trust that is funded by a third party should take into account traditional federal estate tax planning techniques as well. While the third party special needs trust may not be includable in the estate of the beneficiary, it is important to consider the remainder beneficiaries when drafting these trusts. A third party-settled special needs trust can include generation-skipping transfer tax exemption planning so that at the death of the beneficiary, his or her children, or the other issue of the grantor, can benefit from generation-skipping tax exemption planning. If a beneficiary of a special needs trust is able to access public benefits, and if most of the needs of the beneficiary are provided by such benefits, it is likely that the special needs trust can grow in value and may not be expended during the life of the beneficiary. One can include a limited power of appointment for the beneficiary, if he or she is competent, which will not cause inclusion of the trust in his or her taxable estate, but will provide for some control over the future of the trust corpus, particularly if the beneficiary has children. By keeping in mind that this planning should benefit others in the future, a practitioner can provide good advice to a wealthy client who wants to provide significant funds that will be there if needed for a disabled family member, but will also provide prudent estate planning for other people for whom the grantor may wish to provide.

Conclusion

When planning for clients who lack capacity or may have other disabilities, providing for their special needs is paramount. However, the rules for income taxation, both for trusts and for

estates and individuals, must be considered. Interrelated with the income tax rules are the rules for capital gains, gifts and for the transfer of property at death.

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Tax Types and Why You Care: The Relationship Between Income Tax, Capital Gains Tax, Gift Tax and Federal Estate Tax

2015 Special Needs Trusts
October 15, 2015

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Individual Income Tax

- Payable by individual who received benefit of income
  - Qualified Income Trusts
  - Timing of Liquidation of Retirement Plan

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Individual Income Tax Rates for 2015

If Taxable Income Is Between:	The Tax Due Is:
0 - $9 225	10% of taxable income
$9 226 - $37 450	$922.50 + 15% of the amount over $9,225
$37,451 - $90 750	$5 156 25 + 25% of the amount over $37,450
$90 751 - $189 300	$18 481.25 + 28% of the amount over $90,750
$189 301 - $411 500	$46,075 25 + 33% of the amount over $189 300
$411,501 - $413 200	$119 401.25 + 35% of the amount over $411,500
$413 201 +	$119 996.25 + 39.6% of the amount over $413 200

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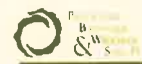
Fiduciary Income Tax

- Payable by Trust, Beneficiary or Grantor
  - Income Only Trusts
  - Discretionary Trusts
  - Special Needs Trusts
  - Grantor Trusts
  - Estates
  - Depends on explicit terms of the trust



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Income Tax Rates for Trusts 2015

If Taxable Income Is:	The Tax Is:
Not over $2,500	15% of the taxable income
Over $2,500 but not over $5,900	$375 plus 25% of the excess over $2,500
Over $5,900 but not over $9,050	$1,225 plus 28% of the excess over $5,900
Over $9,050 but not over $12,300	$2,107 plus 33% of the excess over $9,050
Over $12,300	$3,179.50 plus 39.6% of the excess over $12,300
	+ 3.8% Medicare Surtax

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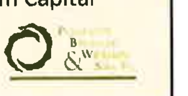
Capital Gains Tax

- Assessed on appreciation at time of sale
- Basis of Property Transferred by Sale
- Basis of Property Transferred by Gift at Death
- Basis of Property Transferred by Gift During Lifetime
- Inheriting a Life Estate
- Principal Residence Exclusion from Capital Gain



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Long Term Capital Gains Tax Rates 2015

- If seller is in 10% or 15% bracket, rate is 0
- If seller is in 25%-35% bracket, rate is 15%
- If seller is in 39.6% bracket, rate is 20%
- Also applies to trusts and estates

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Federal Gift Tax

- Direct Lifetime Transfers of Gifts
- Transfers of Gifts to Trusts
  - Gifts of Future Interests
  - Crummey Powers
- Transfers to Special Needs Trusts
  - Transfers to d(4)(A) Special Needs Trusts
  - Transfers to Third Party-Settled Trusts
- Transfers to Grantor Trusts

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Federal Gift Tax Rate in 2015

- Payable by Donor
- Gift tax rate in 2015 is 40% of net value on date of gift
- Exemption amount in 2015: $5,430,000
- Tax payable in year following year of gift

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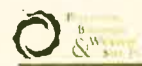
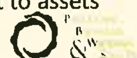


Generation-Skipping Transfer Tax

- Applies to transfers during lifetime and at death
- Additional tax on transfers after gift tax or federal estate tax
- Transfers to skip persons or trusts that will distribute to skip persons
- Exemption amount $5,430,000 for lifetime
- Allocation of exemption amount to assets



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Federal Estate Tax

- Inclusion in taxable estate depends on amount of control decedent had over assets on date of death
- Special Needs Trusts
  - Self-settled d(4)(A) Special Needs Trusts
  - Third party-settled Special Needs Trusts

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Federal Estate Tax Rate in 2015

- Payable by estate
- Rate on net value of estate is 40%
- Exemption amount in 2015: $5,430,000
- Portability for spouses for unused portion of exemption amount of decedent
- Tax due 9 months after date of death

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Conclusion

When planning for clients who lack capacity or have other disabilities, providing for their special needs is paramount. However, the rules for income taxation, both for trusts and for estates and individuals, must be considered. Interrelated with the income tax rules are the tax rules for capital gains, gifts and for the transfer of property at death.

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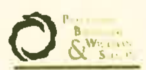

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Basics of Special Needs Trusts

Thursday, October 15, 2015

Breakout Session 1
1:15 P.M. – 2:15 P.M.

Crowdfunding for Medical Needs and the Special Needs Trust

Presenter:
Mary Alice Jackson
Attorney at Law, Mary Alice Jackson, PC
Austin, TX

- Materials
- PowerPoint

Stetson University College of Law presents:
2015 SPECIAL NEEDS TRUSTS
THE NATIONAL CONFERENCE
October 14-16, 2015
The Vinoy Renaissance Resort & Golf Club
St. Petersburg, Florida

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

The National Conference on Special Needs Trusts
Stetson University College of Law
October 14-16, 2015
The Vinoy Hotel
St. Petersburg, Florida

"CROWDFUNDING": CHARITABLE INTENT AND UNINTENDED CONSEQUENCES

Mary Alice Jackson
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I. Introduction*

Misfortune and tragedy open the hearts of individuals, family, friends and sometimes strangers. A feeling of helplessness can plague people and entities who are touched when they learn these stories, and who want to help but are uncertain what steps to take to assist. This is particularly true when a diagnosis is first made, an accident occurs, or an illness becomes life-threatening. Those on the periphery of the situation don't know what to say because there are few words that adequately express their feelings. In today's technological society, people will often spring into action by identifying what the individual or family might need and working out how to provide for those needs. A specially equipped van, money to offset lost wages, assistive devices, respite for caregivers, and home alterations may be identified as some of the things that can make a significant difference in the life of a person with a disability and her family. Sometimes the needs are met by in-kind donations, but a common and simple method of help is to make a financial contribution. There is a sense of urgency in the initial days of fund raising because well-meaning individuals can easily forget their good intentions and their focus turns away from the crisis and moves back to everyday life.

What is crowdfunding? "Crowdfunding" is defined as the practice of soliciting financial contributions from a large number of people, especially from the online community.[1] The first known use of crowdfunding was in 2006.[2] The term has multiple applications and it's important for special needs practitioners to know that crowdfunding is not limited to raising funds for individual causes. In April of 2012 Congress passed the "Jumpstart Our Business Startups Act" (JOBS), allowing cost-effective access to capital for companies of all sizes which seek access to capital. These companies may raise capital as well as offer and sell securities through crowdfunding.[3]

The crowdfunding programs "for a cause" have an entirely different purpose, and these are the programs which can provide much needed help for persons with disabilities or potential disabilities, and which can inadvertently create serious consequences for those receiving public benefits. In recent years, numerous crowdfunding websites have emerged to help individuals

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*With special thanks and acknowledgements to my law clerk, Kristina Ferguson for her research and writing assistance

[1] *Crowdfunding*. Merriam Webster. www.merriam-webster.com/dictionary/crowdfunding.

[2] *Id*.

[3] *SEC Issues Proposals on Crowdfunding: 2013-227*. U.S. Securities and Exchange Commission. https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540017677.

organize support and collect funds via their online social networks. Though crowdfunding websites have been extremely successful in helping friends, family, and even strangers raise substantial funds for personal and charitable causes, these websites typically fail to educate their users on the possible adverse implications of fundraising for an individual receiving public assistance. Often, there is no alert to warn people to inquire about public benefits and how the fund raising efforts should be directed in a manner which does not affect eligibility. One of the possible solutions is the establishment of a special needs trust.

Individuals receiving public assistance for certain programs like SSI or Medicaid are bound by strict income and resource rules in order to maintain their eligibility. Fortunately, there are ways to avoid disqualification of benefits, however the mechanisms available to beneficiaries and their legal representatives are highly dependent on timing, and in order to maximize benefits, pre-planning is especially important. This article will describe some popular crowdfunding websites, highlight the lack of information these websites provide regarding fundraising for individuals receiving or eligible to receive public benefits, and a few issues which need to be considered before a beneficiary, friend, family member, or even stranger creates a campaign on a crowdfunding website.

II. Income Laws and Regulations.

The receipt of SSI and Medicaid are predicated on certain income and asset requirements. An understanding of SSI income and resource rules is necessary for advising clients who are considering using crowdfunding to generate income for themselves or their loved ones. Under SSI rules, income is defined as (1) any item an individual receives in cash (which includes checks, money orders, or electronic funds transfers) or (2) in-kind that can be used to meet his or her needs for food or shelter.[4] This includes the receipt of any item which can be applied either directly, or by sale or conversion, to meet food or shelter needs.[5] These definitions create particular concern for public benefits recipients who receive income from crowdfunding.

Title XVI of the Social Security Act identifies two types of income—earned and unearned income.[6] Earned income consists of wages, net earnings from self-employment, payments for services performed in a sheltered workshop or work activities center, and certain

[4] SI 00810.005; SI 00810.020.
[5] SI 00810.005.
[6] 42 U.S.C. §1382a(a)(1)(2); SI 00810.015.

types of royalties.[7] Earned income can result in a dollar for dollar reduction in SSI benefits in any month in which it is received. For instance, if Mrs. Thompson receives $733 per month in SSI, and earns $210 in income each month from a job, her total SSI income would be reduced to $523 per month. Unearned income (all income that is not earned income[8]) includes, but is not limited to, annuities, pensions, alimony, support payments, dividends, rents, prizes, awards, in-kind support and maintenance (a/k/a "ISM"), cash gifts, and donations.[9] ISM is food or shelter given to a person or that a person receives because someone else pays for it.[10] ISM can be categorized as either earned (providing shelter in exchange for work) or unearned income. Cash gifts and donations fall into the category of unearned income. Donations solicited from a crowdfunding website can directly affect a beneficiary's eligibility for SSI by reducing or completely eliminating the SSI benefit in the month(s) received. In states where SSI eligibility means automatic Medicaid eligibility (Section 1634 states), this could also result in a loss of Medicaid benefits.

So an important question to consider (preferably *before* any crowdfunding campaign is underway) is for what purpose(s) are the funds being raised and to whom the funds will be paid. Under Medicaid rules, payment is attributable to the individual whose name is on the check.[11] Though the "name on the check" rules seems straightforward, when there is a campaign for "Lucy's Gang" aimed at producing funds for a minor beneficiary and her parents, the rule is less clear. Monies made payable directly to Lucy or deposited into an account that has her Social Security number are clearly income to her. Checks made payable to Lucy's parents might be considered as belonging to her parents because of the "name on the check" rule. If SSI and/or Medicaid benefits are being provided because the recipient meets the rules governing "deeming" of resources, checks made payable to her parents for Lucy's benefit may also result in disqualification for benefits.[12] As for minors—who cannot receive funds outright—it may take a determination by a court to decide whether a guardianship is necessary under state law and who actually owns the funds. The Social Security Administration or the state Medicaid agency may then have to review that determination.

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[7] 42 U.S.C. § 1382a(a)(2); SI 00810.015A.2.
[8] SI 00810.015A.3.
[9] SI 00810.015A.3; SI 00830.520.
[10] SI 00835.310B.
[11] 42 U.S.C. § 1396r-5(2)(A).
[12] SI 01330.00.

Consider the situation in which a young child is seriously injured as the result of a crime. The hospital social worker applies for Medicaid coverage for the child because the parents have no health insurance. The local news covers the incident for weeks until the perpetrator is apprehended. In the meantime, a crowd-funding campaign is initiated to provide money for uncovered medical expenses, the costs of retrofitting the home for the child's anticipated needs and assistive devices, and pre-payment of her school tuition. The campaign identifies cash to be paid directly to the parents for the uncovered medical costs and the home adjustments. The tuition is paid directly to the school by the fund. Who is/are the beneficiary of these funds under SSI and Medicaid regulations? If the crowdfunding organization become aware of the public benefits issue will they know what other payment options will exist? Many times a "trust" fund is established at a local bank for the benefit of the child or family. What does that mean? The fact that many public benefit recipients are confused by the rules and regulations will not help them avoid potential repercussions of the receipt of these funds.

Once a recipient receives unearned income, there is a duty to report the change in income no later than 10 days after the end of the month in which the change occurred.[13] Under SSI rules, unearned income is counted at the earliest of when it is received, when it is credited to an individual's account, or when it is set aside for his or her use.[14] However, with crowdfunding campaigns, beneficiaries may be unaware of funds made payable to them.

What if the existence of the crowdfunding effort is unknown to the Medicaid recipient or applicant? How can that individual be penalized for something he or she had no idea was happening? There are rules in place for that eventuality not only in a crowdfunding instance but when applicants/recipients are unaware of other assets. Under SSI rules, if an individual is unaware of his or her ownership of an asset, the asset is not considered a resource during the period in which the individual was unaware.[15] Rather, the value of the asset is counted during the month of discovery.[16] For example, a local church creates a crowdfunding campaign for Mika while she is in the hospital, and delivers a check made payable to Mika to her home address on 9/15/15. Mika returns home on 10/15/15 and discovers the check. According to

[13] SI 02301.005.
[14] SI 00810.030.
[15] SI 01110.117.
[16] SI 01110.117.

POMS, the month in which Mika discovers the check is when the check is counted as her income.[17] The following months, the check will be counted as a resource.[18]

Though there is a $20 general exclusion for income, and a $60 exclusion for infrequent or irregular unearned income, crowdfunding websites are able to generate large sums of money that quickly bypass these exclusions. Unfortunately, crowdfunding websites can be created almost instantly and provide little to no information on fundraising for individuals receiving certain public benefits. [19]

III. The Websites

Over the past few years, the number of crowdfunding websites has grown rapidly, with websites raising millions of dollars for a variety of start-ups, projects, causes, and individuals. Where some websites allow users to create campaigns for hobbies or start-up ventures, other websites have focused on charitable giving. According to *Forbes*, two of the top ten most popular crowdfunding websites—Indiegogo and Crowdrise— allow users to fundraise for individuals and personal causes.[20] However these two websites and many others such as GiveForward, GoFundMe, YouCaring, FundRazr and FundAnything, lack accessible information and guidance on the implications of fundraising for an individual who is receiving or may be eligible to receive public assistance. This article will review the seven abovementioned websites and the guidance (or the lack thereof) they provide to users.[21]

The process of creating a fundraiser is fairly simple, and most websites have similar processes. The websites generally require that the campaign be "cause-related," meaning that the purpose of the campaign is to raise awareness and funds for an organization, foundation, or individual. On FundAnything, over 90% of the campaigns are created to collect contributions

[17] SI 01110.117.
[18] SI 01110.117.
[19] SI 00810.410, SI 00810.420.
[20] *Top 10 Crowdfunding Sites for Fundraising*. Forbes. May 8, 2013. http://www.forbes.com/sites/chancebarnett/2013/05/08/top-10-crowdfunding-sites-for-fundraising/.
[21] Indiegogo.com and Crowdrise.com, GiveForward.com, GoFundMe.com, YouCaring.com, FundRazr.com and FundAnything.com.

for individual causes.[22] Generally the first step is to create a campaign page, where the campaign creator describes the cause or beneficiary and the campaign's fundraising goal.

After creating a campaign page, the campaign creator will then set up the payment option. For nearly all the websites, funds are directly deposited into the campaign creator's PayPal, Stripe or WePay account. Once funds are deposited, the campaign creator can then distribute those funds directly to the beneficiary or use those funds to purchase items or services for the beneficiary's benefit, depending on the nature of the campaign. For all the websites, the campaign creator has the power to determine when and how the funds are distributed. Unlike many of the websites, Indiegogo permits the campaign creator to have funds sent directly to the beneficiary by entering the beneficiary's bank account information.[23] However, to do this, the campaign creator must have access to this information, which provides the beneficiary or his legal representative some notice of the campaign, which may allow for pre-planning.

GoFundMe has a unique feature. On GoFundMe, there is a simple "withdraw" button with on-screen instructions so that users can withdraw the balance of funds collected directly into the bank account or request a check made payable to them or directly to the beneficiary if the beneficiary has contacted the website. Unlike Indiegogo, campaign creators on GoFundMe are not able to enter the beneficiary's bank account information during the withdrawal process. Rather, the beneficiary must contact GoFundMe's support staff directly to utilize this function.[24] Then, the campaign creator is prompted to "spread the word"—by sharing the campaign via email and social media. Essentially, the campaign creator has the ultimate power in determining how funds are distributed to the beneficiary even without the beneficiary's consent. Most crowdfunding websites, but not all, are for-profit and charge a fee—between 3-12% of the money donated—to cover processing costs and website expenses.[25]

Of these seven websites, none require a beneficiary's consent of the fundraising campaign. However, one website— Indiegogo—advises users to "get consent of the person for whom you are raising funds prior to posting the campaign," and to "[m]ake sure they understand

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[22] *Support Center-FAQs*. Fund Anything. http://support.fundanything.com/customer/portal/articles/1079378-can-i-use-fundanything-if-i-don%E2%80%99t-have-any-affiliations-with-charities-or-non-profit-organizations-.

[23] Crowdrise.com; http://support.crowdrise.com/hc/en-us/articles/201514244-How-do-I-get-my-money-.

[24] *Common Questions*. GoFundMe. http://www.gofundme.com/questions/

[25] *Turning to the Web to Help Pay Medical Bills*. Kaiser Health News. July 2, 2013. http://khn.org/news/online-fundraising-to-help-pay-medical-bills-takes-hold/.

that the campaign page will remain live indefinitely, even after the campaign deadline has passed."[26] Indiegogo also recommends adding the person or organization that benefits from the campaign to the campaign's "team" with editor privileges.[27] However, it is unlikely if the website actually verifies if the campaign creator obtained the beneficiary's consent. The other websites do not include similar precatory language regarding a beneficiary's consent. Not only does this raise concerns about eligibility for public benefits, but also privacy concerns for the beneficiary and his or her family.

Unlike more traditional fundraisers, such as a pot-luck dinner or 5k run, in which beneficiaries and their families typically have knowledge of the fundraiser in advance, on crowdfunding websites, funds can be raised almost instantly without the beneficiary's or her legal representative's knowledge. The unfortunate news is that these websites provide little to no guidance regarding how donations affect eligibility for public benefits. Rather, websites proudly advertise that money can be raised for practically anyone. Crowdrise states that as a campaign creator you can raise money for "your friend, your dog, your mom, your neighbor, your dentist, your hair person, your teacher, your hamster, your boss, your UPS guy, your grampy, a stranger, your masseuse. . . pretty much anyone you can think of. . . as long as it's all for good."[28] Of the websites reviewed, only GiveForward advised that "beneficiaries on Medicaid, SSI or other income-based support should check with a benefits specialist before depositing a GiveForward check."[29] Unfortunately, most websites do not include similar disclaimers despite providing other resources, guidebooks, and articles on topics such as tax implications and raising money for individuals with cancer and for medical expenses.

The availability of other information on websites could be misleading to a well-intended campaign creator who may assume that the information provided by these websites is comprehensive. For example, Indiegogo provides two handbooks titled "The Handbook on

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[26] *How to Raise Funds for a Friend or Another Person*. Indiegogo. https://indiegogolife.support.indiegogo.com/hc/en-us/articles/204067356-How-to-Raise-Funds-for-a-Friend-or-Another-Person.

[27] *Indiegogo Support.* Indiegogo. https://support.indiegogo.com/categories/20015371-creating-a-campaign/posts.rss.

[28] *Can I fundraise for a friend?* Crowdrise. http://support.crowdrise.com/hc/en-us/articles/203882610-Can-I-fundraise-for-a-friend-

[29] *Support Center*. GiveForward. http://help.giveforward.com/customer/portal/articles/1326791-how-will-the-money-raised-affect-medicaid-medicare-social-security-and-taxes-.

Raising Money for Medical Expenses"[30] and the "Personal Fundraising Handbook."[31] However, neither contains information regarding the effects of raising money for individuals receiving government benefits. On the contrary, the Handbook encourages creating a fundraiser for an individual even if the campaign creator does not know the individual personally!

Unfortunately, these websites generally only advertise the advantages of crowdfunding, so the guidance of an SNT attorney can be especially important in preserving an individual's eligibility for government benefits.

IV. Advising Clients

SNT attorneys can advise clients on ways to prevent beneficiaries of crowdfunding campaigns from becoming disqualified for SSI and Medicaid benefits. The goal of special needs planning is to maximize goods and services which can be provided by public benefit programs, so that privately held funds can be used for needs that are not covered by the public benefits. In many cases funds paid directly to an individual with a disability can be set aside in a special needs trust (SNT), and by and large, the availability of tools to prevent disqualification depend on timing and how the funds are received by the beneficiary.

Pre-crowdfunding planning tips: Until the crowdfunding websites SNT attorneys are unlikely to be consulted before a crowdfunding campaign begins. Instead, we will be playing defense: trying to resolve any issues which arise once the fund raising has begun or the campaign has been completed. SSA may not learn of the campaign until an annual review, resulting in overpayment requests, and if damage control has been done before that time, we may have done everything possible to serve the client/beneficiary.

Let's think positively and consider that a practitioner is contacted for a consultation before a crowdfunding event begins. The consult itself will be much like any other SNT planning meeting and can provide the clients with information that is key to having a successful event. But there will be additional information needed before a plan can be developed.

- Who is organizing the fund raising event?

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[30] *The ABCs to Raising Money for Medical Expenses*. Indiegogo. https://learn.life.indiegogo.com/wp-content/uploads/2015/04/IGG_Life_ABCs_Advanced_040615.pdf.
[31] *Personal Fundraising Handbook*. Indiegogo. https://learn.life.indiegogo.com/wp-content/uploads/2014/12/IGGLife-GuidetoPersonalFundraising.pdf.

- Is there more than one intended beneficiary? If so, are all of the beneficiaries currently receiving or applying for means-tested benefits such as SSI, Medicaid, Section 8 housing, food stamps?
- Has the intended beneficiary been determined to be disabled by the SSA? If not, will the funds be used for an ABLE account which would require a doctor's certificate rather than an SSA or state disability determination?
- If the injury/disability is the result of an accident, has it been determined to be likely that there will be a long term disability?[32]
- Has a guardian been appointed?
- How old is the intended beneficiary?
- Are there deeming or ISM issues?
- Who has decided the use of the proposed funds?
- Has a particular crowdfunding site been selected?
- Is there an estimate of how much money might be raised?
- How should the crowdfunding effort be designed:
    - To whom should the funds be made payable?
    - What will the funds be used for – specific purchases or cash needs?
    - Should the use of the funds be explained to contributors?
    - Do the parties/donors have an expectation that their contributions will be tax deductible? (They aren't[33])

These detailed questions may be off-putting to clients so it's a good idea to give them an explanation of why you need the information. The first step is to identify what public benefits the beneficiary currently receives so the attorney can determine whether the planning is necessary. As we know, many times the exact nature of the public benefits aren't known, so written documentation has to be supplied. Is anyone aware of whether a hospital or other medical care facility has applied for Medicaid benefits? If not, the social worker needs to be asked. If the benefits program has income and/or resource limits, did someone supply the social worker with adequate and correct information? Sometimes, unbeknownst to the beneficiary or the family, a

[32] 42 U.S.C. § 1382c(a)(3).
[33] *See* IRS publication 526 (2014).

social worker may have already submitted an application for public benefits so that the hospital will be paid. This would be for *acute* care coverage to ensure that the hospital gets paid; different means-testing criteria are likely to apply if the beneficiary is going to need *long term care supports and services*. Other important issues will be whether the person in your office has the legal authority to access and manage funds for an incapacitated beneficiary. Before providing special needs planning options, practitioners need to be certain that the decision will not be for the benefit of other family members and friends who aren't receiving or won't need benefits. If so, the Medicaid office may have difficulty determining what percentage of the contributions belong to the Medicaid recipient/applicant. It may be necessary for the crowdfunding company to specify two separate funds to avoid that complication.

V. Planning Options

Having people raise money for an individual with a disability is a thoughtful, generous and sometimes life changing event. What options can we offer to our clients to discuss with the crowdfunding entity so that beneficiary will receive the best bang for the buck?

***Do Nothing*.** This option implies that the beneficiary or his/her legal representative decide to decline, relinquish or temporarily forego public benefits. This course of action can be the easiest under certain circumstances, such as uncertainty about future prognosis; if there is no guardian when one will be needed; or the complications involved in the special needs planning are just too overwhelming. Doing no planning for long term care supports and services is always an option and doesn't mean that the beneficiary will have to forego acute care Medicaid benefits.

***Spend down*.** Spending down on exempt assets is perfect planning in some cases and may even turn out to be the only element of the plan. Cars, houses, home improvements, debts, clothing, technology – spending money is often the easiest solution. (Make sure that the spend down consists of items for the benefit of the beneficiary to avoid transfer of asset problems. However, transfer penalties are typically avoided when the spending involves something owned by both spouses – i.e. home improvements).

What's the effect of receiving a lump sum of money and spending it down in the month received? Income is counted at the earliest of these three points: (a) when it is received; (b) when it is credited to the beneficiary's account; or (c) when it is set aside for his or her use.[34]

[34] SI 00810.030.

The income will be countable income in the month when one of those three occurrences takes place. Any spend down must be carefully planned so that the income is spent in the month received, and not rolled over into the next month, creating potential ineligibility due to excess resources. Timing is essential in spending down.

In some states, a spend down can include prepaying for long term home and community based care which are not provided via a Medicaid program. A "personal service contract" can be used to pre-pay for care to be provided within a period of time which is consistent with the beneficiary's actuarial life expectancy. The pre-payment is in the form of a lump sum, although in some instances, the provider may hold a note or a lien on personal property. There are contractual provisions, record keeping and tax considerations when entering into a personal service contract. These contracts are not recognized by Medicaid options in all states.

Another option is to create a campaign that does not raise money or in-kind items that are considered as unearned income under SSI rules. Under SSI rules, an item received is not income if (1) it is neither food nor shelter, or (2) it cannot be used to obtain food or shelter.[35] Thus, before establishing a crowdfunding campaign, attorneys could advise their clients to create a campaign that will raise money to purchase items that are not considered income. However, even when an item is not considered as income, it can still be subject to evaluation as a resource when it is retained after the month of receipt.[36] For example, an accessible van does not fall under the income category, but after the month of receipt, it may affect an individual's eligibility for SSI under the resource rules. Some examples of non-income gifts could be a gift to pay tuition or other necessary education expenses, payment of bills (with the exception of bills for food or shelter), or certain types of gift cards or certificates for the beneficiary.[37] Though a gift card or certificate are generally considered as cash equivalents, if the card or certificate cannot be used to buy food or shelter and has a legally enforceable prohibition on the individual selling the card, then the card is not considered unearned income for SSI purposes.[38] However, any unspent balance on the gift card or certificate could be considered as a resource beginning the month after

[35] SI 01110.600.
[36] SI 01110.600.
[37] SI 00830.455; SI 01130.455; SI 00830.522; SI 00815.400.
[38] SI 00830.522.

receipt.[39] Also, paying for medical and social services on the beneficiary's behalf, including in-kind items received in conjunction with these services, are not income for SSI purposes.[40]

***Transferring funds*.** It's well known that a transfer of assets to a third party creates a period of ineligibility before SSI and/or Medicaid benefits can be received. A transfer is any sum exchanged for less than fair market value any time after the beginning of the look back date. (The look-back date can also be referred to as the "reporting period" to clarify the concept for clients). It's important to note that **there are *different waiting periods for SSI* benefits than there are for Medicaid benefits**. The Foster Care Independence Act of 1999 created a period of ineligibility of 36 months for SSI benefits. This law applies to any transfer made after December 14, 1999, the effective date of the law. There was no SSI transfer penalty prior to that date.

SSI transfer regulations were not caught up in the web of changes that came about as a result of the Deficit Reduction Act of 2005. Instead, the penalty period for a transfer of assets when an individual is applying for SSI is calculated differently.[41] The period of ineligibility begins on the first day of the month after the month that the resource was transferred for less than fair market value. Generally speaking, the length of the ineligibility period is the total uncompensated value of assets transferred since the look back date; divide the uncompensated value by the full amount of the Federal Benefit Rate (FBR) and the resulting amount is the number of months of ineligibility.[42] There are variations in those states which provide a state supplement and when both spouses are involved. So state laws and the POMS should be consulted if this option is being considered.

The penalty period for Medicaid eligibility purposes is more severe than the SSI penalty. The look back date is 60 months (5 years) prior to the date of application. The penalty period is figured by calculating the total uncompensated value of the transfer divided by your state's "transfer of assets divisor", and the transfer penalty begins to run only when the applicant

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[39] SI 01120.201.

[40] SI 00815.050; SI 00815.050E. Medical services are defined as services directed toward diagnostic, preventative, therapeutic, or palliative treatment of a medical condition and which are performed, directed, or supervised by a State licensed health profession, are never income regardless of the source of the service or the source of payment for the service. SI 00815.050B.1. For SSI purposes, a social service is any service (other than medical) which is intended to assist a handicapped or socially disadvantaged individual to function in society on a level comparable to that of an individual who does not have such a handicap or disadvantage. SI 00815.050C.1.

[41] SI 01150.110(D)(1).

[42] SI 01150.111(A).

is otherwise eligible for Medicaid except for the issue of the transfer. (Otherwise eligible in terms of income, assets and medical need). There may be circumstances where a transfer to a third party is worth a try because of the uncertainty of a disability, or because there is other health insurance available (via a health care exchange, a parent's policy or COBRA) and the five year wait period fits well into the anticipated medical prognosis. The worst case scenario in choosing this option may be the need to create a self-settled payback trust[43] at some point in the future. All planning situations are fact dependent and clients need to know all the options, even the ones that the attorney would not believe to be appropriate given the known facts. Sometimes, additional facts emerge when other options are discussed, and new avenues of planning might be placed on the table.

Creation of a Special Needs Trust. A special needs trust will protect the beneficiary's public benefits almost immediately. Some details will need to be worked out with the crowdfunding company. (1) Can the funds be deposited directly into an established third party trust, avoiding the need for Medicaid estate recovery? (2) If not, and the funds must be paid to the beneficiary, a first party SNT will be necessary and the Medicaid payback needs to be considered as a cost of benefit planning.

Because there is no Medicaid payback requirement under a third party trust, any funds remaining after the death of the beneficiary must be paid to an identified beneficiary or beneficiaries. If the individual with the disability has already signed a Last Will and Testament, the process is easier. If not, the designated beneficiaries may need to be identified by state laws directing intestate heirs. This situation also applies if there are funds remaining in a first party trust after the Medicaid payback.

A third party SNT is created by someone other than the beneficiary. The beneficiary does not want to deposit his or her own funds into the trust because this results in the complications of tracing funds when and if Medicaid payback is required. The best situation in a crowdfunding campaign would be for the contributions to be paid directly to the Trustee of the third party SNT. Will the crowdfunding company be interested in dealing with these restrictions? Will they consider this planning to subject themselves to too much liability, make the creation of a first party trust necessary, and perhaps resulting in a period of time when the beneficiary applicant/recipient will lose or miss benefits?

[43] 42 USC §1396p(d)(4)(A) or (d)(4)(C).

Unfortunately, the campaign creator— not the beneficiary— has significant control over how the solicited funds will be distributed to the beneficiary. Even if there is a third party SNT established for the beneficiary, the campaign creator may be unaware that it exists and fail to make the funds payable to the trust. Choosing the right campaign may require both education and negotiation, and perhaps even indemnity although the normal distributions made after a campaign could have similar potential liabilities.

The benefit of establishing a third party SNT is that the SSI rules are complicated and ever-changing, and by placing funds directly into a third party SNT, such funds are prohibited from being used in ways that could potentially affect the beneficiary's status for government benefits.[44] Also, a trust may better provide for a beneficiary's needs, especially if a large amount of funds are expected from a crowdfunding campaign. A third party SNT may give the trustee control over how the funds can be used, as opposed to an outside friend or family member who may have limited insight into the beneficiary's actual needs.

Post-crowdfunding campaign: Unfortunately, because of the lack of information on crowdfunding websites, pre-planning may not occur. The beneficiary may not even know that funds have been collected on his or her behalf, which would likely cause the beneficiary to become ineligible for government benefits. Thus, the funds made payable to the beneficiary will be considered as unearned income. If funds are made out to an entire family, a portion of the funds will likely be attributable to each family member, including the individual receiving the public benefits. After funds have been made payable to the individual who is the recipient of the funds, it would be too late to create a third party SNT. To prevent the donation from disqualifying an individual for government benefits, certain types of self-settled trusts can be created.

As mentioned above, a first party special needs trust may be the best planning option after all other options have been discussed. Rules to keep in mind about first party trusts include that the trust must be established when the beneficiary is under 65, and must be created by a parent, grandparent, guardian or court. In states where court approval is required to establish a special needs trust, timing will be important.

[44] SI 00815.400.

Another option for a first party trust would be to utilize a pooled trust.[45] These trusts pool assets of numerous beneficiaries which are then invested and managed by a non-profit organization. Each beneficiary has a separate trust account, even though the assets are pooled for investment purposes. These trusts are only available to beneficiaries under the age of 65 (however, transfers to the pooled trust account after the age of 65 may be made in the states which see the regulation as non-binding because it is written in ambiguous terms).[46] As is the case with a d(4)(A) trust, the beneficiary must be disabled under the Social Security definition of disability, and joinder into a pooled trust can be executed by the individual with a disability[47], a parent, grandparent, guardian or court. Upon the death of the beneficiary, the balance is either retained in the trust or paid back to the state Medicaid agency.

ABLE Accounts. Lastly, Congress recently passed legislation that gives attorneys another planning tool for crowdfunding campaigns—the ABLE account.[48] Under the Achieving a Better Life Experience (ABLE) Act, which was signed into law on December 19, 2014, money from any person, including the beneficiary's own funds, can be contributed to an ABLE account, with an annual contribution limit of $14,000. Funds in an ABLE account do not affect the recipient's eligibility for SSI, Medicaid, and other public benefits, and are permitted to be used for qualified disability expenses, including but not limited to, education, housing, transportation, and financial management. The rules regarding ABLE accounts will be further described in the federal regulations, which are in the process of being finalized. ABLE accounts may not be available for use until final IRS and SSA regulations are completed, and your state has passed its own ABLE statute.

VI. Conclusion

No good deed goes unpunished. Despite the good intentions of people who want to help families in desperate financial straits, it is not easy to create a financial safety net when the parties involved are on, or will need, public benefits based on financial need. Crowdfunding websites complicate matters by allowing individuals to solicit funds almost instantly and without the beneficiary's consent. The good news is that there are plenty of ways to allow generous

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[45] 42 U.S.C. § 1396p(d)(4)(C).
[46] SI 01220.201 "there is no age restriction under this exception. However, a transfer of resources to a trust for an individual age 65 or over may result in a transfer penalty (see SI 01150.121).
[47] 42 U.S.C. § 1396p(d)(4)(C).
[48] 26 U.S.C. § 529A.

fundraising to occur in a manner that allows everyone to be a winner. With the advice and planning of a special needs attorney, fundraising can benefit the person in need and meet the intention of others who want to help.

Crowdfunding:
Charitable Intent and Unintended Consequences

The National Conference on Special Needs Trusts
Stetson University College of Law
October 2015
St. Petersburg Florida

Mary Alice Jackson
Mary Alice Jackson, P.C.
804 Rio Grande
Austin, TX 78701

What is Crowdfunding?

- Practice of soliciting financial contributions from a large number of people, typically via the Internet, to fund a project, cause, individual, hobby, start-up, you-name-it!

Headlines:

- "Donations for honest homeless man Glen James top $158,000"— GoFundMe campaign raised this amount in just over two weeks!
- "Internet Rallies for Wounded Vet" –$51,000 raised for war veteran who was left paralyzed from the waist down
- "Inspiring Story of How Boston University Student Raised $5,000 in a Day to Stay in College"

Crowdfunding for Personal Causes and Individuals

- GiveForward.com
- GoFundMe.com
- YouCaring.com
- FundRazr.com
- FundAnything.com
- Indiegogo.com
- Crowdrise.com
- AND MANY MORE!

Image: [illegible]

How it works—easy as 1-2-3

- **Create campaign**
  - Share story, add pictures, set campaign goal amount, establish a deadline
  - You don't need to know beneficiary personally
- **Set up payment option**
  - Select currency, funding type (keep it all, or all or nothing)
- **Spread the word**
  - Sign in through Facebook, Google+, LinkedIn, or email address

How do individuals receive money?

- Contributors donate money— can be anonymous.
- Payments processed by a 3rd party
  - i.e. PayPal, WePay, Stripe, or Network for Good.
- Deposited into campaign creator's account
  - Option to deposit funds into beneficiary's account on Indiegogo and GoFundMe. But need personal bank account info; GoFundMe requires authorization by beneficiary.
- Campaign creator distributes funds to beneficiary, or purchases goods and services for beneficiary.

Public Benefits and Income Rules

- **Two types of Income**—earned and unearned.
  - Cash or in-kind
- **Earned Income**--$ for $ reduction in SSI benefits
  Wages, royalties, earnings from self-employment.
- **Unearned income**
  - All income that is ***not*** earned income. SI 00830.001.
  - *E.g.* support and maintenance, alimony, pension, annuities, prizes, awards, etc.
  - GIFTS are unearned income. SI 00830.520.

SSI rules allow for some income exclusions!

- Bills paid by a third party. SI 00815.400
  - *Not for food or shelter*
- Tuition, fees, or other educational expenses. SI 00830.520
- $20 per month general income exclusion. SI 00810.420
- Infrequent or irregular income exclusion. SI 00810.410
  - $60/month for unearned income.
- PASS exclusion. SI 00810.430
  - Income of a blind or disabled recipient if needed to fulfill a plan to achieve self-support (PASS). Does not apply to blind/disabled individual age 65 or older, unless he/she was receiving SSI or state disability or blind payments for the month before becoming 65.

Case Study: "Lucy's Gang"

- Lucy is seriously injured as a result of a crime. The hospital social worker applies for Medicaid coverage for Lucy because her parents have no health insurance. The local news covers the incident for weeks until the perpetrator is apprehended.
- In the meantime, a crowdfunding campaign is initiated to provide money for:
  - Uncovered medical expenses,
  - Costs of retrofitting the home and for assistive devices, and
  - Pre-payment of her school tuition.

"Lucy's Gang"

- The campaign identifies that cash will be paid *directly to her parents* for uncovered medical costs and home adjustments, and that tuition will be paid *directly to the school* by the fund.
  - What if all funds are made payable to "Lucy's Gang"?
  - Who would be the beneficiary of the funds under SSI and Medicaid regs?
  - Establishing a trust fund at the local bank for the benefit of the child or family?

When to report income changes:

- Unearned income is counted as income in the ***earliest*** month it is:
  - Received by the individual; ***or***
  - Credited to the individual's account; ***or***
  - Set aside for the individual's use. SI 00830.010
- **Duty to report** changes no later than 10 days after the month in which change in income occurred.
  - SI 02301.005

Case Study: Mika, the unaware recipient

- Mika is recovering from a car accident at a hospital . While at the hospital, her church creates a crowdfunding campaign and raises $5,000 for Mika. A church member delivers a check made payable to Mika to Mika's home, along with get-well soon cards, food, and flowers on 9/15/15. When Mika returns home on 10/15/15, she discovers the check!

Mika—the unaware recipient

- If Mika is unaware of the check while at the hospital, it will not be considered a resource.
- However, when Mika finds the check, the check is countable income. The following months, the check is counted as a resource.
  - SI 01110.117

Crowdfunding: the Beneficiary

- Is the beneficiary receiving public benefits?
  - If so, look at which benefits.
    - are there income/resource limitations like SSI or Medicaid?
- Is an application pending?
  - Did someone, e.g. a hospital social worker, file an application?
- "Name on the Check" rule
  - Is the money given outright?
    - To an entire family?
  - Is the recipient a minor?

Is there guidance on affecting a beneficiary's eligibility for public benefit?

- ***GENERALLY NO***
- Advertise that you can raise money for practically anyone, even strangers!
- Indiegogo advises user to "get consent of the person for whom you are raising funds"
- GiveForward was the only website that advises "beneficiaries on Medicaid, SSI or other income-based support" to "check with a benefits specialist before depositing a GiveForward check."

Solutions: Pre and Post Crowdfunding

- Importance of timing
- Power of the campaign creator in determining how funds are distributed and whether the beneficiary or his/her legal representative has knowledge of the campaign
- Importance of notice to the beneficiary or his/her legal representative

Questions to ask your client before developing a plan:

- Who is organizing the fund raising event?
- Is there more than one intended beneficiary?
- Are all the beneficiaries receiving/applying for means tested benefits?
- Has the intended beneficiary been determined to be disabled by SSA?
  - If not, will the funds be used for an ABLE account which would require a doctor's certificate?
- If the injury/disability is the result of an accident, has it been determined to be likely that there will be a long term disability?

Questions continued:

- Has a guardian been appointed?
- How old is the intended beneficiary?
- Are there deeming or ISM issues?
- Has the purpose of raising funds been identified?
- Has a particular crowdfunding site been selected?
- Is there an estimate of how much money might be raised?

Designing a crowdfunding effort:

- To whom should the funds be made payable?
- What will the funds be used for?
  - —specific purchases or cash needs?
- Should the use of funds be explained to contributors?
- Do the donors have an expectation that their contributions will be tax deductible?

Advising Clients—Pre-crowdfunding

- Do Nothing
- Plan to Spend Down
- Transfer funds
- Third Party SNT
  - Created by someone other than the beneficiary
  - 3rd party money—beneficiary cannot place his/her own funds into trust
- Structuring the campaign
  - So that donation does not qualify as income (e.g. tuition, medical expenses, certain gift certificates). Not considered income if
    - (1) it is neither food nor shelter; or
    - (2) it cannot be used to obtain food or shelter
  - Beware of resource rules!

Advising Clients—Post-crowdfunding

- Self-settled SNT w/ Medicaid Payback provision
  - 1st party funds
  - Established by a parent, grandparent, legal guardian, or court.
- Master Pooled Trust (d)(4)(C)
  - 1st and 3rd party funds
- ABLE Account

Image: [illegible]

ABLE Account

- Achieving a Better Life Experience (ABLE) Act
  - Signed into law 12/19/14
  - Amends Section 529 of IRC to create tax-free savings accounts for individuals with disabilities (onset before 26 yrs old)
- Contributions to account can be made by any person including the beneficiary.
- Does not affect eligibility for SSI, Medicaid, and other public benefits
- Annual contributions limit: $14,000
- Qualified disability expenses—including, but not limited to, education, housing, transportation, financial management.
  - Awaiting federal regulations…

Example: Able Account

- Robert, age 19, is entitled to SS benefits based on a disability. Robert's family creates a crowdfunding campaign, with a goal raising $10,000 to help pay for Robert's college tuition.

What you can do!

- Educate clients
- Assist clients with pre/post crowdfunding planning
- Raise awareness
  - Provide information on websites concerning fundraising and crowdfunding; also to churches, schools, and community groups
  - Reach out to crowdfunding websites, explain the adverse implications of fundraising for individuals receiving public benefits
  - Explore the issues—create a discussion with your local bar association, committees, and study groups

Basics of Special Needs Trusts

Thursday, October 15, 2015

Breakout Session 2
2:30 P.M. – 3:30 P.M.

Creating the Trust: SSA Requirements to get a Self-Settled Trust Accepted and Funded Addressing the Technicalities of Doing it Right in Light of Recent Litigation

Presenter:
Patricia Sitchler
Attorney at Law
San Antonio, TX

- Materials
- Appendix 1
- PowerPoint

Stetson University College of Law presents:
2015 SPECIAL NEEDS TRUSTS
THE NATIONAL CONFERENCE
October 14-16, 2015
The Vinoy Renaissance Resort & Golf Club
St. Petersburg, Florida

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

CREATING THE TRUST:
SSA REQUIREMENTS TO GET A SELF-SETTLED TRUST ACCEPTED AND FUNDED

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BASICS OF SPECIAL NEEDS TRUSTS
STETSON UNIVERSITY SCHOOL OF LAW
OCTOBER 15, 2015
ST. PETERSBURG, FLORIDA

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EXCEPT FOR APPENDIX I

WHO WILL CREATE THE SELF-SETTLED SPECIAL NEEDS TRUST ("SNT")? Recall that a self-settled SNT created pursuant to federal and state law allows an individual's funds to be set aside for the his/her own benefit if the beneficiary is disabled within the Social Security Administration definition of disability.[1] In order to fund a self-settled SNT, one must utilize the "A" trust or the "C" trust. But who signs the trust document? The Statute of Frauds requires a written document signed by the Settlor/Grantor.[2] The "A" trust statute specifically states that a self-settled SNT may be created by a parent, grandparent, guardian or court, omitting the SSI recipient from the role as grantor.[3] But the creation of a SNT is not a foregone conclusion, especially a Court recreated SNT. If a Judge is creating SNT, the Judge must be convinced of the appropriateness of the SNT. In a case out of New York, the Judge refused to allow the creation of a SNT since the ward's income exceeded her necessary expenses. The Judge noted that "this is unlike a situation in which it is demonstrated that the expenses will exhaust an incapacitated person's funds, thus rendering them impoverished. Here it appears that there are sufficient funds to meet [her] needs and to provide 'luxuries' as might be supplied by a SNT."[4]

1. **SNT Created by a Parent or Grandparent**. A SNT signed by a parent or grandparent is referred to by the Social Security Administration as a "seed" trust.[5] About ten years ago, if a parent or grandparent (collectively referred to as "parent") was the settlor of a SNT and the beneficiary then transferred his/her own assets to the SNT, SSI would disqualify the SNT beneficiary because the parent did not have "apparent authority" to fund the Trust. The reference to "seed trust" probably arose from a Region 6 long-time SSI policy worker. The SSI policy worker explained in 2006 that:

> "It should be noted that at the point the parent established the seed trust that met the (d)(4)(A) criteria (e.g., Medicaid pay back provision, etc.), the trust was not a (d)(4)(A) trust because it only contained the assets (e.g., $10.00 seed money) of the parent and a (d)(4)(A) trust must contain the assets of the disabled individual under age 65. However, the (d)(4)(A) provision of the Act only says that the trust must "contain" the assets of the disabled individual—it does not say the trust must be "established with" the assets of the disabled individual. Consequently, after the disabled adult child's assets are transferred to the seed trust, the trust "contains" the child's funds and meets the (d)(4)(A) criteria. who understood that a parent could "seed" the SNT with a nominal amount of money complying with (d)(4)(A) requirements and then the beneficiary or the beneficiary's agent could transfer assets into the trust."[6]

In Region 6 as far back as 2006 we were able to create a seed Trust without disqualifying a beneficiary. Subsequently, POMS was revised to refer to a seed Trust as described above.[7]

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1 42 U.S.C. §1396p(d)(4)(A) & (C) sometimes regerred to as an "A" Trust or a "C" Trust.

2 Restatement of Trust (Third) §§22-23. *See, e.g.,* Texas Property Code §112.004.

3 *See* Section III, *supra* discussing the "A" and "C" trusts.

4 *In the Matter of LaBarbera (Donovan),* (Sup. Ct. Suffolk N.Y. April 26, 1996) as reported in 215 NYLJ 81, p.36, col. 6.

5 POMS SI 01120.203.B.1.f.

6 Rick Williams, Supplemental Security Income Policy specialist, University of Texas School of Law Special Needs Conference, 2006.

7 POMS SI 01120.203.B.1.f.

So how could anything go wrong with a parent created SNT? In a case styled *Draper v. Colvin*,[8] the lower court found that Ms. Draper's SNT was not an exempt resource. Originally the SNT was "signed" by her parents in their individual capacity but parents were also named in her POA as her agents. While the parents did not "seed" the Trust, South Dakota allowed creation of dry trusts. Nonetheless, the Court held that effectively Ms. Draper signed the trust through her agent/parents despite the fact that the parents signed in their individual capacity. The Draper case was appealed and the Eighth Circuit Court affirmed the lower court holding.[9]

Potential Issue: Before addressing the potential best practices for a parent-created SNT, the author would caution the use of a parent or grandparent to create a self-settled SNT. Conceivably, a parent could return to Court alleging that the SNT is invalid because the parent/settlor did not understand what s/he was signing. For example, an 18 year old transferred her personal injury funds into a parent created SNT. Following funding, the parents, who are caring for the 18 year old, asked for distributions that would benefit the parents and/or extended family. The distributions were denied by the Trustee and so the parents returned to court to "bust" the Trust alleging that the parent/settlor never understood what s/he signed and so the SNT was void. Thus, it would be wise to scrutinize the family dynamics when trying to determine the best method of creating the SNT.

Good Practices (or donning a belt-and-suspenders):
▸The parent signing the SNT should not be the Agent named in a Power of Attorney, if possible.
▸Even if your state allows the creation of a dry trust, seed the trust with a nominal amount of money. Proof of funding could be by opening the SNT account with the nominal funding amount or photocopying a $5 bill as an Exhibit to the SNT.[10]
▸If there is a concern that funding a seed SNT might disqualify the trust beneficiary, then seed the Trust and nominally fund it with the beneficiary's own funds and then submit the seed trust to SSA for review. If the seed trust is found to be deficient, at least the beneficiary would not lose SSI eligibility allowing for the seed trust to be amended or re-drafted.

2. **<u>Court Created SNT</u>**. Federal law allows a Court to create a SNT for a person who meets the federal criteria found in 42 U.S.C. §1396p(d)(4)(A) & (C). What gives a Judge the authority to create a trust for an individual and require the individual's assets to fund the trust? In some states judicial authority arises from Common Law and Equity. In other states there are specific statutes authoring a Judge to create a management trust for the benefit of a minor or adult person with a disability who has no guardian. For example, Texas Property Code §142.005 allows a judge in litigation to create a Trust for a minor or an incapacitated person who has no guardian. Section 142.005 fits the definition of the

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8 2013 WL 3477272 (U.S. Dist. Ct., D. S.D., No. 12-4091-KES, July 10, 2013)

9 779 F.3d 556 (8th Cir. 2015, no writ).

10 Title 18, United States Code, Section 504 permits black and white reproductions of currency and other obligations, provided the copies "shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated" and "the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section." 18 U.S.C. §504 (ii) & (iii). Most photocopy machines are digital scanners. The copier hard-drive will keep a copy of any scanned currency but in a high-use copier, the scans are most likely overridden within a few days of copying. If disposing of the copier or copier hard-drive, it would be wise to wipe the hard-drive before disposing of the drive.
http://rossander.org/infosec/2010/07/cbs-story-on-copier-hard-drives-is-overblown/

Judge-created trust referred to in 42 U.S.C. §1396p(d)(4)(A) and (C).

There was much inconsistency nationwide when SSA reviewed Trusts. In order to address these inconsistencies, a trust review manual was published by the Social Security Administration in an effort to make the review of trusts more consistent. The "Fact Guide for National Trust Training" dated 12/16/2013 includes subsection "F" entitled "Exceptions to Counting Self-Funded Trusts as Resources" referring to who can establish a Trust. The local SSA office staff initially reviews the SNT. "If there are unresolved issues that prevent you [local staff] from determining the resource status of the trust, or there are issues that you believe need a legal opinion, follow your regional instructions or consult with your Regional Office ("RO") program staff via vHelp. If necessary, the RO staff will seek guidance from the central office (CO) or the Regional Chief Counsel (RCC). Do not contact or refer materials to the RCC directly."[11]

Notwithstanding the new guidelines, the Social Security Administration has recently disqualified SSI beneficiaries in some states when the beneficiary or the beneficiary's next friend, attorney or agent filed the Application or Motion asking a Judge to consider creating a SNT for the benefit of a beneficiary with a disability. The SSI reasoning was:

> "An appointed representative may petition the court to create a trust for the beneficiary. The court will approve the request and initiate creation of the trust. While it appears that the court "established" the trust, it was the appointed representative acting as an agent of the beneficiary who actually established the trust. In this case, we would consider the beneficiary to have established the trust. For SSI purposes, in order to find that the court created the trust, the trust must be the direct result of a COURT ORDER.
> *Example*: A beneficiary wins a lawsuit in the amount of $50,000.00. As part of the settlement the judge orders the creation of a trust in order for the beneficiary to receive the $50,000.00. As a direct result of this court order, a trust was created with the beneficiary's settlement money. The trust document lists the $50,000.00 as the initial principal amount in Schedule A of the trust. We would consider this trust to be established by the court because the beneficiary had no power to create the trust himself/herself."[12]

This instruction created a dilemma. A judge does not open a drawer and pull out an order creating a SNT. All orders originate with an Application or Motion. One solution would be to have a guardian ad litem appointed to bring the Application or Motion requesting the Judge to create the SNT for the benefit of the plaintiff/disabled individual. Since a Guardian is allowed by the statute to create a SNT, then the Guardian ad Litem should not be considered an agent of the trust beneficiary and the Judge can sign the Order creating the Trust.[13] However, in cases where the trust beneficiary suffers from a physical disability but is otherwise mentally competent, there is no basis for appointing a Guardian ad

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11 POMS SI 01120.202A.1.d.

12 SSA "Fact Guide for National Trust Training" dated 12/16/2013.

13 "A guardian ad litem is, in a sense, an officer of the court. '[He] is not simply counsel to one party in the litigation, but instead plays a hybrid role, advising one or more parties as well as the court.'" *DuPont v. Southern Nat'l Bank of Houston*, 771 F. 2d 874, 882 (5th Cir. 1985), cert. denied, 475 U.S. 1085 (1986).

Litem. But after communications with the Baltimore office of concerns with the Fact Guide for National Trust Training instructions, the Social Security Administration recently amended its interpretation of a Court created SNT stating:

> "In the case of a special needs trust established through the actions of a court, the creation of the trust must be required by a court order for the exception in section 1917(d)(4)(A) [and presumedly (d)(4)(C)] of the Act to apply. That is the special needs trust exception can be met when courts approve petitions and establish trusts by court order, so long as the creation of the trust has not been completed before, [sic] the order is issued by the court. Court approval of an already created special needs trust is not sufficient for the trust to qualify for the exception. The court must specifically either establish the trust or order the establishment of the trust."[14]

Again looking at the *Draper* case, the parents tried to rectify the SSA objections that the SNT did not comply with (d)(4)(A) requirements, so the Draper Trust was judicially amended and signed by the Judge. However, the South Dakota Court held that the SNT was not established by the South Dakota Court. It was only approved by the Court.[15]

If an individual was erroneously disqualified by SSI because someone other than the Judge or Guardian brought a motion or application requesting the Court to create a SNT, the beneficiary/SSI recipient must immediately request SSA to re-open the case and/or the erroneous determination must be appealed. The Social Security Administration will not voluntarily reopen cases that were erroneously counted as a resource because the court was petitioned to establish the trust.[16]

> "The SSI claimant, recipient or representative payee must file an appeal or request reopening if he or she disagrees with our determination. If reopening is necessary per SI 04070.015, follow the administrative finality rules in SI 04070.010."[17]

Good Practices:

▸Review POMS SI 01120.202 "Development and Documentation of Trusts created on or after 01/01/00" and POMS PS 01825.000 for your state's specific trust rulings.

▸Track the language in the SSA clarification using the phrase that the Court hereby "establishes" the SNT.

▸Insert specific state statutory authority for a Court created trust in the Court Order for ease of reference for SSI review.

▸Beware of denials based on the Fact Guide for National Trust Training dated 12/16/2013 that was subsequently revised by Policy Clarification for Trusts dated May 28, 2015.

3. **<u>Created by a Guardian</u>**. Federal also allows a Guardian to create and establish a SNT. The

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14 SSA unpublished Policy Clarification for Trusts dated 05/28/2015; *See* Appendix I attached to this paper.

15 2013 WL 3477272 (U.S. Dist. Ct., D. S.D., No. 12-4091-KES, July 10, 2013).

16 SSA unpublished Policy Clarification for Trusts dated 05/28/2015, paragraph C.3; *See* Appendix I attached to this paper.

17 SSA unpublished Policy Clarification for Trusts dated 05/28/2015, paragraph C.3; *See* Appendix I attached to this paper.

Fact Guide for National Trust Training states: "A person establishing the trust must have legal authority to act with regard to the assets of the individual. An attempt to establish a trust account by a third party with the assets of an individual WITHOUT the legal right or authority to act with respect to the assets of that individual will generally result in an invalid trust."[18] For example, a management trust in the form of a self-settled SNT can be signed by a Guardian pursuant to Court Order as set out in Texas Estates Code §1301 *et seq*.[19]

Good Practices:

▸Review POMS SI 01120.202 "Development and Documentation of Trusts created on or after 01/01/00" and POMS PS 01825.000 for your state's specific trust rulings.

▸Make clear in the Court's order that the Court is ordering the Guardian to establish the SNT and fund the Trust with the Ward's funds giving the Guardian the necessary legal authority to act.

▸Insert specific state statutory authority for a Court created trust in the Court Order for ease of reference for SSI review.

4. **Pooled Trust created by the Beneficiary**. Federal law allows the SSI recipient to create and establish a Pooled SNT.[20]

Good Practices:

▸Review POMS SI 01120.225 "Pooled Trust Management Provisions" and SI 01120.202 "Development and Documentation of Trusts created on or after 01/01/00.

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18 SSA Fact Guide for National Trust Training paragraph F.1.E.2.

19 *Johanson's Texas Estates Code Annotated*, 2014 Edition, Commentary to §1301.051. "Amendments in 2011 extended the list of persons for whom a management trust can be created to include persons with only a physical disability. The 2013 amendments liberalized the rules applicable to such trusts. The disabled person may himself make application for establishing the trust, the court need not appoint an attorney ad litem or guardian ad litem, the trustee need not be a bank or trust company and no fiduciary bod or account are required. See §§ 1301.052, 1301.057, 1301.058, 1301.101 and 1301.154."

20 42 U.SC §1396p(d)(4)(C).

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PROFESSIONAL ACTIVITIES

Sole practitioner practicing throughout the state of Texas
Adjunct Professor of Law, St. Mary's University School of Law (1998 to present)
Co-Chair, Long Term Care, Medicaid and Special Needs Trusts Committee of the Real Property, Trusts & Estates Section of the American Bar Association (2010-2013)
Member, National Academy of Elder Law Attorneys (national and state chapters)(State Board of Directors, 2000 to 2006, 2009 through 2012, Texas Chapter President 2004-2005)
Member, Special Needs Alliance
Member of the College of the State Bar of Texas (1997 to present)
Member of the American Bar Association, State Bar of Texas, San Antonio Bar Association; Texas Trial Lawyers Association and San Antonio Trial Lawyers Association
Planning Committee Chair, State Bar of Texas, Elder Law and Guardianship Course (2004)
Planning Committee Member, State Bar of Texas, Elder Law Course (2000, 2001, 2003-2008, 2013-2015)
Planning Committee Member, State Bar of Texas, Advanced Estate Planning Course (2008 & 2013)
Planning Committee Member, The University of Texas School of Law Estate Planning, Guardianship and Elder Law Conference (1999 to present)
Co-Director, The University of Texas School of Law Special Needs Trust Conference (2005 to present)
Listed in the 2011 Inaugural Edition, Martindale-Hubbell Bar Register of Preeminent Women Lawyers (and in 2012-2014)
Listed in *Best Lawyers in America* in Elder Law (2007-2015)
Listed in *Texas Monthly Super Lawyers 2004-2014* in Elder Law and Top 50 Lawyers in South and West Texas (2013).
Listed in *Scene in SA San Antonio's Best Lawyers* in Trust and Estate Law (2008-2015)
Co-Author of *Save My Home! Saving Your Home, Farm or Ranch from Medicaid Estate Recovery in Texas*, Elder Law Trio Press, Houston, 2005.
Co-Author of *Elder Law*, *Texas Practice Series Vol.. 51,* Thomson-Reuters (formerly West Publishing), 2008 to present.
Named the Outstanding Attorney in San Antonio in Elder Law and Estate Planning (2013) by the *San Antonio Business Journal*.

LAW-RELATED PUBLICATIONS AND PRESENTATIONS

Author, *Powers of Attorney: Recent Developments*, University of Texas School of Law Estate Planning, Elder Law and Guardianship Course, Galveston, Texas, August 2015.
Co-Presenter, *Alternatives to Guardianship*, University of Texas School of Law Estate Planning, Elder Law and Guardianship Course, Galveston, Texas, August, 2015.
Author, *Elderly/Disability Issues and Medicaid, SSI and Social Security Disability*; 2015 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker's Association, Dallas, Texas, July 2015.
Author, *What Real Estate Attorneys Need to Know about Wills and Probate*, State Bar of Texas Advanced Real Estate Law Course, San Antonio, Texas, July 2015.
Author, *Creating a SNT without Creating Malpractice*, State Bar of Texas Advanced Elder Law Conference, Houston, Texas, April 9, 2015.
Author, *Cracking the Entitlements Enigma Code*: *What Practitioners Need to Know about Medicaid*, Corpus Christi Estate Planners Counsel, Corpus Christi, Texas, November 20, 2014.
Author, *Auditing the MERP Claim*, Texas-NAELA Annual Fall Meeting, Fort Worth, Texas, October, 1, 2014
Author, *Medicaid Do's and Don'ts,* 2014 Medico-Legal Summit, South Texas Geriatric Education Center and the VA-GRECC, San Antonio, Texas, September 18, 2014.
Author, *Elderly/Disability Issues and Medicaid, SSI and Social Security Disability*; 2014 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker's Association, Dallas, Texas, July 21, 2014.

Author, *Winding Up the Settlement: The Government Benefit Elephant in the Room,* State Bar of Texas Soaking Up Some CLE, May 15, 2014, South Padre Island, Texas.

Co-Author, *Where Real Estate and Estate Planning Collide*, State Bar of Texas, Advanced Elder Law Conference, April 3, 2014, Dallas, Texas.

Author, *Cracking the Government Benefits Enigma Code: What Estate Planners need to know about Government Benefits*; San Antonio Estate Planner's Counsel's Docket Call in Probate Court, February 21, 2014, San Antonio, Texas.

Author, *And How are the Children: Planning for Children with Special Needs Trusts*, University of Texas School of Law 2014, 10th Annual Changes and Trends Affecting Special Needs Trusts, February 6-7, 2014, Roundrock, Texas.

Co-Author, *Elder Law Planning and Issue Spotting*, Building Blocks of Wills, Estates & Probate, State Bar of Texas Webcast, January 24, 2014.

Author, *Special Needs Trusts,* Northeast Independent School District Continuing Education, San Antonio, Texas, October 24, 2013

Author, *The Good News/Bad News Client: Adult Protective Services issues that may arise when caring for an Elderly or Disabled individual*, University of Texas Health Science Center Medico-Legal Conference, October, 10, 2013.

Author, *Winding up the Settlement: the Government Benefit Elephant in the Room*, Corpus Christi Probate Conference, September 27, 2013

Author, *Winding up the Settlement: the Government Benefit Elephant in the Room*, Texas NAELA, Austin, Texas, September 7, 2013

Panelist, *Ask the Experts*, Estate Planning, Guardianship & Elder Law Conference, University of Texas School of Law, Galveston, Texas, August 8-9, 2013

Author, *Elderly/Disability Issues and Medicaid, SSI and Social Security Disability*; 2013 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker's Association, Dallas, Texas, July 2013.

Panelist, Elder Law, Disability Planning and Bioethics Group: *Current Issues Affecting Special Needs Trusts,* American Bar Association Section of Real Property, Trust and Estate Law 24th Annual Spring CLE Symposia, Washington, D.C. May 2-3, 2013

Author, *Administrative Appeals: Cutting it off at the Pass*, State Bar of Texas Advanced Elder Law Course, Houston, Texas, April 11, 2013.

Author, *Special Needs Trusts,* Northeast Independent School District Continuing Education, San Antonio, Texas, March 21, 2013.

Author, *Special Needs Trust: The Moving Target*, University of Texas School of Law 2013, 9th Annual Changes and Trends Affecting Special Needs Trusts, February 7-8, 2013, Austin, Texas.

Co-Author, *Elder Law Planning and Issue Spotting*, Building Blocks of Wills, Estates & Probate, State Bar of Texas Webcast, January 25, 2013.

Numerous presentations 1996 though 2012.

Instruction

Identification Number AM-15032 Effective Date: 05/28/2015
Intended Audience: All RCs/ARCs/ADs/FOs/TSCs/PSCs/OCO/
OCO-CSTs/ODAR
Originating Office: ORDP OISP
Title: Policy Clarification for Trusts
Type: AM - Admin Messages

Program: Title XVI (SSI)
Link To Reference: See References at the end of this AM.

Retention Date: November 28, 2015

A. Purpose

This administrative message provides reminders regarding our current policy on special needs trusts and clarifies our policies on court establishment of trusts and the reevaluation of previously excepted trusts.

B. Background on court ordered trusts and the reevaluation of trust resource determinations

We are clarifying our policy regarding the establishment of special needs trusts by court orders, as set out in SI 01120.203B.1.f. The special needs trust exception can be met when courts approve petitions and establish trusts by court order so long as the creation of the trust has not been completed before the order is issued by the court. [emphasis added] In addition, the reevaluation of previously excepted trusts during posteligibility (PE) events is not necessary unless there is an amendment to the trust or a clarification or change in policy that may affect the trust resource determination.

C. Policy for exception to counting trusts that meet the requirements of section 1917(d)(4)(A) of the Social Security Act
The resource counting provisions of section 1613(e) of the Act do not apply to a trust:

- which contains the assets of an individual under age 65 and who is disabled; and
- which is established for the benefit of such individual through the actions of a parent, grandparent, legal guardian or a court; and
- which 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.
For more information on the special needs trust exception, see SI
01120.203.

1. Who established the trust
The special needs trust exception does not apply
to a trust established through the actions of the
disabled individual himself or herself. To
qualify for the special needs trust exception,
the assets of the disabled individual must be put
into a trust established through the actions of the disabled individual's:
- parent(s);
- grandparent(s);
- legal guardian(s); or
- a court.

2. Courts establishing trusts
In the case of a special needs trust established
through the actions of a court, the creation of
the trust must be required by a court order for
the exception in section 1917(d)(4)(A) of the Act
to apply. That is the special needs trust
exception can be met when courts approve
petitions and establish trusts by court order, so
long as the creation of the trust has not been
completed before, the order is issued by the
court. Court approval of an already created
special needs trust is not sufficient for the
trust to qualify for the exception. The court
must specifically either establish the trust or
order the establishment of the trust.

[emphasis added]

a. Example of a court ordering establishment of a trust

John Jackson is a legally competent adult who
inherited $250,000 and is an SSI recipient. His
sister, Justine Jackson, petitioned the court to
create and order the funding of the John Jackson
Special Needs Trust. Justine also provided the
court with a draft of the trust document. A month
later the court approved the petition and issued
an order requiring the creation and funding of
the trust. This trust meets the requirement in SI

01120.203B.1.f. The fact that the trust beneficiary is a competent adult and could have established the trust himself is not a factor in the resource determination.

b. Example of a court-established trust
A beneficiary wins a lawsuit in the amount of $50,000. As part of the settlement, the judge orders the creation of a trust in order for the beneficiary to receive the $50,000. As a direct result of this court order, a trust was created with the beneficiary's settlement money. The trust document lists the $50,000 as the initial principal amount in Schedule A of the trust. This trust meets the requirement in SI 01120.203B.1.f.

c. Example of a court-approved trust
Jane Smith is ineligible for SSI benefits because she has a self-established special needs trust that does not meet the requirements for exception in SI 01120.203. Jane petitioned the court to establish an amended trust and to make the decision retroactive, so her original trust would become exempt from resource counting from the time of its creation. The court approved the petition and issued a nunc pro tunc order stating that the court established the trust as of the date on which Jane Smith had previously established the trust herself. The amended trust does not meet the requirement in SI 01120.203B.1.f. The court did not establish a new trust; it merely approved a modification of a previously existing trust.

d. Example of a court-approved trust
Dan Peters is the trust beneficiary of a special needs trust. His sister petitioned the court to establish the Dan Peters Special Needs Trust and submitted Dan's already created special needs trust to the court along with the petition. Although the court order states that it approves and establishes the trust, the court simply approved the existence of the already established special needs trust. This trust does not meet the requirement in SI 01120.203B.1.f.

3. Reopening of erroneous trust resource determinations

Do not voluntarily reopen cases where we erroneously determined that the trust was countable because the court was petitioned to establish the trust. The SSI claimant, recipient or representative payee must file an appeal or request reopening if he or she disagrees with our determination. If reopening is necessary per SI 04070.015, follow the administrative finality rules in SI 04070.010.

For pending claims or cases under review in the appeal process, use this policy clarification to assist you in making the trust resource determination.

D. Policy for reevaluating trust resource determinations

Evaluate all trusts where a claimant, recipient, or deemor alleges ownership of a trust that needs a trust resource determination (such as a new or amended trust) in all initial claims and PE events to determine the resource status of the trust.

For PE events, do not reevaluate the trust resource determination unless there is new and material evidence, such as an amendment to the trust or a clarification or change in policy that may affect the trust resource determination. However, evaluate all trust income implications, such as trust distributions and payments, if any. For resource status changes in PE events, see SI 01120.200J.7.

E. References

SI 01120.200 Trusts - General, Including Trusts Established Prior to 1/1/00, Trusts Established with the Assets of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act
SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00
EM-14026 REV Regional Centralization of SSI Trust Reviews - Business Process Using the SSI Trust Monitoring System (SSITMS)

Direct all program-related and technical questions to your RO support staff or PSC OA staff. RO support staff or PSC OA staff may refer questions or problems to their Central Office contacts

------------------End Announcement

Creating the Trust: SSA Requirements to get a Self-Settled Trust Accepted and Funded

Patricia Flora Sitchler, CELA
Stetson SNT Conference, Basics of Special Needs Trusts
October 15, 2015

Creating the SNT

- Creating and establishing a self-settled Special (aka Supplemental) Needs Trust is governed by federal and state law authorizing a parent, grandparent, court or guardian to establish and sign the Trust document.
- How simple is that?

The moving target

Federal Law

- 42 U.S.C. §1396p(d)(4)(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in 42 U.S.C. §1382c(a)(3)) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title.

POMS

- Instructive and given deference but not law
  - Christensen v. Harris County, 529 U.S. 576 (2000)
- https://secure.ssa.gov/poms.nsf/home/readform
  - POMS Table of Contents
  - SI-Supplemental Security Income
  - SI 011:Resources
  - SI 01120.199 -.204; .225; 227; SI 01130.420; SI 01150.121; SI 01730.048; .105

State Law

- How is a Trust created?
  - When a property owner declares that property is to be held in a trust for which a statute of frauds requires a written trust document, it is sufficient to satisfy the statute of frauds if the written document is signed by the declarant.... Restatement (Third) of Trusts §§22-23
- Statute of Frauds
  - "A trust in either real or personal property is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent...." Texas Property Code §112.004
  - Caveat: some states allow oral trusts - review your state trust laws

Parent/Grandparent created aka "seed" trust

- In the case of a legally competent, disabled adult, a parent or grandparent may establish a "seed" trust using a nominal amount of his or her own money, or if State law allows, an empty or dry trust. After the seed trust is established, the legally competent disabled adult may transfer his or her own assets to the trust or another individual with legal authority (e.g., power of attorney) may transfer the individual's assets into the trust. POMS SI 01120.203

Parent/Grandparent created aka "seed" trust

- "The special needs trust exception does not apply to a trust established through the actions of the disabled individual him/herself. To qualify for the special needs trust exception, the assets of the disabled individual must be put into the trust established through the actions of the disabled individual's parent or grandparent...." May 28, 2015 SSA unpublished instructions (Appendix 1)

Draper trap

- In a case styled *Draper v. Colvin*, 2013 WL 3477272 (U.S. Dist. Ct., D. S.D., No. 12-4091-KES, July 10, 2013) the lower court found that Ms. Draper's SNT was not an exempt resource because originally it was "signed" by her parents in their individual capacity but parents were also named in her POA as her agents. The parents did not "seed" the Trust but South Dakota allows creation of dry trusts. Nonetheless, the Court held that effectively Ms. Draper signed the trust through her agent/parents despite the fact that the parents signed in their individual capacity. To try to rectify the problem, the Trust was then judicially amended and signed by the Judge. However, the Court held that the SNT was not established by the South Dakota Court. It was only approved by the Court. The Draper case was appealed the Eighth Circuit Court and it affirmed the lower court holding. 779 F.3d 556 (8th Cir. 2015, no writ).

Good practices Parent/grandparent created SNT

- Sign in individual capacity (avoiding having the agent sign if possible) regardless of state law allowing the creation of a dry trust.
- "Seed" the trust with at least $10 with proof that the Trust initially owned $10 prior to funding the Trust with the beneficiary's funds.
- Submit the seed trust with nominal funding for SSI review.
- But, might a parent/grandparent argue that the trust should terminate because the parent/grandparent did not understand what s/he was signing?

Court created SNT

- "In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. Approval of a trust by a court is not sufficient." POMS SI 01120.203
- "...the special needs trust exception can be met when courts approve petitions and establish trusts by court order, so long as the creation of the trust has not been completed before the order is issued by the court. Court approval of an already created special needs trust is not sufficient for the trust to qualify for the exception. The court must specifically either establish the trust or order the establishment of the trust." May unpublished instructions (Appendix 1)

Good Practices --Court created SNT

- Use the wording required by SSA: established and created; Avoid having a court "approve" the creation of the trust.
- Will the Judge sign the trust document to satisfy the statute of frauds?
  - By execution of this Order by the Presiding Judge of this Court establishes and creates the John Doe Supplemental Needs Trust in the form attached to this Order as Exhibit "A," and the requirements of the Statute of Frauds that a Trust document must be signed by the Settlor are satisfied

Good Practices --Court Created SNT

- Review POMS SI 01120.202 "Development and Documentation of Trusts created on or after 01/01/00" and POMS PS 01825.000 for your state's specific trust rulings.
- Insert specific state statutory authority for a Court created trust in the Court Order for ease of reference for SSI review.
- Beware of denials based on the Fact Guide for National Trust Training dated 12/16/2013 that was subsequently revised by Policy Clarification for Trusts dated May 28, 2015.

Guardian created SNT

- A creature of statute.
- Using the guardianship statutes to create a trust for a person who is physical disability but mentally competent
- The following persons may apply for the creation of a [guardianship management] trust...a person who has only a physical disability. Texas Estates Code §1301.051(5)
- "On application by an appropriate person ...the court with jurisdiction over the proceedings may enter an order that creates a trust for the management of the funds of the person...." Texas Estates Code §1301.053

Good Practices

- Review POMS SI 01120.202 "Development and Documentation of Trusts created on or after 01/01/00" and POMS PS 01825.000 for your state's specific trust rulings.
- Make clear in the Court's order that the Court is ordering the Guardian to establish the SNT and fund the Trust with the Ward's funds giving the Guardian the necessary legal authority to act.
- Insert specific state statutory authority for a Court created trust in the Court Order for ease of reference for SSI review.

Individual Beneficiary created SNT

- Pooled Trust 42 U.S.C. §1396p(d)(4)(C)
- Review POMS SI 01120.225 "Pooled Trust Management Provisions" and SI 01120.202 "Development and Documentation of Trusts created on or after 01/01/00.

Thursday, October 15, 2015

Breakout Session 2
2:30 P.M. – 3:30 P.M.

Differences Matter – First vs. Third Party SNTs: Structure and Creation

Presenter:
Jane Skelton
Attorney at Law
Maine Elder Law Firm
Bangor, ME

- Materials
- PowerPoint

Stetson University College of Law presents:
2015 SPECIAL NEEDS TRUSTS
THE NATIONAL CONFERENCE
October 14-16, 2015
The Vinoy Renaissance Resort & Golf Club
St. Petersburg, Florida

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Differences Matter

First vs. Third Party SNTs: Purpose, Structure and Creation

1. Introduction

The purpose of any special needs trust is to maximize resources for an individual with disabilities. Many individuals with disabilities rely on means-tested (or needs-based) public benefits that have income and/or asset limits. The two most common types are Supplemental Security Income (SSI) and Medicaid.[1] It would be prohibitively expensive for many individuals to replace these public benefits and services by privately purchasing them. And this same network of support is sometimes simply unavailable except through these public benefit programs. If an individual who has means-tested public benefits later receives and retains income and/or assets in excess of the eligibility limits for a particular public benefits programs, he or she will forfeit eligibility for these important benefits.

A special needs trust is designed to receive and administer assets for the benefit of the individual with a disability. If the trust is drafted, established, and administered correctly, the transfer of assets into the trust and the existence of the trust assets will not disqualify the trust beneficiary from means-tested public benefits. The beneficiary continues to receive the public benefit and, at the discretion of the trustee, has access to the trust assets that improve the quality of the beneficiary's life.

A common phrase used to describe special needs trusts is that they "supplement, not supplant" public benefits. As a result, special needs trusts are sometimes referred to as supplemental needs trusts. For the purpose of this article (and among elder law attorneys, in general), the terms are interchangeable. The terms can refer to either first party trusts, which hold assets that belonged

[1] Lawyers who draft special needs trusts and the trustees who administer them must study and understand the public benefits available to individuals with disabilities. Some of them are means-tested and some are not. Social Security Disability Income (SSDI) is an insurance program based on an individual's disability status and work history. It goes hand-in-hand with Medicare which is available to those who have received SSDI for 24 months. SSDI and Medicare are not means-tested, and therefore a special needs trust may be of little use for individuals with only those benefits. But an individual covered by SSDI and Medicare may also be eligible for SSI and Medicaid as well as a myriad of other means-tested public benefits that provide medical care, food, housing, and cash to individuals with disabilities. Each year, the Stetson University's Special Needs Trusts – The National Conference provides excellent resources addressing and describing the "alphabet soup" of public benefits. The reader is encouraged to refer to those and keep abreast of changes to them.

to the individual with disabilities or to which he or she was legally entitled, or third party trusts, which hold assets that belonged to someone other than the individual with disabilities. A special needs trust is never a *pure support trust* which directs and requires the trustee to distribute to the beneficiary as much income and principal as is necessary for the beneficiary's health, education, maintenance, and support. (But it may be a conversion from a support trust. See Section 2(C), below.) Instead, the trustee will have the sole discretion to make distributions from the trust.

This article will also touch on pooled special needs trusts which can be either first or third party trusts. It will also discuss the sole benefit trust which can be described as a hybrid of first party and third party special needs trusts.

This article is intended to be introductory overview to the purposes and basic differences between first party special needs trusts and third party special needs trusts.[2]

2. Preliminary Questions: Is a Special Needs Trust Necessary and Appropriate? Are There Alternatives?

A special needs trust is not always necessary when an individual with a disability is to receive or has received assets that, if kept, would disqualify him or her for means-tested public benefits. There may be other appropriate tools to protect those benefits or it may be appropriate to forego the benefits for a period of time. This article will not review the alternatives in depth, but lawyers asked about special needs trusts must consider them. In fact, it may be malpractice to fail to do so.

- ✓ *ABLE Act accounts* will be available soon for special needs planning. In December 2014, Congress passed the Achieving a Better Life Experience Act (ABLE Act). The ABLE Act allows states to set up programs that permit individuals with disabilities or their family members to make contributions to 529A accounts which are similar to 529 education accounts. But there are some limitations on these accounts: they are only available to individuals whose disability was established before age 26; there can be only one ABLE Act account for an individual; anyone can contribute to the account, including

[2] This section provides a mere outline of the considerations for drafting a d4A trust. For a comprehensive review of statutory and equally important non-statutory drafting considerations, the reader is encouraged to consult the most recent edition of the Special Needs Trusts Handbook by Thomas D. Begley Jr. and Angela E. Canellos. The authors include valuable drafting tips, particularly in response to changes in the SSA's Program Operations Manual System.

the individual, but total contributions in a year may not exceed $14,000 in a single year; funds can be used for "qualified disability expenses" and distributions for any other purpose will make the entire account countable as a resource; and upon the death of the account participant, the remaining account balance is subject to payback. However, an ABLE Act account may be a better choice in the case of a small inheritance, other unplanned receipt of modest funds, or a situation where the individual saves money and does not spend down the public benefits to remain below the income limit. An ABLE Act account may also be a good option if the family would like the individual to have more autonomy over a portion of assets while the rest are managed in a traditional special needs trust.

- ✓ With the passage of the *Affordable Care Act* in 2010, medical insurance companies are prohibited from denying coverage to individuals with pre-existing medical conditions. This means that a lawyer must consider whether purchasing a health insurance plan through the exchange or a Medicaid expansion program is a better choice than establishing and administering a special needs trust to maintain Medicaid eligibility.
- ✓ In some cases, individuals receive a modest enough sum that they can *spend down* the excess resources. Common spend down opportunities include purchasing a home or home improvements and repairs; furniture; books and education, including tuition; entertainment, including vacations, stereo and television, and magazine and newspaper subscriptions; motor vehicles and motor vehicle repairs; funeral expenses through an irrevocable mortuary trust; legal fees; services of a care manager; and more.
- ✓ In some cases, excess resources can be *transferred to third parties* to preserve eligibility for public benefits, but proceed with caution. There is an SSI transfer penalty, which is calculated by dividing the value of the transfer by the maximum SSI payment, currently $733. Example: A transfer of only $20,000 by an SSI recipient results in a 27-month period of ineligibility for SSI and the possible forfeiture of the SSI-linked Medicaid. But if the individual is not receiving SSI, has Medicaid based on a waiver program, and is not receiving an institutional level of care, there is no Medicaid transfer penalty. This should only be considered if there is no likelihood of a need for long-term care within the five years following the transfer.

Keep in mind some benefits do not have income and asset limits, particularly SSDI and Medicare. (See footnote 1.) These are insurance-based public benefits. The individual who worked and paid payroll taxes (or was the dependent of someone who did) is entitled to the benefits regardless of his or her assets. Individuals can receive inheritances, personal injury settlements, and assets from other sources with no risk to these insurance-based public benefits.[3]

3. Which Trust to Use?

Once it is determined that a special needs trust is appropriate, the next question is which type of special needs trust should be considered. Although special needs trusts can be distinguished from one another in many ways, the most important distinction is between first party trusts and third party trusts.

A. First Party Special Needs Trusts

First party special needs trusts are funded with assets that belong to the individual for whom the trust is being created. These trusts are referred to by several other names, all of which provide hints to their genesis and creation. They may be referred to as *self-settled special needs trusts* since these trusts are funded with assets that belonged to the trust beneficiary or to which the beneficiary was legally entitled. They are also referred to as *d4A trusts*. This name is a nod to the section of the Omnibus Budget Reconciliation Act of 1993 by which Congress recognized and codified this type of self-settled special needs trust. These first party trusts may also be called *payback trusts* or *under-65 trusts*, and both names reference the statutory requirements imposed by 42 U.S.C. §1396p(d)(4)(A).

A first party special needs trust is considered when an individual with disabilities owns or acquires assets and wants to become or remain eligible for means-tested public benefits. The assets might be in the form of a personal injury settlement or award, possibly resulting from the incident that caused the disability. Assets sometimes include a bequest from a parent, grandparent, or other caring friend or relative who did not know about or have the opportunity to create a third party trust. The same third party could also have named the individual (instead of a

[3] In some cases, a trust may be appropriate for the individual who does not have means-tested public benefits but who is not good at managing money. The individual could accept the assets and then transfer them to a third party who then establishes a support trust for the benefit of the individual. It would not have the typical special needs trust provisions.

third party trust) as the beneficiary of a life insurance policy, annuity, or retirement account. Additionally, a first party special needs trust can be used for alimony or property division in a divorce and for child support payments when a child of the divorcing parents has special needs.

In all of these cases, if the individual receives these assets outright and cannot spend them down below the $2,000 SSI threshold within the month of receipt,[4] he or she will be ineligible for SSI and other benefits, especially Medicaid. But if the assets are transferred to a properly established trust, the "windfall" will be used at the trustee's discretion to benefit the individual without jeopardizing eligibility for government benefits.

Although this article focuses on special needs trusts established for the benefit of one individual under 42 U.S.C. §1396p(d)(4)(A), first party assets can also be directed to an already existing pooled trust established pursuant to 42 U.S.C. §1396p(d)(4)(C).[5] These are also OBRA 93 trusts and subject to stringent statutory criteria.

The OBRA 93 statutory criteria for a first party special needs trust (see Section 4B) are essentially a "deal" Congress made with individuals with disabilities. Individuals who are otherwise eligible for means-tested public benefits remain eligible despite availability of their assets (at the trustee's discretion) in the first party special needs trust that meets the statutory

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[4] 20 C.F.R § 416.1207(d).

[5] Most readers of this article are not likely to be involved in the creation of pooled trusts (also known as d4C trusts), so this article will not focus on that topic. But it is interesting to note the statutory criteria any first party pooled trust must meet pursuant to 42 U.S.C. §1396p(d)(4)(C) for the trust assets to not be considered countable to the beneficiary and for the transfer of assets to an account at such a pooled trust to not be treated as a transfer of resources for less than fair market value. Criteria for a d4C trust are:

> **(i)** The trust is established and managed by a non-profit association.
>
> **(ii)** A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
>
> **(iii)** Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, *by such individuals*, or by a court.
>
> **(iv)** To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

Emphasis is added above to highlight that the individual with disabilities himself or herself may establish the account in the d4C pooled trust. An account at a pooled trust is typically created through a joinder agreement that the intended beneficiary may sign. As discussed below, the individual may not establish his or her own d4A trust.

criteria. One of the chief criteria is the inclusion of a "payback" provision: when the special needs trust beneficiary dies, remaining assets in a first party special needs trust must be available to reimburse any state that provided medical assistance to the beneficiary. Under this legislative deal, the individual's payment for his or her own medical care is deferred until death. At that point, the state is reimbursed dollar-for-dollar, and no interest is charged. Since the Medicaid reimbursement rate is almost always less than the private pay rate, the use of a first party special needs trust is like getting an interest-free, subsidized loan from the state Medicaid agency. And if there are no remaining trust assets, the state is never reimbursed.

For considerations in drafting a first party special needs trust pursuant to 42 U.S.C. §1396p(d)(4)(A), see Section 4B of this article.

B. Third Party Special Needs Trust

A third party special needs trust is funded with the assets of someone other than the trust beneficiary. This donor wants to provide for an individual with disabilities without jeopardizing that individual's eligibility for means-tested public benefits. Features that distinguish a third party trust from a first party trust include:

- ✓ A third party special needs trust will never be a "self-settled" trust; it is established by a third party and funded with the assets of one or more third parties for the benefit of the individual with disabilities. It should never accept any assets of the individual with disabilities. In fact, doing so likely "pollutes" the trust and makes the trust assets countable, thereby disqualifying the individual from means-tested public benefits.
- ✓ A third party trust does not have to comply with strict statutory criteria like those imposed on a first party trust. OBRA 93 specifically excludes trusts established under a decedent's will and trusts established by someone other than the individual (or his or her spouse) from the definition of "trust." [6]

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[6] Section1396p(d)(2)(A) provides:

> For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:
>
> **(i)** The individual.
>
> **(ii)** The individual's spouse.

- ✓ There is no "payback." That is, there is no requirement that trust corpus remaining in a third party special needs trust after the beneficiary's death be reimbursed to states that provided medical assistance to the beneficiary.
- ✓ A third party special needs trust can be drafted to benefit more than one beneficiary.
- ✓ A third party trust may be a testamentary trust established in a will or it may be established in a freestanding (or standalone) trust agreement.

A third party special needs trust is usually considered in the context of estate planning for a loved one. It is proactive rather than reactive. For example, suppose a parent died intestate or prepared a simple will with no planning for her child with disabilities who is dependent on SSI and Medicaid. The mother's assets will be distributed outright to the child who will then lose eligibility. It is possible that one of the alternatives to a special needs trust, described in Section 2, will be appropriate. If not, then to protect the child's future public benefits, a first party trust with payback provisions will typically be considered. This is a reaction to the circumstances. If it is to be a d4A trust (as opposed to a d4C pooled trust), the other parent, a grandparent, a guardian, or a court will need to establish the trust. And whether it is a d4A or a d4C trust, it will need to include a payback provision.

With proactive estate planning for the child, grandchild, or other loved one with disabilities, the testator (in a will) or the settlor (in a standalone trust) has these opportunities: to hand-pick the trustee and the successor trustees; to highlight objectives for the trust assets either within the trust document or in a separate letter of intent;[7] and to decide how any trust assets remaining on the death of the beneficiary of the special needs trust will be distributed, whether to other descendants or to charities. For considerations in drafting third party special needs trusts see Section 4C.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

[7] *See* Amy C. O'Hara & Sheryl Frishman, *Letter of Intent*, 7 THE VOICE (July 2013), http://www.specialneedsalliance.org/the-voice/letter-of-intent-3.

Just as there are pooled trusts for first party funds, there are also third party pooled trusts administered by nonprofit agencies. Since these are not funded with the assets of the individual with disabilities, they are not governed by 42 U.S.C. §1396p(d)(4)(C) and need not (but might) include payback provisions. Planning to leave an inheritance for a loved one in an account in a pooled trust has these chief advantages: the trust is already in existence and the trustee will likely be a panel of volunteers with expertise in public benefits, taxes, and financial planning.[8]

Another form of third party trust is what may be referred to as a convertible trust. Clients may want to provide for a loved one but are unsure whether that loved one will be dependent on means-tested public benefits in the future. In that case, the estate planning vehicle (whether will or freestanding trust) may begin as a support trust that is flexible enough to convert to a discretionary special needs trust in the future.

C. Sole Benefit Trust

As described above, most special needs trusts can be identified as either a first party (self-settled) trust or a third party trust, and both types seek to preserve eligibility for means-tested public benefits for the intended beneficiary. The *sole benefit trust* considers the eligibility for public benefits for both the settlor and the beneficiary. The statutory authority for sole benefit trusts is OBRA 93, codified at 42 U.S.C. § 1396p(c)(2)(B). It exempts from the Medicaid transfer penalty assets that

> (i) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse,
>
> (ii) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse,
>
> (iii) were transferred to, or to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II), or
>
> (iv) were transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1382c(a)(3) of this title).

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[8] *See* Stuart D. Zimring, *Using Pooled Trusts in Estate Planning*, 6 THE VOICE (Jan. 2012), http://www.specialneedsalliance.org/the-voice/using-pooled-trusts-in-estate-planning-2.

Trusts established under these provisions are sometimes referred to as c2B trusts, which is a reference to section l396p(c)(2)(B).

Sole benefit trusts are often used when an older parent of a child with disabilities needs long-term care that could be paid for with Medicaid benefits. Unlimited assets may be transferred from the parent to a properly drafted trust for the benefit of a child with disabilities. The state Medicaid agency will not impose a Medicaid transfer penalty on the parent whose assets were transferred, and the establishment of the trust will not disqualify the beneficiary from means-tested public benefits. Note that a parent-child relationship is not required. In fact, there need not be any familial relationship between the grantor and the beneficiary for a sole benefit trust to comply with section l396p(c)(2)(B).

The fact that the trust is created by and funded with the assets of a third party make this type of trust similar to a third party trust. But, the trust must satisfy the requirement that the trust be "solely for the benefit of" the beneficiary, and the way that requirement is interpreted by state Medicaid agencies and satisfied in the trust makes it similar to a first party trust.[9] For recommendations on drafting a sole benefit trust that meets the criteria of section l396p(c)(2)(B)(iv), see Section 4D of this article.

(This article continues on the following page.)

[9] For an in-depth discussion of these trusts, see *The Sole Benefit Trust: the "Forgotten" Trust* by Howie S. Krooks, Esq., which was presented at Stetson University's 2012 Special Needs Trust National Conference.

Drafting Considerations	**First Party Special Needs Trust under l396p(d)(4)(A)**	**Third Party Special Needs Trust**	**Sole Benefit Trust under l396p(c)(2)(B)**
Established by whom?	By a court or by a parent, grandparent, or guardian of the settlor/grantor	By a third party, typically a parent or grandparent of the intended beneficiary	By a third party (often a parent of the intended beneficiary) who seeks eligibility for means-tested public benefits
With whose funds? Who is true grantor?	The intended beneficiary with his or her own funds	One or more third parties with their own funds	One or more third parties with their own funds
For the "sole benefit" of one beneficiary	Yes	Not necessarily	No
Payback provisions required?	Yes	No	Possibly, subject to state interpretation
Required to be actuarially sound?	No	No	Possibly, subject to state interpretation
Age limit?	Must be established for a beneficiary under age 65	No	Must be established for a beneficiary under age 65
Revocable or irrevocable?	Must be irrevocable	May be revocable or irrevocable	Must be irrevocable
Typical uses?	Protect eligibility for means-tested public benefits after receipt of personal injury award or settlement, unplanned for inheritance, or "windfall"	Estate planning for a loved one who does or may rely on means-tested public benefits	Medicaid planning for the grantor/settlor who wants to benefit a loved one who relies on means-tested public benefits
Reactive or proactive?	Reactive	Proactive	Reactive and proactive
Subject to review by public benefits agencies?	Yes, in determining eligibility of beneficiary	Yes, in determining eligibility of beneficiary	Yes, in determining eligibility for grantor and beneficiary

4. Drafting Considerations

A. Starting Principles

Although the various types of special needs trusts have different etiologies and serve many different purposes, some general observations may be made for drafting any type of special needs trust.

First, it should go without saying that the drafter must be knowledgeable about and remain abreast of the law and regulations regarding special needs trusts. One way to stay up-to-date is to attend Stetson University's annual Special Needs Trust National Conference. In addition to having a finger on the pulse of trends in special needs trusts nationally, the drafter must also be fluent in local state trust and probate law and the idiosyncrasies of the local Medicaid agency.

Second, it is also a baseline principle that the individual circumstances of the intended special needs trust beneficiary must be taken into account. Never rely on a client's representation of the benefits being received by the beneficiary. Verify all means-tested public benefits to which the intended beneficiary is or may be entitled - SSI, SSDI, childhood disability benefits (CDB), Medicaid, Medicare, VA, housing assistance (e.g. Section 8), Supplemental Nutrition Assistance Program (SNAP, commonly referred to as food stamps), Low Income Home Energy Assistance Program (LIHEAP) - and insist on documentation from the government agency. Do you understand the eligibility rules for each benefit? Will the existence of a special needs trust and different types of distributions from a special needs trust (e.g. food and shelter vs. clothing and car expenses) affect eligibility?

Third, understand your client's goals, options, and individual circumstances. Could assets be spent down? Could the individual with disabilities accept the funds outright and purchase insurance not available prior to the Affordable Care Act? If the assets to be set aside are modest and if the donor wants the individual to have autonomy, could an ABLE Act account be sufficient? If family members are being suggested to serve as the trustee, are they really suitable for the role?

Fourth, incorporate flexibility. The circumstances of the beneficiary may change, and the law and rules regarding public benefits will change. Some ways to draft for flexibility include:

- ✓ Using trust protectors, advisory committees, and other advisors who may have powers to amend the trust. In the alternative and if necessary, allow for amendment by the court.
- ✓ Include decanting provisions as appropriate to allow for the transfer of assets into a new trust without court involvement.
- ✓ Include merger provisions to allow consolidation of trusts that have the same purpose and structure. (Remember: A first party and a third party special needs trust would never be merged.)
- ✓ Depending on the settlor's goals, a freestanding third party special needs trust may be drafted to reserve to the settlor the powers to amend and revoke.
- ✓ Where appropriate, consider including powers of appointment.

Once the trust is established, the drafter should submit the document to the state Medicaid agency and the Social Security Administration to request approval of the trust agreement. This is necessary if the beneficiary is already receiving SSI and Medicaid.[10]

B. Drafting a First Party Special Needs Trust

Assets owned by the individual and transferred to a trust will be countable to that individual for the purpose of determining eligibility for SSI and Medicaid. But in 42 U.S.C. §1396p(d)(4), Congress exempted certain trusts from this rule, including

> A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

From its statutory foundation, the d4A trust must meet the following criteria:

- ✓ The trust must be funded with the assets of the individual who will be the sole beneficiary of the trust during his or her lifetime.

[10] On April 28, 2014, the SSA implemented a process so that review of all trusts submitted for SSI claims and post-eligibility actions will be made in field offices.

- ✓ The trust beneficiary must be under age 65 when the trust is established. Assets in the trust will remain exempt for the purpose of Medicaid eligibility after age 65, but any assets transferred into the trust after age 65 will be countable.
- ✓ The trust beneficiary must be disabled as defined by the Social Security Act in 42 U.S.C. § 1382c(a)(3). If the individual is not already receiving SSI or Medicaid, the disability will have to be confirmed by the Disability Determination Service.
- ✓ At present, the trust must be "established" pursuant to a court order or by a parent, grandparent, or guardian of the beneficiary. The trust may not be established by the beneficiary,[11] which results in one of the oddities of d4A trusts. Although the beneficiary is the "grantor" of the trust as his or her assets will fund the trust, the beneficiary cannot sign the trust document and cannot fund the trust directly.[12]
- ✓ The trust must include a payback provision which provides that state Medicaid agencies will receive all amounts remaining in the trust upon the death of the beneficiary up to the amount of medical assistance paid since birth, not just since the event creating the disability or since creation of the trust. Only two categories of expenses have priority to the Medicaid payback: state or federal taxes due because of inclusion of the trust in the beneficiary's estate, and reasonable fees for administration of the trust estate. If more than one state has provided benefits, the amount available will the prorated. If there are any trust assets remaining, other expenses of the trust may be paid (e.g., funeral expenses, debts owed to third parties) and then the balance may be distributed to remaindermen.

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[11] The Special Needs Fairness Act seeks to enable competent individuals to establish their own special needs trusts. It was passed unanimously by the Senate on September 9, 2015. The National Academy of Elder Law Attorney's Public Policy Manager tracks progress on the Special Needs Trust Fairness Act of 2015 (H.R. 670/S. 349) at https://www.naela.org/Public/Advocacy_Public_Policy/Public_Policy/SNT_Fairness_Act.aspx.

[12] The reader is encouraged to consider the materials presented by Patty Stichler at Stetson University's 2015 Special Needs Trust National Conference regarding the 8th Circuit U.S. Court of Appeals' decision in Draper v. Colvin, No. 13-2757 (March 3, 2015), and the unnecessarily contorted complexities imposed by the SSA in the creation and funding of d4A trusts.

In addition to tracking the statute, the drafter must also consult the SSA's Program Operations Manual System. For example, although not required by statute, the POMS requires that a self-settled special needs trust be irrevocable.[13]

C. Drafting a Third Party Special Needs Trust

A third party trust can take several forms. It is commonly a testamentary trust included in a will. In fact, this structure (as opposed to a revocable living trust) must be used in the context of Medicaid planning when a community spouse (typically the healthier spouse) intends to preserve assets from the long-term care expenses of the other spouse in the event that the community spouse dies first. The will provides that all or a portion of the deceased spouse's assets will be held in the testamentary trust for the lifetime of the surviving spouse and be used to supplement and not supplant public benefits, subject to the discretion of the trustee. Upon the death of the surviving spouse, the remaining trust assets will be distributed as the community spouse provided in his or her will, typically to the couple's descendants.

The testamentary trust for the benefit of a surviving spouse must be drafted with an eye to Medicaid regulations and procedures in the state where the surviving spouse is likely to reside after the death of the community spouse. Some states treat the failure of the surviving spouse to pursue any statutory spousal elective share or statutory exemptions and allowances as transfers of assets for less than fair market value. The value of what the surviving spouse failed to pursue and collect will be subject to a transfer penalty.[14]

A third party special needs trust for the benefit of anyone other than a surviving spouse can be established in a will or in a freestanding trust that comes into existence during the lifetime of the grantor. The trust could be revocable or irrevocable, depending on the goals of the settlor as well as tax considerations. There are several benefits to this, including coordinating lifetime or testamentary gifts from several sources. For example, a divorced couple may both want to

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[13] SI POMS 01120.200(D)(1)(a): Trusts – General, Including Trusts Established Prior to 1/1/00, Trusts Established with the Assets of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act, https://secure.ssa.gov/poms.nsf/lnx/0501120200.

[14] In Maine, a surviving spouse is entitled to one-third of the augmented estate of the decedent spouse as well as to statutory exemptions and allowances currently totaling $29,000. The Department of Health and Human Services will impose a transfer penalty if the surviving spouse fails to receive this amount from the estate of the first-to-die spouse.

provide for a child. They could agree to establish a third party special needs trust for that child's benefit, which initially may be only minimally funded. Each parent could have their respective estates (through wills, revocable living trusts, and beneficiary designations) direct assets to the trust upon death. And grandparents or siblings of the child with disabilities could do the same. A third party trust will be established in the context of a client's estate plan so consideration must be given to the client's other estate planning goals and intended beneficiaries as well as to gift, estate, and income tax issues.

D. Drafting a Sole Benefit Trust

As the term is used in this article, a sole benefit trust is established by one person who seeks to become or remain eligible for means-tested benefits by transferring assets for the benefit of an individual with disabilities. The individual who will be the beneficiary must have been determined to be disabled pursuant to the Social Security definition of disability found in 42 U.S.C. § 1382c(a)(3).

For the transfer to not result in a transfer penalty for the settlor, the trust must satisfy the "solely for the benefit of" requirement of 42 U.S.C. § 1396p(d)(4)(C)(iv). States have interpreted this requirement differently, so it is essential that the drafter be aware of the idiosyncrasies in the relevant state. For example, the Maine Department of Health and Human Services takes the position that a sole benefit trust must either include payback provisions or be "actuarially sound."

If the sole benefit trust uses a payback provision, it will be similar to those used in a d4A trust. It must provide that funds remaining in the trust upon the death of the beneficiary are available to reimburse the state up to the amount of medical assistance paid on the trust beneficiary's behalf.[15] (Again, if the beneficiary received medical assistance in more than one jurisdiction, the jurisdictions will be reimbursed proportionately.) During the beneficiary's lifetime, the trust must be solely for the beneficiary's benefit. But if trust assets remain after the payback, named remaindermen could receive the remaining trust assets.

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[15] HFCA Transmittal 64 3257(B)(6).

If the trust is designed to be "actuarially sound" to meet the "solely for the benefit of" requirement for a sole benefit trust, it must provide that the trust will be paid out over the life expectancy of the beneficiary. In Maine, the inclusion of the following language satisfies the Medicaid agency: "I intend that the trust assets be expended during Dorothy's lifetime, and the Trustee shall make such expenditures on an actuarially sound basis considering Dorothy's life expectancy." The trustee is required to make distributions at least annually but has the discretion to distribute more rapidly.

Whether a payback provisions or an actuarially sound provision is what is included in a particular trust requires consideration of the individual beneficiary's circumstances, including his or her realistic life expectancy, the extent to which the state has and continues to provide medical assistance, and whether the beneficiary receives SSI benefits that would be disrupted with actuarially sound distributions (unless the trust provides that distributions cannot be used for food and shelter). If the beneficiary is receiving means-tested public benefits, the drafter will need to draft the trust in accordance with the third party trust rules in the state where the beneficiary resides.

5. Conclusion

This article provides an introduction to the differences in purpose, structure, and creation of first and third party special needs trusts. A special needs trust is intended to improve the quality of life for an individual with disabilities, but a poorly drafted special needs trust or the wrong type of special needs trust for a particular situation can disqualify the beneficiary for much-needed, means-tested public benefits and disrupt his or her network of support. The reader is strongly encouraged to consult other resources, to mentor with experienced practitioners, and to stay current with changes in the ever-evolving arena of tax law, trust law, and public benefits.

Sample Scenarios

- Filip's mother died, she did not leave a Will, and all her assets will be distributed outright to Filip.
- Fiona is settling a lawsuit and will be receiving a personal injury settlement.
- Grace's husband, Thurston, now resides in a nursing home.
- Thad's parents are planning their estates.
- Thad's grandmother wants to make a lifetime transfer for Thad's benefit.
- Grant has been admitted to a nursing home. He wants to transfer his assets to qualify for Medicaid and to provide for his son, Solomon.

Purpose of an SNT

- The purpose of any SNT is to "supplement, not supplant" means-tested public benefits.
- Means-tested public benefits are welfare benefits. To be eligible for them, an individual must have limited assets or income or both. The two most common means-tested public benefits are SSI and Medicaid.

SSI

- Supplemental Security Income (SSI) is a federal stipend for low-income individuals who are aged (65 or older), blind, or disabled. It is administered by the Social Security Administration but funded from the U.S. Treasury general funds, not the Social Security trust fund. SSI provides monthly income to approximately eight million Americans.
- The maximum monthly SSI payment for an individual in 2015 is $733.
- The asset limit for SSI eligibility is $2,000 for a single individual and $3,000 for couple.

Medicaid

- Medicaid provides health coverage to more than 50 million Americans. It is jointly funded by the federal government and individual states, and it is administered by each state. It covers children, the aged, blind, and/or disabled and others who are financially eligible.
- In Maine and most states, a person who is eligible for SSI is automatically eligible for Medicaid, and Medicaid starts the same month as SSI eligibility.
- In Maine, the effective asset limit for Medicaid for an individual is $10,000.
- In Maine, Medicaid is called MaineCare.

Differences Matter

- Not all disability benefits are means-tested.
- Social Security Disability Insurance (SSDI) is funded through payroll taxes and is available to those who have a sufficient work history and contributed through payroll taxes. It is a form of insurance and is an entitlement. There is no asset limit for SSDI.
- After receiving SSDI for two years, a disabled person will become eligible for Medicare.
- SSDI and Medicare are not means-tested. There is no asset limit.

But It Can Be Complicated…

- Some individuals are "dual eligible" and are enrolled in both Medicare and Medicaid. And an individual can receive both SSDI and SSI, which the SSA calls "concurrent" benefits.
- Others receive Childhood Disability Benefits (CDB) on the record of a retired or deceased parent. The SSA refers to these benefits as SSDI for "adults disabled since childhood" (also called Disabled Adult Child benefits). Although there is no asset limit for the monthly CDB income, assets will have to remain below $2,000 ($10,000 in Maine) for continued eligibility for Medicaid.

Other Means-Tested Programs

There are many other federal, state, and municipal means-tested benefits programs. This is a small sample:

- Housing Assistance (e.g., Section 8)
- Low Income Home Energy Assistance Program (LIHEAP)
- Supplemental Nutrition Assistance Program (SNAP)
- Temporary Assistance for Needy Families (TANF)
- Women, Infant, and Children Food Program (WIC)

Proceed with Caution

- The eligibility rules are different for each program. It is essential to understand the public benefits the individual receives or for which he or she may apply in the future.
- Confirm all the benefits available to the intended beneficiary by collecting documentation directly from the agency. Relying on the client's representation that he or she is "on disability" is never enough.
- The existence of a SNT or distributions from a SNT may actually disqualify an individual for public benefits.
- Know what benefits the individual receives or may apply for in the future and analyze how a SNT can help–or hurt–the individual's particular circumstances.

Remember the Sample Scenarios?

- Filip's mother died, she did not leave a Will, and all her assets will be distributed outright to Filip. Are we concerned if Filip receives only SSDI and Medicare?
- Fiona is settling a lawsuit and will be receiving a personal injury settlement. What can we do if we want to protect Fiona's eligibility for SSI and Medicaid?
- Thad's parents are preparing their Wills, and Thad may at some point in the future need means-tested public benefits. Should a trust be created? If so, what kind?
- Thad's grandmother wants to make a lifetime gift for Thad's benefit. What are her options?
- What should Grace include in her Will?
- Solomon's father has been admitted to a nursing home, and he wants to transfer his assets to qualify for Medicaid and to provide for Solomon. Is there anything he can do?

Alternatives to SNTs

Spend Down – Is it possible to promptly spend down the excess resources on any of the following?

- home or home improvements and repairs;
- furniture;
- clothing, jewelry, and other personal belongings;
- books and education, including tuition;
- entertainment, including vacations, stereo and television, and magazine and newspaper subscriptions;
- motor vehicles and motor vehicle repairs;
- funeral expenses through an irrevocable mortuary trust;
- legal fees and accountant's fees;
- services of a care manager;
- and more.

More Alternatives to SNTs

- Medical insurance through the Affordable Care Act
- Transfer of assets
- Coming soon: ABLE Act accounts, a.k.a. 529A accounts

First Party SNTs v. Third Party SNTs (And Let's Not Forget Sole Benefit Trusts) What Do They All Have in Common?

All SNTs are intended to maximize resources for individuals with disabilities. The SNT is a legal arrangement and a fiduciary relationship that permits the beneficiary of the SNT to receive means-tested public benefits yet have access—at the discretion of the Trustee—to SNT assets. The individual cannot be the Trustee, and the Trustee must have sole discretion with regard to making distributions that can improve the quality of the beneficiary's life.

Differences Matter. Again. A Lot.

The fundamental difference between a first party SNT and a third party SNT is whose assets are used to fund the trust.

- If a SNT is established for Filip's inheritance or Fiona's PI settlement, it will be *a first party SNT*, funded with the assets they own or to which they are legally entitled.
- If Thurston's wife or Thad's parents or Thad's grandmother create trusts in the scenarios described, they will all be *third party SNTs* funded with the assets of a third party, that is, someone other than Thurston or Thad.

Two Types of First Party SNTs

First party trusts are also called self-settled trusts, and they are creatures of statute. Federal law provides for two types of self-settled SNTs:

- The (d)(4)(A) SNT gets its name from the statute that authorizes it: 42 U.S.C. § 1396p(d)(4)(A). It must be created for the sole benefit of an individual with disabilities who is under age 65 and by (for now) the individual's parent, grandparent, guardian, or a court.
- A pooled trust is authorized by 42 U.S.C. § 1396p(d)(4)(C). A pooled special needs trust is a trust created and administered by a nonprofit organization. The assets of different individuals with disabilities are administered in the pooled trust, but each beneficiary's assets are maintained in a separate account.

First Party Trusts (cont.)

Remember Fiona and Filip? If they had means-tested benefits like SSI and MaineCare and wanted to maintain eligibility but put away their "excess" assets for future use, either a (d)(4)(A) trust or an account at an existing (d)(4)(C) trust could be used.

- In both cases, Filip and Fiona would be the "grantors" of their self-settled trusts or trust accounts.
- Yet *under current law* the (d)(4)(A) cannot be established by Filip or Fiona, only by a parent, a grandparent, a guardian, or a court.
- The pooled trust joinder agreement for a (d)(4)(C) trust can be signed by a parent, a grandparent, a guardian, a court, or by the individual whose funds will be transferred to trust.

First Party Trusts (cont.)

- A self-settled SNT must be irrevocable. That is, the grantor whose assets were transferred to the trust can have no authority to revoke of terminate the trust.
- The (d)(4)(A) trust may only be established for the benefit of an individual under age 65, whereas in some states an account at a (d)(4)(C) trust can be established for someone over age 65.

First Party Trusts (cont.)

- A (d)(4)(A) trust must provide that when the beneficiary dies or upon the termination of the trust, the remaining trust assets will be used to "pay back" any state that has provided benefits to the individual under any state's Medicaid program.
- With a (d)(4)(C) trust, the beneficiary's remaining funds must either stay in the pooled trust for the benefit of the other trust beneficiaries or be used to pay back states that have provided Medicaid benefits.

Third Party SNTs

- A third party SNT is created to receive gifts and bequests from third parties, such as parents, grandparents, other family, or friends.
- A third party SNT is not a creature of statute.
- A third party SNT does not have to include a pay back provision.
- A third party SNT is much more flexible than a first party SNT.

Third Party SNTs (cont.)

Remember Thad? Thad's parents are planning their estates. Let's assume that Thad is receiving SSI and Medicaid and a network of services his parents do not want to disturb. They can do either of the following:

- They can provide for Thad by including testamentary trusts in their Wills that would come into effect upon the death of the second of them to die.
- Or, they can create a stand-alone trust during life, which they might minimally fund with the intention of funding it upon the death of the second of them. That trust could receive bequests and lifetime gifts from others, including Thad's grandmother, or she can create her own trust. The stand-alone trust could be revocable or irrevocable, depending on tax issues and non-tax objectives.

Third Party SNTs (cont.)

What about Grace? Her husband, Thurston, is in a nursing home. If Grace has consulted an elder law attorney, it is likely that most of the couple's assets have been transferred to Grace. The elder law attorney may also have guided Grace in getting Thurston eligible for Medicaid benefits. And Grace has probably signed a new Will in case she should die before Thurston. The new Will provides that at least some portion of Grace's probate assets would be directed to a testamentary special needs trust for Thurston's benefit. The assets in the trust would not be countable to Thurston for the purpose of continued eligibility for Medicaid benefits, and, after his death, the remaining assets would be distributed as contemplated in Grace's Will.

Note: This plan can only be established in a Will.

Note: The plan could force Thurston to pursue a spousal elective share after Grace's death.

Never the Twain Shall Meet

- The funds of a third party should never be transferred into a first party trust. If that happens, the funds will be exposed to payback provisions unnecessarily.
- The funds of the individual with disabilities should never by transferred into a third party SNT. To do so will "pollute" the trust and risk making all the assets countable to the beneficiary for eligibility purposes.

What about Grant and Solomon?

A Sole Benefit Trust is a type of third party special needs with first party features. It can meet the dual goals of qualifying Grant for Medicaid nursing home benefits while benefiting Solomon. Typically, gifts made by an individual within five years of applying for Medicaid nursing home benefits will be subject to a transfer penalty. There is no penalty for transfers to a child with a disability, but that won't work if Solomon receives SSI and Medicaid. The answer is a Sole Benefit Trust, so that Solomon's benefits can continue. Like a first party trust, the Sole Benefit Trust is a creature of statute. Some states require a payback provision; others require that the trust be "actuarially sound."

Differences Really Do Matter

- The eligibility rules for the public benefits available to individual with disabilities are different. In particular, some are means-tested and some are not.
- Whose assets will be used to fund the trust? That variable makes all the difference in how the trust will be drafted and established.
- Different scenarios demand different trusts.
- And we didn't talk about the differing tax treatments for different SNTs.

***Viva la difference*, but don't let the differences trip you up.**

Basics of Special Needs Trusts

Thursday, October 15, 2015

Breakout Session 2
2:30 P.M. – 3:30 P.M.

(Re)Introduction to Pooled Trusts

Presenter:
Laurie Hanson
Attorney at Law
Long, Reher & Hanson, P.A.
Minneapolis, MN

- Materials
- Appendix A
- Appendix B
- PowerPoint

Stetson University College of Law presents:
2015 SPECIAL NEEDS TRUSTS
THE NATIONAL CONFERENCE
October 14-16, 2015
The Vinoy Renaissance Resort & Golf Club
St. Petersburg, Florida

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(Re)Introduction to Pooled Trusts
By: Laurie Hanson, Long, Reher & Hanson, P.A.
2015 Special Needs Trusts National Conference
October 15, 2015

A pooled trust is a trust with separate sub-accounts for multiple beneficiaries.[1] Contributions and distributions are tracked separately in sub-accounts established for each beneficiary. To minimize each beneficiary's cost of participation in the pooled trust, however, the property held in the multiple sub-accounts is pooled together for purposes of administration and investment. Pooling multiple sub-accounts together can command better interest rates, and minimize fees for managing the trust.

The *special needs* pooled trust (pooled SNT) is a creature of the federal Medicaid Statute;[2] it is a particular type of special needs trust that is maintained by a non-profit entity for the benefit of multiple beneficiaries, all of whom are living with disabilities. Funds placed by a client or third parties in a qualified pooled SNT sub-account are treated as excluded assets for purposes of determining the client's eligibility for Medicaid (MA)[3] and Supplemental Security Income (SSI).[4] When correctly established and administered, a pooled SNT sub-account can provide a source of funds to improve the quality of life of a person who relies on needs-based public benefits to meet basic daily needs.

This paper comprises a general overview of pooled SNTs and their relationship to public benefits eligibility. The paper will cover the essential features of a pooled SNT and sub-accounts therein; the circumstances in which placing funds in a pooled trust sub-account might benefit a

[1] For a comprehensive discussion of pooled trusts, *see* Renee C. Lovelace, Pooled Trust Options: A Guidebook, 13 (Melange Press, 2010) and Thomas D. Begley, Jr. and Angela E. Canellos, Special Needs Trust Handbook, *Pooled Trusts*, Chapter 16 (2015).
[2] 42 U.S.C. § 1396p(d)(4)(C).
[3] Id. Funds may also be excluded for other public benefits such as food support or public housing, but not because the funds are in a §1396p(d)(4)(C) trust but because of the particular program's rules about trusts in general.
[4] The Foster Care Independence Act of 1999 authorized first-party special needs trusts for SSI recipients. 42 U.S.C. § 1382(B).

client and in fact may be more appropriate than a traditional special needs trust; the history of pooled trusts in the context of Medicaid and SSI eligibility rules, sources of the law governing pooled trusts, advantages and disadvantages of using a pooled SNT, and how to assist a client to open a pooled trust sub-account.

I. History of Pooled Trusts' Treatment under the Medicaid Statute

The history and evolution of special needs trusts and pooled SNTs is complex; this section contains only a brief outline of the critical features of this history. The first pooled "disability trusts" were created in the 1970s and 1980s by non-profits and public charities serving individuals with disabilities and their families as a means to provide for their future financial needs.[5] For example, The Arc[6] and its state branches operated pooled disability trusts for many years.[7]

Prior to 1993, an individual who placed funds in a pooled trust sub-account did not incur Medicaid eligibility transfer penalties. In addition, the estate recovery provisions of the Medicaid statute were not widely implemented or enforced by the states; and there was no payback requirement tied to the pooled disability trust sub-account. Because pooled trusts of the past had no payback requirements, a beneficiary could specify the remainder beneficiaries of his or her sub-account other than the charity that operated the trust. At the death of the pooled trust beneficiary, a certain percentage of the assets remaining in the trust would be paid to the charity and the remaining assets distributed to the residual beneficiaries named in the pooled trust sub-account.

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[5] *See generally* National Guardianship Association, *Pooled Trusts Pre-Conference Intensive, Developing Trust Programs for People with Disabilities, Current Practice and Important Issues* at 4)A. (1998). *See also* The ARC, *Pooled Trust Programs for People with Disabilities, A Guide for Families* (2002) at www.uic.edu/orgs/rrtcamr/300005_PooledtrustPrograms.pdf ; PLAN (Planned Lifetime Assistance Network), a service component of the National Alliance for the Mentally Ill (NAMI) at www.nami.org/helpline/plan.htm

[6] Formerly known as the Association for Retarded Citizens ("ARC")

[7] Kathleen Kienitz, *Pooled Disability Trusts: A History and Survey of their Use in the United States*, 20, NAELA News, December 2005/January 2006.

In 1993, Congress enacted the Omnibus Budget Reconciliation Act of 1993 ("OBRA '93), a budget bill with provisions aimed at minimizing perceived abuses of the Medicaid program by the wealthy. So-called "Medicaid millionaires" were reportedly transferring all their wealth into Medicaid Qualifying Trusts ("MQTs"), creating artificial impoverishment for the sole purpose of becoming eligible for Medicaid coverage of long term care costs. This practice was perceived to be (and probably was) widespread. With OBRA '93, Congress sought to limit the practice of "Medicaid planning" through amendments to the Social Security Act, which governs eligibility for many public benefits including Medicaid.

OBRA '93 amended the Social Security Act by adding language aimed at restricting the practice of divestment of assets into virtually any trust, including MQTs, by individuals seeking to qualify for Medicaid.[8] Through OBRA '93, Congress extended existing penalty provisions applicable to other types of transfers to all transfers of assets into an irrevocable trust, even when there was no way the individual could access the benefit.[9]

Specifically, OBRA '93's amendments provide that:

- section 1396p(d) governs trusts established by individuals receiving or applying for benefits;[10]
- the corpus of a revocable trust shall always be considered available to the individual applying for or receiving benefits;[11]
- in the case of an irrevocable trust, the corpus of the trust shall be considered *available* if under the terms of the trust there are any circumstances under which payment from the trust could be made to or for the benefit of the individual;[12]
- all transfers of assets into irrevocable trusts that are *not available* for purposes of Medicaid eligibility, are subject to the transfer penalties set forth in the statute.;[13]

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[8] 42 U.S.C. § 1396p(d)(3)(A),(B).
[9] *Id. See also Appendix C*
[10] 42 U.S.C. § 1396p(d)(1).
[11] 42 U.S.C. § 1396p(d)(3)(A)(i).
[12] 42 U.S.C. § 1396p(d)(3)(B).
[13] 42 U.S.C. § 1396p(d)(3)(B); The OBRA 1993 House Budget Committee Report stated that irrevocable trusts that benefit the grantor will be considered available resources, but made an exception for special needs trusts, Miller

- any portion of the irrevocable trust, or any income on the corpus from which no payment could under any circumstance be made to the individual, shall be considered, as of the date of establishment of the trust…*to be assets disposed by the individual for purposes of subsection (c);*[14]and

- Certain trusts that are exempt from these rules are set forth in 42 U.S.C. § 1396p(d)(4) and include the pooled trust — the "(d)(4)(C)" trust.

OBRA '93 also created a partial exemption from the new transfer restrictions and penalty provisions for certain irrevocable trusts, including first party special needs trusts and pooled SNTs established for the benefit of persons certified as disabled by the Social Security Administration. [15] The exempted trust categories are described in 2 U.S.C. § 1396p(d)(4). As long as these "(d)(4)" trusts are established and administered in accordance with the statute, assets in the trust remain excluded and transfers of assets to the trust are generally permissible.[16]

Despite the fact that federal law defines the relationship between pooled SNTs and public benefits, there are significant differences among the states on critical issues such as whether or not an individual age 65 and older can establish a pooled trust sub-account without penalty or how much of the beneficiary's funds the non-profit entity may retain at the death of the beneficiary. Further, state laws differ on requirements for third party special needs trust. For instance, in Minnesota there are strict requirements as to who may fund the third party trust, when the assets in the trust are exempt for MA purposes, and specific language that must be in the trust. Thus, it is imperative that the practitioner is familiar with both state and federal law.

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income trusts, and pooled trusts. House Conf. Rep. No. 103-213, at 834, reprinted in 1993 U.S.C.C.A.N. 1523. The enacted statute implements the Committee Report.

[14] 42 U.S.C. § 1396p(d)(3)(B)(ii).

[15]The provisions of 42 U.S.C. §1396p(d)(3)(B) (concerning irrevocable trusts and transfers in and out of trusts) do not apply to pooled trust sub-accounts. 42 U.S.C. §1396p(d)(4)(C); This is consistent with legislative intent as expressed in the OBRA 1993 committee reports and a detailed summary of the House's legislation that said (d)(4) "exempts certain trusts for the benefit of disabled individuals from the transfer rules." CRS Bill Summary description of § 5111, H.R. 2138, 103rd Cong., 1st Sess. (1993) available at www.thomas.gov.

[16]In some states, a penalty may be imposed if the individual establishing the trust is over the age of 64.

There are two types of pooled special needs trusts. The first party SNT trust, also known as a self-settled SNT is a trust funded with property belonging to the beneficiary of the trust or sub-account. A third party SNT is funded with assets belonging to someone other than the beneficiary. The purpose of the modern (post-1993) pooled SNT remains much the same as it was at the beginning: to pool funds of multiple individuals with disabilities for management purposes and to administer the trust in a manner that maintains the beneficiary's eligibility for public benefits. The only difference? Strict compliance with both federal and state regulations concerning pooled trust establishment and administration. A comparison of the main differences and similarities of the two trusts follows:[17]

II. The First Party Pooled Special Needs Trust

A. **The Statutory Requirements.** With a self-settled trust the person funding the trust and the beneficiary are the same person.[18] To be exempt from the new transfer rules and considered an exempt asset and not a Medicaid qualifying trust under MA and SSI eligibility rules, the trust must meet the following requirements:

1. The beneficiary may be of any age and must be disabled.[19]

This means that the beneficiary must be found to be disabled using the criteria established by the Social Security Administration.[20] An individual who is receiving SSI or Social Security Disability Insurance (SSDI) benefits meets this criteria. If a person is disabled but is not receiving SSI or SSDI, the state Medicaid agency has a process for making the disability

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[17] *See* Comparison Chart, infra, p. 13.

[18] POMS SI 01120.199 E.3.

[19] 42 U.S.C. § 1396p(d)(4)(C)

[20] 42. U.S.C 1382c(a)(3)

determination. The statute contains no age restriction regarding who may establish a pooled trust sub-account.[21]

2. The trust must be established and managed by a nonprofit association.[22]

The master pooled trust (the "master trust") must be established by a nonprofit association as defined under state law.[23] The master pooled trust agreement[24] governs the overall operation of the pooled trust. The nonprofit organization is generally the settlor and trustee and the agreement sets forth the terms of a pooled trust including the purpose of the trust, the intent of the settlor in establishing the trust, requirements to establish a sub-account and duties of the trustee in the administration of the sub-accounts, and what happens to the funds in the sub-account upon the beneficiary's death. The beneficiary of the trust is the group of individuals who establish sub-accounts within the trust.

The nonprofit must also maintain managerial control over the trust. For instance the non-profit association must be responsible for example, for investment, removal or replacement of the trustee, and day-to-day decisions regarding the pooled trust beneficiaries.[25]

3. A separate account must be maintained for each beneficiary of the trust. The trustee may pool these accounts together for purposes of investment and management.[26]

Each account must be separately maintained; accountings must be provided, and distributions monitored. Individual accounts must have a separate tax ID number; generally the beneficiary's social security number is used.

[21] 42 U.S.C. § 1396p(d)(4)(C)
[22] § 1396p(d)(4)(C)(i)
[23] POMS SI 01150.121
[24] See LSS Pooled Trust Agreement, Appendix A.
[25] POMS SI 01120.225 D. See also Begley and Canellos, supra fn. 3 at 16.5-6.
[26] § 1396p(d)(4)(C)(ii)

4. The sub-account must be established for the individual's sole benefit by the disabled individual or by his or her parent, grandparent, legal guardian, or a court.[27]

There are four separate issues/requirements in this clause of the statute:

i. **How is a sub-account established?** A sub-account is established by executing a joinder agreement,[28] a written agreement between the trustee and the establisher of the sub-account. There must be a joinder agreement for every beneficiary's sub-account. The joinder agreement sets out the minimum initial deposit that the entity requires to establish the sub-account, and provides a fee schedule associated with administering the trust account. Joinder agreements differ among the non-profit associations that administer pooled SNTs. Some are very detailed, while others are relatively simple. Because pooled trust sub-accounts must be reported to various public agencies, many organizations do not include details about the trust or the beneficiary within the joinder document itself. Comprehensive and generally private information is commonly maintained in a separate file that is not given to public agencies, therefore maintaining a beneficiary's privacy.

Practitioners should check with the pooled trusts operating in their state to determine how long the non-profit has operated the pooled trust, how many beneficiaries it has receiving MA and SSI in your state, to review their joinder agreements and become familiar with the organization's threshold eligibility requirements.[29]

ii. **Who may execute the joinder agreement?** The joinder agreement may be executed by the disabled individual or by his or her parent, grandparent, legal

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[27] §1396p(d)(4)(A)(C) (iii)
[28] See Joinder Agreement for Lutheran Social Service of Minnesota Special Needs Pooled Trust, Appendix B.
[29] For a list of pooled trust nationwide see, Begley and Canellos, *supra fn3,* at Appendix 16-4.

guardian, or a court. Because the individual him or herself may execute the joinder agreement, an attorney-in-fact[30] or a representative payee[31] may also establish and fund the trust. All of the issues regarding establishment of a special needs trust by a guardian or court are relevant to the establishment of a pooled trust sub-account and are outside the scope of this discussion.

PRACTICE TIP: Joining a pooled trust and creating a sub-account is generally a simple process. You should discuss the different pooled trust providers within your state with your client and allow the client to familiarize herself with each organization, how the entity operates its trust, the minimum deposit required, and the fee schedule. The client must feel comfortable with the staff members who will be administering the trust. Creating healthy and lasting relationships with the administrators of the trust is very important, as the beneficiary will have to work with these staff members as long as the sub-account exists.

Once the client decides on the pooled trust organization she wishes to use, she should complete the joinder agreement document provided by the pooled SNT organization. This document establishes the sub-account into which funds will be placed for the client's benefit. The client can make additional contributions to the account as funds that would otherwise jeopardize the client's public benefits are received.

iii. **Who has authority to fund the sub-account?** Technically, the sub-account is a grantor trust. This is because the beneficiary's assets are used to fund the trust. Some pooled trusts use the individual's social security number because the assets belong to

[30] POMS SI 01120.203B.19
[31] POMS GN 0602.075

the individual. If the beneficiary is not competent, it is imperative that the person funding the trust have the authority to act with regard to the assets of the disabled beneficiary. The beneficiary may fund a pooled trust sub-account with current Title II and/or title XVII benefits, current earnings, personal injury awards, inheritances received directly, and other resources or income.[32]

iv. **The sub-account must be used for the individual's sole benefit.** This provision generally requires that distributions from each sub-account be made for the sole benefit of the individual. If any individual or entity benefits (or may benefit) from a distribution, the trust is not an exempt trust. Issues raised in the administration of a sole benefit trust are, for instance, payment to family members, purchasing a home in which individuals other than the beneficiary live, paying for companion services, etc.[33]

5. **The pooled trust sub-account must provide that any funds remaining in the beneficiary's account upon his or her death not retained by the trust be paid to the State for an amount equal to the total amount of medical assistance paid on behalf of the beneficiary**.[34]

Check your state law! While the federal law seems clear – any amount "not retained by the trust" must be paid back to the state. States all over the country have imposed various restrictions. For instance, in Minnesota, the non-profit association may retain only 10% of the funds remaining in the sub-account at death and the balance must be paid to the State for an amount equal to the total amount of medical assistance paid on behalf of the beneficiary. Right

[32] Most pooled SNTs will not accept real property or tangible assets into a pooled trust sub-account.
[33] POMS SI 01120.201F.2
[34] §1396p(d)(4)(A)(C)(iv)

across the border in Wisconsin, there is no pay-back provision - the non-profit may retain 100% of the balance.[35]

In Pennsylvania, state law provided that the non-profit association could retain only 50% of funds remaining and required that the other 50% be used for reimbursement. The Third Circuit struck down this law and stated that the federal statute allows for 100% retention and that states may not place restrictions on retention.[36]

Trustees must comply with rules and regulations regarding administrative expenses after the death of the beneficiary. Some expenses may be paid - taxes due from the trust to the state or federal government because of the death of the beneficiary and reasonable fees for administration of the trust estate.[37] Prohibited expenses and payments after the death of the beneficiary include taxes due from the estate of the beneficiary not arising from the trust, inheritance taxes due for residual beneficiaries, payment of debts owed to third parties, funeral expenses, and payments to residual beneficiaries.[38] Like the first party special needs trust administration following death, coordination with the state Medicaid agency is important to ensure that expenses are not prohibited – BEFORE making the payment!

B. Advantages of First Party Pooled Special Needs Trusts.

An individual on public benefits who receives an inheritance or a personal injury award or settlement, or sells property and is suddenly over resource limits may establish a pooled trust sub-account to retain eligibility. An individual who needs to apply for MA because he or she needs long-term care services, or apply for SSI due to being unable to work and having no income, may establish a pooled trust sub-account to become eligible. These individuals always

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[35] For an anecdotal list of reported states on retention in pooled trusts see, Begley and Canellos, *supra fn3,* at Appendix 16-7
[36] Lewis v. Alexander, 653 F.3d 325 (3[d] Cir. 2012)
[37] POMS SI 01120.203 2.g and 3
[38] Id. at 3(b).

have the option of spending their money until it is gone and then applying for benefits. Also, if they are under the age of 65 they can establish a first party special needs trust. There are circumstances when it is prudent to use a pooled trust:

- the value of the client's otherwise available assets is not significant enough to justify initiating a court proceeding to establish a court-supervised special needs trust;
- a competent beneficiary wishes to self-settle—the pooled SNT sub-account is the only type of Medicaid-exempt trust that the individual can establish for himself or herself; or
- there is no appropriate family member or other individual who can serve as trustee of a special needs trust, but the value of the assets to be placed in the trust are not enough to warrant hiring a corporate trustee; or
- Joining a pooled SNT is usually a less expensive option for the client than establishing a standard special needs trust, especially if there is no family member who will serve as trustee at no cost and thus joining the pooled trust sub-account helps to maximize the amount of assets that will be available to provide for the client's direct needs.

II. Third Party Pooled Trust Sub-Accounts

A third party pooled trust sub-account is funded by a third party—that is, someone other than the beneficiary. Third parties might include parents, grandparents, siblings, and extended family or friends who have no legal obligation to support the beneficiary. Funds placed in the sub-account must be those in which the beneficiary has no ownership interest. In contrast with the first-party sub-account discussed above, federal law does not require a payback provision in connection with a third party pooled trust account.

Third party pooled SNT sub-accounts may be appropriate when a client is planning for a child or a loved one with a disability and

- there is no family member or other individual who can serve as trustee;
- the funds to be contributed by the third-party are insufficient to warrant hiring a professional or corporate trustee; or

- services provided by the pooled trust such as care management and monitoring are desired by the family.

III. Transferring Assets into First Party Pooled Special Needs Trusts.

Individuals age 64 and younger may place assets in a pooled trust sub-account without penalty in every state in the country. Based on an informal survey of lawyers and pooled trust administrators,[39] however, nineteen states allow individuals over the age of 64 to place funds in a pooled trust sub-account without penalty[40] and twenty two states impose a period of ineligibility without considering whether the beneficiary received fair market value when funding the pooled trust sub-account.[41] Five states are in flux – either advocates are currently litigating the imposition of a penalty or are developing fair market value criteria[42] and we currently have no information about two states.[43] Sometimes even county agencies within states have inconsistent policies. For example, Minnesota's Department of Human Services allows an individual certified as disabled to establish and fund a pooled trust sub-account without assessing a transfer penalty if the person is under the age of 65. If the individual is over age 64, however, some county agents in Minnesota will regard the transfer of assets into a qualified pooled SNT sub-account as an uncompensated transfer of assets per se, and impose a transfer penalty on the beneficiary. In

[39] Informal survey of 50 states and the District of Columbia, conducted by and on file with Laurie Hanson, Long, Reher & Hanson, P.A., Minneapolis, Minnesota. Last updated August 16, 2015.
[40] (*Id.*) – they are: AL, AK, CA, CT, DE, FL, IA, IN, ID, KS, KY, MA, MD, MT, NY, OH, OK, RI, WV, WI, AND DC (20 states and DC).

[41](*Id.*) – they are AZ, GA, HI, LA,ME, MS, NC,ND, NH, NJ, NM, NV, OR, PA, SC, SD, TX, UT, VA,VT, WA,WY
[42] (*Id.*) – they are CO, MI, MN, TN (Fair Market Value/Litigation) IL (allows a public guardian to establish a pooled trust sub-account for a ward without penalty but imposes a penalty on all other applicants and recipients. 305 ILCS 5/3-1.2 (Section 3-1.2)(2013). This is a distinction without precedent in federal Medicaid law.)
[43] (*Id.*) - they are AR and NE.

other counties in Minnesota, though, a fair market value analysis of the transfer will be conducted, and the transfer may not result in any penalty period.

	Third Party SNT (pooled or otherwise)	**First Party SNT**	**First Party Pooled SNT**
Beneficiary Requirements	A person with a disability of any age	A person with a certified disability under the age of 65 at time of establishment.	A person of any age with a certified disability.
Established by	Master Pooled Trust Agreement established by non-profit association generally as settlor and trustee. Sub-accounts and standalone trusts may be established by any third party.	Parent, grandparent, court appointed guardian/conservator, or court.	Master Pooled Trust Agreement established by non-profit association generally as settlor and trustee. Sub-accounts established by **Individua**l, parent, grandparent, court appointed guardian, or court who execute joinder agreements to "join" the master trust.
Funded By	Assets belonging to third parties only.	Assets belonging to the beneficiary or anyone else.	Subaccount can be funded by assets belonging to the beneficiary or anyone else.
Limited Funding?	No limit to amount held by Trust.	No limit to amount held by Trust.	No limit to amount held by Trust in the federal statute.
Transfer penalty?	None except if individual funding trust is applying for MA, then it must be a sole benefit SNT.	No penalty.	No penalty in all states if individual is under age 65; if individual is 65 or older, some states penalize the transfer, others do not.
Distribution upon death of Beneficiary	To persons, charities etc. as designated by the Settlor. No payback to the State is required.	Payback to the State is required. Distribution to state agency to reimburse for all medical assistance (Medicaid) benefits paid during lifetime. Any excess is then distributed according to terms of the trust.	Generally, if the non-profit does not retain all of the assets, there must be a payback to the state and then remaining assets may be distributed as set forth in the joinder agreement.

IV. Comparison of First Party and Third Party Trusts

V. Conclusion

First and third party pooled SNTs are a disability planning option often overlooked by practitioners. Establishing a pooled SNT sub-account may be an excellent planning strategy when the client's resources are limited or when no reliable family member or friend is available to serve as the trustee of a first-party special needs trust. Be familiar with your own state's law regarding transfers to pooled trusts by persons over 64 as well as retention issues. Finally, the practitioner should become acquainted with the various pooled SNT options that are available within the state, and cultivate relationships with staff members of these entities so as to be able to advise the client regarding the best pooled trust for the client's particular needs.

JULY 2012 AMENDED AND RESTATED LSS POOLED TRUST AGREEMENT

THIS JULY 2012 AMENDED AND RESTATED POOLED TRUST AGREEMENT effective this 28th day of August, 2012, amends and restates the LSS Pooled Trust Agreement originally dated December 31, 2007, amended December 11, 2008 and as amended and restated on the 29th day of December, 2009, as amended and restated on the 28th day of September, 2010, and as amended and restated on the 11th day of April 2012, and shall be referred to as (the "Trust Agreement"), and is by and between LUTHERAN SOCIAL SERVICE OF MINNESOTA, a Minnesota non-profit corporation, as Settlor and as Trustee, hereinafter called the "Settlor" and "Trustee."

ARTICLE 1
CREATION OF TRUST

1.01 ***Definitions***. The following capitalized terms shall have the definitions set forth below; other defined terms are defined elsewhere in this Trust Agreement.

(a) "Assets" will include both principal and income.

(b) "Beneficiary" will mean a "disabled person" as defined in §1614(a)(3) of the Social Security Act (42 U.S.C. §1382c(a)(3)), who qualifies under 42 U.S.C. §1396p, as amended, to be a recipient of benefits and services under this Trust Agreement.

(c) "Charitable Trust" means the trust created and administered to hold funds transferred as part of the Remainder Shares from Sub-Accounts under this Trust Agreement, as well as other contributions made to the Charitable Trust from time to time.

(d) "Effective Date" means the date of this Trust Agreement set forth above.

(e) "Grantor" means a Beneficiary, parent(s), grandparent(s) or legal guardian of a Beneficiary, or any court, using the Beneficiary's funds to establish the Sub-Account.

(f) "Joinder Agreement" means the individual and separate written agreement between the Trustee and a Grantor by which the Grantor establishes a Sub-Account for the sole benefit of a Beneficiary.

(g) "Personal Representative" means legal guardian, conservator, or agent acting under a durable power of attorney, Trust Funds Manager, representative payee, custodian, or other legal representative or fiduciary of a Beneficiary.

(h) "Primary Representative" means the person named in the Joinder Agreement with whom the Funds Manager and Trustee is authorized to communicate the Beneficiary's interest.

(i) "Public Benefits" or "Government Assistance" may be used conjunctively, interchangeably or separately within this Trust Agreement, and will mean all services benefits, medical care, financial assistance and any other assistance of any kind that may be provided by any local, state or federal agency, to or on behalf of a Beneficiary. Such Public Benefits and Government Assistance benefits include, but are not limited to, the Supplemental Security Income program ("SSI"), the Old Age Survivor and Disability Insurance program ("OASDI"), Social Security Disability Insurance program ("SSDI"), and any Medicaid/Medical Assistance program, together with any additional, similar, or successor public programs.

(j) "Remainder Share" means that portion of the Sub-Account that is designated according to the Joinder Agreement to be paid over to the Lutheran Social Services, as Trustee, upon termination of the Sub-Account to be held and administered as part of the Charitable Trust established under this Trust Agreement. The Remainder Share must not exceed ten percent (10%) of the account value at the time of the beneficiary's death or termination of the trust, and must only be used for the benefit of disabled individuals who have a beneficiary interest in a Trust Sub-Account.

(k) "Sub-Account" means a trust account established, held and maintained for the sole benefit of a Beneficiary which includes assets provided by (1) the Beneficiary or the Beneficiary's spouse, (2) a person, including a court or administrative body, with legal authority to act in place of or on behalf of the Beneficiary, or (3) any person, including a court or administrative body, acting at the direction or upon the request of the Beneficiary.

(l) "Supplemental care" and "supplemental needs" may be used conjunctively, interchangeably or separately within this Trust Agreement and the terms will always mean care that is not otherwise provided, or needs that are not met, by any public or private financial assistance that might be otherwise available to any Beneficiary.

(m) "Trust" means the LSS Pooled Trust established pursuant to this Agreement.

(n) "Trustee" means Lutheran Social Service of Minnesota ("LSS"), or its successor organization, or any successor Trustee to LSS as may be provided in this Trust Agreement.

(o) "Property" means any cash, investments, accounts or other assets of any kind that the Grantor transfers to the Trust to be added to the Sub-Account for the Beneficiary's benefit.

(p) "Trust Fund Manager" or "Funds Manager" means a bank or trust company that is doing business in the State of Minnesota as per Article 8 and is investing the Property of the Trust for the Trustee and the Trust Beneficiaries.

1.02 ***Name and Creation***. This Trust, named the "LSS Pooled Trust," is created and established pursuant to the Omnibus Reconciliation Act of 1993 (OBRA '93), codified at 42 U.S.C. 1396(p) which provides that a trust established with the assets of a disabled individual that meets the criteria of 42 U.S.C. 1396(p)(d)(4)(C) will not be used in determining a disabled person's eligibility for benefits.

1.03 ***Funding***. The Settlor previously transferred, assigned and conveyed an initial contribution of One Hundred Dollars ($100.00) to the Charitable Trust. The Trust estate will consist of this contribution by the Settlor and any additional contributions in cash or property made to the Trust estate at any time by any Grantor in accordance with the provisions of this Trust Agreement.

1.04 ***Irrevocability***. This Trust Agreement is irrevocable. Neither the Settlor, Grantor, nor the Beneficiaries will have any right to change, modify, amend or revoke any term or provision hereof, or to terminate this Trust Agreement or any trust created pursuant to this Trust Agreement.

1.05 ***Amendments***. Notwithstanding Section 1.04 of this Trust Agreement, this Trust Agreement may be amended by the Trustee from time to time to effectuate its purposes and intent. The Trustee may also amend, but is not required to amend, the Trust Agreement to conform with any rules, regulations or legislative changes that are approved by any federal, state, or local governing body or agency relating to 42 U.S.C. §1396p or related statues, including state statues and regulations that are consistent with the provisions of OBRA '93, amended 42 U.S.C. §1396p. Notice of proposed amendments will be provided to the Minnesota Department of Human Services and the Social Security Administration.

ARTICLE 2
SETTLOR'S PURPOSE AND INTENT

2.01 ***Purpose***. This Trust has been created for the purpose of providing supplemental assistance to Beneficiaries. The Trust assets will be managed, invested, and disbursed to promote the comfort and well-being of each Beneficiary by providing for supplemental needs. The Trustee will not make any disbursements that would have the effect of replacing, reducing or substituting any Government Assistance or other Public Benefit otherwise available to a Beneficiary or which would render the Beneficiary ineligible for Government Assistance. It is vitally important that each Beneficiary have eligibility to

participate in such programs in order to maintain a level of dignity and humane care. It is the Settlor's Intent that this Trust be considered a Pooled Trust under 42 U.S.C. §1396p(d)(4)(C)(i), and the Trustee shall manage the trust consistent with this intent.

2.02 ***Settlor's Intent***. Settlor's intent in creating this Trust is to establish a supplemental trust under the authority of 42 U.S.C. 1396(p) and Minn. Stat. § 256B.056 or Minn. Stat §501B.89, subd. 3, as the case may be, for the benefit of the Beneficiaries of this Trust to facilitate a Beneficiary's eligibility for means-tested Public Benefits. Private or Public Benefits or Government Assistance should not be made unavailable to a Beneficiary or be terminated because of this Trust. Notwithstanding any other provision of this Trust, no assets of the Trust, including but not limited to any Sub-Account or the Charitable Trust may be used to satisfy claims of any Beneficiary's Creditors. The Trust is not intended to, and will not, be used to defeat the rights of pre-existing creditors. The Trust and Sub-Accounts are intended for Beneficiaries who need the support of public programs with limitations on the amount of income and resources a recipient may receive on their own. The provisions of this Trust are designed for a continuing conservation and enhancement of funds to be used by the Trustee to supplement, rather than supplant, financial and service benefits, including but not limited to Government Assistance, which a Beneficiary might become eligible to receive as a result of said Beneficiary's disability from any local, county, state or federal agency, or through any public or private profit or nonprofit corporations, entities or agencies.

2.03 ***Beneficiaries Have No Interest in Trust Assets***. A Beneficiary will have no interest in either the income or principal of the Trust. This is not a support trust, and assets held in the Trust and in Sub-Accounts of this Trust are not intended to be the primary means of support for any Beneficiary. The Trust assets and each Sub-Account may only be used for the supplemental needs of a Beneficiary. The Trustee does not owe any obligation of support to any Beneficiary, and no Beneficiary will have any right of entitlement to the principal or income of the Trust or to any Sub-Account, except as the Trustee may direct the Trust Funds Manager to disburse, in the Trustee's sole discretion.

2.04 ***Spendthrift Provisions***. This Trust is a spendthrift trust. Each Sub-Account created by this Trust Agreement shall be a spendthrift trust to the fullest extent allowed by law. No Beneficiary will have any power to sell, assign, transfer, encumber, or in any other manner to anticipate, or dispose of, his or her interest in the Trust or any Sub-Account. No portion of the Trust or Sub-Account will be subject to garnishment, attachment or other legal process by any Beneficiary's creditors. Under no circumstances may a Beneficiary compel a distribution from a Sub-Account maintained for that Beneficiary or any other part of the Trust estate. Prior to the actual receipt of trust property by any beneficiary, no property (income or principal) distributable under any Sub-Account created by this Trust Agreement shall, voluntarily or involuntarily, be subject to anticipation or assignment by any Beneficiary, or to attachment by or to the interference or control of any creditor or assignee of any Beneficiary, or be taken or reached by any legal or equitable process in satisfaction of any debt or liability of any Beneficiary, and any attempted transfer or encumbrance of any interest in such property by any beneficiary hereunder prior to distribution shall be void.

ARTICLE 3
GRANTOR CONTRIBUTIONS

3.01 ***Grantor's Intent as to Sub-Accounts***. Each Grantor, in making contributions to the Trust to fund a Sub-Account, intends to supplement, rather than supplant, financial and service benefits which a Beneficiary might become eligible to receive as a result of said Beneficiary's disability from any governmental agency or through any public or private entities or agencies, including Government Assistance. Each Grantor intends for each Sub-Account to establish a supplemental fund pursuant to 42 U.S.C. §1396p and to limit the Trustee's disbursements to, or on behalf of, a Beneficiary to that respective Beneficiary's supplemental care and supplemental needs only. To the extent there is a conflict between the terms of this Trust and the governing law, the law and regulations shall control.

3.02 ***Terms Applicable to Grantor Contributions***. Subject to the approval of the Trustee and the Trust Funds Manager, the Trust will be effective as to any individual Beneficiary upon contribution of cash or property ("Property") to the Trust and the execution of a Joinder Agreement by a Grantor and the Trustee. Upon delivery of Property that is approved and accepted by the Trust Funds Manager, the Trust will be irrevocable as to such Grantor and Beneficiary; the contributed Property will not be refundable to the Grantor of such Property and the Grantor will have no further interest, rights in, or control over any interest in such contributed Property; and the designation of the respective Beneficiary may not be revoked, amended or altered; provided that a Grantor may designate a remainder beneficiary to receive any remainder of the contributed Property upon the termination of the Beneficiaries Trust Sub-Account subject to payment of a Remainder Share and repayment to the state(s) as required under Section 6.02.

3.03 ***Effect of Grantor's Contribution***. Subject to the provisions of Article 3 of this Trust Agreement, and subject to the Trustee's sole discretion in making any and all distributions, the effect of a Grantor's contribution to the Trust as it applies to any one Beneficiary is such that the total distributions made on behalf of a Beneficiary will not exceed any amount equal to the total of all contributions made to such Beneficiary's Trust Sub-Account, plus any undistributed income.

3.04 ***Future Transfer of Property***. Property, or any interest in Property, may be designated for future transfer by a Grantor as a contribution to the Trust. Such designated contributions may be revoked by the Grantor at any time during the Grantor's lifetime and continued capacity, provided the Grantor gives prior written notice to the Trust Funds Manager and provided such contributions have not actually been made to the Trust prior to the revocation. Such written notice will be by certified mail, return receipt requested.

ARTICLE 4
ADMINISTRATION OF SUB-ACCOUNTS

4.01 ***Sub-Accounts***. Trustee will maintain a separate Sub-Account for each Beneficiary. The Trust Funds Manager will pool the Sub-Accounts for purposes of investment and management of funds. Trustee will maintain records for each Sub-Account in the name of, and showing the contributions, expenditures and costs for, each Beneficiary.

4.02 ***Fees and Expenses***. Trustee will charge the fees and expenses associated with each Sub-Account as set forth in the Joinder Agreement.

4.03 ***Taxes***. The Joinder Agreement will establish whether the Sub-Account will be taxed as a grantor trust or a trust account. The Trustee or its agents will cause to be prepared on behalf of each Sub-Account that is not a grantor trust the appropriate federal and state income tax returns, the costs and expenses of which will be charged to each Sub-Account in accordance with the actual time and expense incurred for the preparation of such tax returns for that Sub-Account. Any Sub-Account which is not a grantor trust will file its own federal and state income tax returns and any taxes assessed against the income of such Sub-Account will be paid from and out of the Sub-Account assets and Property. If the Sub-Account is treated as a grantor trust, then the income tax returns so prepared for the Sub-Account will be informational returns only. Such informational return will report to the federal and state authorities all allocable income, gains, or losses which are required to be reported on the Grantor's federal income tax return. The Beneficiary and the Primary Representative will be responsible for completing, signing and mailing the annual income tax returns for the Beneficiary which are applicable to any income of the Sub-Account passed through and taxable directly to a Beneficiary under the rules and regulations of the Internal Revenue Code.

4.04 ***Accountings to Grantor and Beneficiary***. The Trustee has designated the Trust Funds Manager to render accountings of each Sub-Account on an annual or more frequent basis (but not more frequent than monthly), as may be required under Minnesota law including, but not necessarily limited to accountings to any required governmental agency, or upon the direction of a court of competent jurisdiction to each Grantor during the Grantor's lifetime and thereafter to each Beneficiary (or to the Personal Representative of a Beneficiary, if one is acting). The accountings will show all assets, receipts, disbursements and distributions to or from such Sub-Account during the reporting period.

4.05 ***Records Available for Inspection***. The records of a Beneficiary's Sub-Account will be open and available for inspection by the Beneficiary or the Personal Representative of a Beneficiary, if one is acting, or both, at all reasonable business hours. The Trustee is not required to furnish Trust records, Sub-Account records, or documentation to any individual, corporation, or other entity who (a) is not a Beneficiary, (b) is not the legal representative of the Beneficiary, or (c) does not have the express

written authorization of the Beneficiary to receive such information. The Trustee's decision will be the sole and final determination as to the sufficiency of any and all written authorizations or requests for records and/or documentation.

ARTICLE 5
DISTRIBUTIONS

5.01 ***Discretionary Distributions by Trustee***. The Trustee will apply to or expend for the benefit of a Beneficiary such sum or sums from the income or principal of the Trust as the Trustee will determine, in the Trustee's sole and absolute discretion, to be necessary or advisable to provide for the supplemental care or supplemental needs of the Beneficiary. The Trustee will possess and exercise the sole discretion and authority to allocate all distributions between income and principal. Any income not distributed from a Sub-Account will be added to the principal of that Sub-Account. The Trustee is under no obligation to direct the expenditure of income or principal and the Trustee will have the discretion to refuse to make any such distributions.

5.02 ***Distributions Limited***. The Trustee will not make distributions or disbursements:

(a) if the effect of such distributions and disbursements will have the effect of replacing, reducing or substituting for Government Assistance or would render the Beneficiary ineligible for otherwise available means-tested publicly funded benefits;

(b) if such distributions and disbursements would be in excess of the resource and income limitations of any Public Benefit program to which the Beneficiary is entitled;

(c) if such distribution or disbursement would provide or pay for any care or service that is a "Medical Assistance covered service" in any state where the Beneficiary resides, unless such Medical Assistance benefits have been terminated or the application for such benefits denied and such termination or denial is no longer the subject of review or contest;

(d) for anything other than necessary services or for services which will enhance the quality of life for the Beneficiary; or

(e) to pay or to reimburse any amounts to the federal government, State of Minnesota, any other state, or any other governmental unit or non-governmental agency for the care, support, maintenance and education of any Beneficiary, other than as provided in paragraph 6.02 of this Trust Agreement after the death of the Beneficiary.

5.03 ***Non-Exclusive List of Permissible Distributions***. The Trustee will have the discretion to make distributions for anything that is a supplemental or special need of the

Beneficiary that is not otherwise provided for the Beneficiary, including but not limited to the following:

(a) medical, dental and diagnostic work and treatment for which there are no available private or public funds;

(b) medical procedures that are, in the Trustee's discretion, advisable even though such procedures may not be medically necessary or life saving and not covered by public or other private funds;

(c) supplemental nursing care, supplemental occupational or supplemental physical therapy that is not covered by public or other private funds;

(d) care appropriate for a Beneficiary that Government Assistance programs may not or do not otherwise provide;

(e) expenditures for travel, companionship by a personal care attendant (PCA) and other expenditures that the Trustee, in the Trustee's discretion, deems advisable to improve the Beneficiary's quality of life; or

(f) an item of similar nature contained in the above.

5.04 ***Payee of Disbursements***. The Trust Funds Manager, at the Trustee's direction and as determined by the Trustee in the Trustee's discretion, may make any payment from a Sub-Account in any form allowed by law, to a person deemed suitable by the Trustee (as determined by the Trustee in the Trustee's discretion), or by direct payment of a Beneficiary's expenses.

ARTICLE 6
TERMINATION OF SUB-ACCOUNTS ONLY UPON DEATH

6.01 ***Sub-Account Terminations***. No Trust Sub-Accounts may be terminated during the life of the Beneficiary of a Sub-Account.

6.02 ***Distribution upon Death of Beneficiary***. Upon the death of a Beneficiary, any amounts that remain in that Beneficiary's Sub-Account (the "Remaining Assets") will be administered so as to conform with all the requirements of 42 U.S.C. §1396p and/or related laws and regulations, including state statutes and regulations that are consistent with the provisions of OBRA '93, amending 42 U.S.C. §1396p and pertaining to reimbursements to States for Government Assistance provided on behalf of such Beneficiary. Such Remaining Assets, after payment of reasonable expenses and administration fees, will be distributed as follows:

(a) A Remainder Share of 10% of the Remaining Assets in the Sub-Account, will be transferred by the Trustee to the Charitable Trust as established under paragraph 6.03 of this Trust Agreement and pursuant to Minnesota

Statute § 256B.056, subd. 3b(d) allowing said distribution to the Charitable Trust.

(b) Any Remaining Assets in a Sub-Account will be subject to claims for reimbursements from the State of Minnesota and any other state which provided Medical Assistance benefits to the Beneficiary. In the event the Remaining Assets are insufficient to pay all claims, then each state's claim will be pro-rated based on each state's proportionate share of the total Medical Assistance benefits paid by all of the states on the Beneficiary's behalf.

(c) The Trustee is also authorized pursuant to the Social Security Administration POMS SI 01120.203(B)(3)(a) and any applicable Federal and state laws to pay any taxes due from the Sub-Trust to the State(s) or Federal government because of the death of the Beneficiary prior to reimbursement to the State of Minnesota or any other state as provided in paragraph 6.02(b) of this Trust Agreement as long as it does not violate the provisions of 42 U.S.C. § 1396(p)(d)(4)(c). Specifically, Taxes due from the estate of the Beneficiary, (other than those arising from inclusion of the Sub-Account in the estate) and inheritance taxes due for residual beneficiaries are not permitted prior to reimbursement of the state for medical assistance.

(d) The remaining assets, if any after payment under the foregoing paragraphs, will be distributed as directed by the Grantor in the Joinder Agreement, or if the Joinder Agreement is silent, such remaining assets will be transferred by the Trustee to the Charitable Trust as established under paragraph 6.03 of this Trust Agreement.

6.03 ***Charitable Trust***. The Charitable Trust will be held and administered, organized and operated as follows:

(a) Exclusively in such charitable activities as may qualify it for exemption from federal income tax under Section 501(c)(3) of the Code, with its purpose being to improve the lives of disabled Beneficiaries when their existing Sub-Accounts are insufficient to meet their special and supplemental needs providing relief of the poor, the distressed, or the underprivileged.

(b) Notwithstanding any other provisions of this Trust, the Charitable Trust shall not carry on any other activities not permitted to be carried on (a) by a Trust exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue law); (b) by a trust, contributions to which are deductible under Section 170(c)(2) of the Internal Revenue Code of 1986 (or the corresponding provisions of any future United States

Internal Revenue Law), or (c) by a Trust that meets the criteria of 42 U.S.C. 1396(p)(d)(4)(C) such that it will not be used in determining a disabled person's eligibility for benefits.

(c) The Charitable Trust assets shall be used solely in furtherance of the purposes set forth above and no part of the Charitable Trust assets shall inure or be payable to or for the benefit of any private individual, except to make payments in furtherance of the purposes of the Charitable Trust.

(d) The Charitable Trust Assets shall not be used for the carrying on of propaganda, or otherwise attempting to influence legislation. No part of the activities of the Charitable Trust shall be the participation in, or intervention in (including the publishing or distributing of statements) any political campaign on behalf of (or in opposition to) any candidate for public office.

(e) Upon termination of the Charitable Trust, any assets in the Charitable Trust will be paid to Lutheran Social Service of Minnesota; provided however, that if Lutheran Social Service has ceased to exist, has been dissolved, or is no longer exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue law); then the Charitable Trust will be applied and paid over to such other nonprofit organization(s) as the Trustee will determine, in the Trustee's sole discretion, to serve the interests and needs of disabled persons, as defined in §1614(a)(3) of the Social Security Act (42 U.S.C. §1382c(a)(3)).

ARTICLE 7
TRUSTEE

7.01 ***Trustee***. In addition to its role as Settlor of this Trust, Lutheran Social Service of Minnesota, or its successor charitable organization, will be the Trustee of the Trust. The Trustee, Lutheran Social Service of Minnesota and any successor trustee, will manage the Trust, as required by 42 U.S.C.§ §1396(p)(d)(4)(C)(i), and will perform such acts and duties as set forth in the Joinder Agreement, and otherwise as the Trustee and the Trust Funds Manager will mutually agree. The Trustee specifically has full authority and power to prosecute, defend, contest or otherwise litigate legal actions or other proceedings for the protection or benefit of this Trust and to pay compromise, release, adjust, or submit to arbitration any debt, claim or controversy, and to insure the Trust against any risk, and to insure the Trust Funds Manager and the Trustee against liability with respect to third persons.

7.02 ***Appointment of Successor Trustee***. Lutheran Social Service may nominate another nonprofit corporation that meets the requirements of Internal Revenue Code 501(c)(3) as a successor Trustee of the Trust. Lutheran Social Service of Minnesota, and any duly designated successor Trustee, will request a court of competent jurisdiction to

designate an appropriate successor Trustee, and will provide notice of proceedings for that purpose to the Minnesota Attorney General, the United States Attorney for the State of Minnesota, and the Minnesota Department of Human Services. In the event that Lutheran Social Service of Minnesota nominates, and a court designates a successor Trustee, then that successor will succeed to all the rights, powers, and privileges accorded Lutheran Social Service of Minnesota as Trustee of the Trust, including the right to name a successor Trustee.

7.03 ***Trustee Powers***. The Trustee shall have the power, and the authority, to do any act or any thing reasonably necessary or advisable for the proper administration and distribution of the Trust and to do all acts and things necessary to accomplish the purposes of this Trust, and to perform the Trustee's duties as such, and to do such other acts or things concerning the Trust as may be advisable. Further, except as may be otherwise expressly directed or required by this Trust Agreement, and in extension, but not in limitation, of the powers provided by applicable law (including but not limited to the powers stated in Minnesota Statutes §501B.81, or corresponding provisions of successor law, which are incorporated in this Trust Agreement by this reference), the Trustee shall have full power and authority as to any properties, at any time comprising a part of any trust hereunder and, without the necessity of notice to, or license or approval of, any court or person during the term of such trust and, for the purposes of administration and distribution of such trust, after its termination, in the Trustee's continuing sole discretion, to perform the following:

(a) Asset Retention and Disposal. The Trustee may retain cash or other assets for so long as it deems advisable. The Trustee may also sell, exchange, mortgage, lease, or otherwise dispose of any assets of the Trust estate for terms ending within, or extending beyond, the term of the trust.

(b) Permissible Investments. Except as provided in paragraph 8.04 of this Trust Agreement, the Trustee may invest, and reinvest in, or exchange assets for, any securities and properties it deems advisable, and as enumerated in the Minnesota Prudent Investor Rule of Minnesota Statutes §501B.151, or corresponding provisions of any successor law, which are incorporated into this Trust Agreement by reference.

(c) Rights of Ownership. The Trustee shall have the right to: (i) to collect, receive, and receipt for any principal or income; (ii) to enforce, defend against, compromise, or settle any claim by, or against, the Trust; (iii) to vote, issue proxies to vote, join in, or oppose any plans for reorganization; and (iv) to exercise any other rights incident to the ownership of any stocks, bonds, or other properties of the Trust estate.

(d) Allocations of Receipts and Disbursements. Except as otherwise provided in this Trust Agreement, the Trustees shall apply the rules stated in the Minnesota Revised Uniform Principal and Income Act in determining whether receipts shall be income or principal and whether disbursements shall be paid out of income or principal.

(e) Division, Distribution, or Allocation. As permitted in Minnesota Statutes §501B.63, the Trustee may use "income" as defined therein to pay the expenses of administration, including the payment of any taxes.

(f) Employment and Delegation. The Trustee may employ such trust fund managers, accountants, attorneys, bankers, brokers, custodians, investment counsel, and other agents as determined by the Trustee to be necessary. The Trustee may delegate to them such of the rights, powers, and duties herein conferred upon the Trustee as the Trustee deems proper. The Trustee shall act in these matters without liability for any mistake or default of any such person selected or retained with reasonable care and prudence.

7.04 ***Trustee May Seek Advice.*** The Trustee may, but is not required to, seek the advice and assistance of any person or entity it deems to be appropriate, including, but not limited to, the Grantor, Primary Representative, any guardian or guardians of a Beneficiary, and any federal, state, or local agencies that are established to assist persons with disabilities. Associated costs, if any, will be a proper expenses of the Trust and may be apportioned on a pro rata basis against all Sub-Accounts or may be charged only against the Sub-Account about which the Trustee seeks such advice or assistance. The Trustee may use available resources to assist in identifying programs that may be of legal, social, financial, developmental or other assistance to Beneficiaries.

7.05 ***The Trustee Not Liable for Failure to Identify Resources.*** The Trustee will identify private or governmental programs that may be of legal, social, financial, developmental, or other assistance to any Beneficiary. In no event, however, will the Trustee be liable to any Beneficiary for failure to identify all programs or resources that may be available to such Beneficiary or to create programs when such programs do not exist.

7.06 ***Trustee to Obtain and Maintain Eligibility.*** The Trustee has full authority and power to take any and all steps necessary to obtain and maintain eligibility of any Beneficiary for any and all Public Benefits and entitlement programs, which programs may include but are not limited to Social Security, Supplemental Security Income, Medicare, Medical Assistance, services provided or authorized or licensed by the Minnesota Department of Human Services, other State services and other community services. In no event, however, will the Trustee be liable to any Beneficiary for failure to obtain or maintain the eligibility of such Beneficiary for any such programs.

7.07 ***Trustee Entitled to Reasonable Compensation.*** The Trustee, including its agents, will be entitled to reasonable compensation and to reimbursement of costs and expenses properly incurred in the management and/or administration of the Trust. All such compensation and reimbursements will be made in accord with a schedule of fees and charges as specified in each Beneficiary's Joinder Agreement.

7.08 ***No Bond.*** Neither the Trustee, nor successor Trustee, will be required to pay a bond for the faithful performance of any duties. If a bond is required by law or by a court

of competent jurisdiction, no surety will be required on such bond, and such bond will be a proper expense of the Trust.

7.09 ***Indemnification***. Except as is otherwise provided in this paragraph, the Trustee and any successor Trustee and their respective agents, employees, officers, and directors as well as their heirs, successors, assigns, and personal representatives of such parties will be and hereby are indemnified by the Trust and the Trust assets against all claims, demands, liabilities, fines, or penalties and against all costs and expenses (including attorney's fees and disbursements and the cost of reasonable settlements) and expressly including claims for the negligence of the indemnified parties and their agents, employees, officers and directors, imposed upon, asserted against or reasonably incurred thereby in connection with or arising out of any claim, demand, action, suit, or proceeding in which he, she, or it may be involved by reason of being or having been a Trustee, whether or not he, she, or it will have continued to serve as such at the time of incurring such claims, demands, liabilities, fines, penalties, costs, or expenses or at the time of being subjected to the same. This right of indemnification will not be exclusive of, or prejudicial to, other rights to which the Trustee and any successor Trustee, and each of their respective agents or employees may be entitled as a matter of law or otherwise. The Trustee and any successor Trustee and their respective agents and employees (and their heirs or personal representatives) will not be indemnified with respect to matters as to which he, she, or it will be finally determined to have been guilty of willful misconduct, gross negligence in the performance of any duty as such, or violation of any fiduciary obligation or duty to a Grantor or Beneficiary, by a court of competent jurisdiction.

ARTICLE 8
TRUST FUNDS MANAGER

8.01 ***Trust Funds Manager's Reliance on Trustee***. The Trust Funds Manager may rely on the Trustee's directions.

8.02 ***Resignation or Removal***. The Trust Funds Manager may be removed without cause by the Trustee at any time upon giving ninety (90) days advance notice to the Trust Funds Manager. The Trust Funds Manager may resign for any reason, at any time, provided that the Trust Funds Manager gives ninety (90) days advance notice to the Trustee of its intention to resign. No court approval is required for the Trust Funds Manager's removal or resignation. If both the Trustee and the Trust Funds Manager agree, the notice requirement may be waived or reduced.

8.03 ***Successor Trust Funds Manager***. If the Trust Funds Manager resigns or is removed, the Trustee will select and appoint a Successor Trust Funds Manager. The Successor Trust Funds Manager must be a bank or trust company doing business in the State of Minnesota. If the Trustee does not appoint a Successor Trust Funds Manager within sixty (60) days after removing a Trust Funds Manager or within sixty (60) days after receiving notice of the Trust Funds Manager's intent to resign, a successor Trust Funds Manager will be selected and appointed by a court of competent jurisdiction in

Minnesota. Any successor Trust Funds Manager will act as such without any liability for the acts or omissions of any predecessor Trust Funds Manager. Any corporation that will succeed (by purchase, merger, consolidation or otherwise) to all or the greater part of the assets of any corporate Trust Funds Manager will succeed to all the rights, duties and powers of such corporate Trust Funds Manager as Trust Funds Manager of this Trust.

8.04 ***Trust Funds Manager Powers***. The Trust Funds Manager will have full power and authority to perform the Trust Funds Manager's duties as such and to receive, hold, manage, and control all the income arising from such Trust and the corpus thereof and to do such other acts or things concerning the Trust as may be advisable; the Trust Funds Manager's power and authority will include, but not be limited to, all powers conferred upon fiduciaries by Minnesota Statute § 48A.07, as amended from time to time, or the provisions of any trust laws of the state of Minnesota, and the powers conferred upon the Trust Funds Manager by applicable law are hereby incorporated into this Agreement by reference; provided, however, that the Trust Funds Manager is specifically prohibited from making direct investments of the Trust assets in real estate or oil, gas and other mineral interests, leases, overriding royalties, production payments, and other oil, gas and mineral properties. The Trust Funds Manager may invest the assets of the Trust in its common trust funds. If the Trust Funds Manager accepts non-productive property contributed by a Grantor, the Trust Funds Manager is authorized to retain such non-productive property as an asset of the Trust.

8.05 ***Limits of Trust Funds Manager's Authority***. No authority described in this Trust or available to the Trustee or Trust Funds Manager pursuant to applicable law will be construed to enable the Trustee or Trust Funds Manager to purchase, exchange or otherwise deal with or dispose of the assets of any Sub-Account for less than an adequate or full consideration in money or money's worth, or to enable any person to borrow the assets of any Sub-Account, directly or indirectly, without adequate interest or security.

8.06 ***No Bond Required***. The Trust Funds Manager will not be required to furnish any bond for the faithful performance of the Trust Funds Manager's duties. If bond is required by any law or court of competent jurisdiction, no surety will be required on such bond.

8.07 ***No Court Supervision of Trust***. The Trust established under this instrument will be administered free from the active supervision of any court. Any proceedings to seek judicial instructions or a judicial determination may be initiated by the Trust Funds Manager or by the Trustee in any court having jurisdiction of these matters relating to the construction and administration of the Trust.

8.08 ***Trust Funds Manager's Compensation***. The Trust Funds Manager will be entitled to reasonable compensation, commensurate with the services actually performed, and as from time to time agreed to by the Trustee.

8.09 ***Trust's Defense Costs and Expenses***. Costs and expenses of defending the Trust or any Sub-Account, including attorneys' fees incurred prior to, during or after trial, and on appeal, against any claim, demand, legal or equitable action, suit, or proceeding may,

in the sole discretion of the Trustee, either (a) be charged on a pro rata basis to all Trust Sub-Accounts, or (b) be charged only against the Trust Sub-Accounts of the affected Beneficiaries.

8.10 ***Indemnification***. As evidenced by each Joinder Agreement executed by a Grantor, such Grantor acknowledges that the Trust Funds Manager is a financial institution and is not licensed or skilled in the field of social services. The Trust Funds Manager may conclusively rely upon the Trustee to identify programs that may be of social, financial, developmental or other assistance to Beneficiaries. Except as is otherwise provided in this paragraph 8.10, the Trust Funds Manager, its agents and employees, as well as its agents, employees, heirs and legal and personal representatives will not in any event be liable to any Grantor or Beneficiary or any other party for its acts as Trust Funds Manager so long as the Funds Manager acts in good faith. The Trust Funds Manager, its agents and employees (and their heirs or personal representatives) will not be indemnified with respect to matters as to which he, she, or it will be finally determined to have been guilty of willful misconduct, gross negligence in the performance of any duty as such, or violation of any fiduciary obligation or duty to a Grantor or Beneficiary, by a court of competent jurisdiction.

ARTICLE 9
GENERAL GOVERNING PROVISIONS

9.01 ***Captions and Headings***. The captions and headings of each paragraph of this Trust Agreement are for purposes of convenience only, and it is the Settlor's intent that no such caption will be considered in the construction of any provision of this Trust Agreement, or in any of the Exhibits, or in any Joinder Agreement executed by a Grantor and the Trustee.

9.02 ***Governing law***. This Trust Agreement will be construed and regulated according to the laws and regulations of the State of Minnesota and the United States.

9.03 ***Complete Authority***. This Trust Agreement, the attached Exhibits, and any Joinder Agreement approved by the Trustee will determine all rights, authority and duties of the parties, as well as designate the fiduciaries and Beneficiary under this Trust Agreement.

9.04 ***Severability***. If any part or portion of this Trust Agreement is adjudicated by a court of competent jurisdiction to be unlawful, or is made invalid by legislative changes and rulings, this Trust Agreement will remain in effect, and in force, as if that part, or portion, were no longer a part of this Trust Agreement.

IN WITNESS WHEREOF, the undersigned has executed this Trust Agreement to be effective as of the day and year first written above.

SETTLOR:
LUTHERAN SOCIAL SERVICE OF MINNESOTA,
a Minnesota non-profit corporation

By:______________________________
Print Name: Patrick Thueson
Its: Vice President & CFO

TRUSTEE:
LUTHERAN SOCIAL SERVICE OF MINNESOTA,
a Minnesota non-profit corporation

By:______________________________
Print Name: Patrick Thueson
Its: Vice President & CFO

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

On this 28 day of August, 2012, before me, a Notary Public, appeared Patrick Thueson, the Vice President & CFO, of Lutheran Social Service of Minnesota, known to be the person described in and who executed the foregoing instrument as Settlor and as Trustee, and acknowledged to me that he/she executed the same as his/her free act and deed.

____
Notary Public

VIRGINIA E FISH
NOTARY PUBLIC - MINNESOTA
MY COMMISSION
EXPIRES JAN. 31, 2015

311605.1

JOINDER AGREEMENT
FOR LUTHERAN SOCIAL SERVICE OF MINNESOTA
SPECIAL NEEDS POOLED TRUST

Instructions for Completing the Joinder Agreement

Please read this Joinder Agreement and the related Lutheran Social Service of Minnesota ("LSS") Special Needs Pooled Trust Agreement ("Pooled Trust") in full and have it reviewed by your legal counsel before execution.

1. This is a non-revocable agreement. Once established, you cannot ask for a return of your funds. The funds contributed to the Special Needs Pooled Trust must be funds that are those of the Beneficiary and not of a third party.

2. Please note that the Pooled Trust cannot disburse funds for basic needs (shelter or food). The funds are budgeted for supplemental items which are appropriate to the Sub-Account Beneficiaries' needs. Under current law, the Trustee can approve a disbursement for a pre-paid burial plan but cannot approve disbursements after the Beneficiary's death for a funeral.

3. Federal law requires that all unspent amounts in a Beneficiary funded Sub-Account at the Beneficiary's death must be used to reimburse the State or States (if the beneficiary has received aid from more than one State) for medical services received. The LSS Remainder Share of 10% of the Pooled Trust for other indigent Beneficiaries is deducted before the State(s) reimbursements.

4. The "Beneficiary" is the individual whose funds are contributed to the Special Needs Pooled Trust Sub-Account and who is the sole individual that may benefit from the Sub-Account created for his or her lifetime benefit. The Beneficiary of the Trust must meet the definition of having a disability to join the Trust. A Beneficiary shall provide written evidence to the Trustee of disability by providing confirmation of the Social Security Administration or the State Medical Review Team's (SMRT) determination of disability.

5. The "Grantor" of the Sub-Account must be the Beneficiary, the parent of the Beneficiary, the grandparent of the Beneficiary or a Legal Representative who signs the Joinder Agreement on behalf of the Beneficiary. Alternatively, the Court may establish the Sub-Account on behalf of the Beneficiary. A Grantor enters into the Joinder Agreement using the Beneficiary's own funds to establish the Sub-Account for the Beneficiary's sole benefit.

6. The "Legal Representative" is the person who may request disbursements from the Sub-Account for the benefit of the Beneficiary and will receive copies of the financial reports and other fee information from the Trustee. If the Legal Representative is someone other than the Grantor, please provide the information for the Legal Representative on Schedule B along with a copy of the document or documents that appoint the Legal Representative in his or her capacity (i.e. Copy of Power of Attorney, Guardianship or Conservatorship court appointment

documentation). Please provide an alternate Legal Representative, if there is one. This will ensure that Lutheran Social Service has someone to contact in the event the primary Legal Representative is unavailable.

7. Concerning distribution upon the death of the Beneficiary, please be very clear who the Grantor wishes to receive the funds remaining after satisfying the State's claim for Medical Assistance/Medicaid reimbursement and LSS' Remainder Share or whether the Grantor wants any remainder to be held in the Pooled Trust for the benefit of other disabled individuals with sub-accounts in the Pooled Trust. If the Grantor designates "heirs at law" as the beneficiary, please attach contact information for the person who would be best able to locate heirs. If the Trustee is unable to locate heirs within a reasonable amount of time, the funds will be used for the benefit of other indigent disabled beneficiaries, as if no beneficiary had been named.

8. On the last page of the Joinder Agreement is the checklist for self-funded Sub-Accounts. Please review this checklist carefully. LSS strongly recommends that an attorney be consulted who is familiar with trust and benefits issues before signing the bottom of the checklist. If the Grantor chooses not to review the checklist with an attorney, please make note on the checklist that you are waiving that right and then sign and date the checklist.

9. Funding Instructions: To fund the Sub-Account, please make the check payable to: "Lutheran Social Service of Minnesota, fbo (for the benefit of) [Beneficiary's name]" or alternatively LSS can provide wire instructions at the time the Joinder Agreement is signed. Please send checks and the completed Joinder Agreement, to:

Attn: LSS Trust Administrator
Lutheran Social Service of Minnesota
1605 Eustis Street, Suite 310
St. Paul, MN 55108

10. Please note that LSS has the right to enter into a Joinder Agreement and the Joinder Agreement is not effective until and unless it is executed by an authorized representative of LSS.

11. If you have any questions, please contact the LSS Trust Administrator, (651) 310-9400.

12. The trusts created pursuant to the Trust Agreement and the Joinder Agreement are subject to the requirements of state and federal law and may be amended as deemed necessary or appropriate by LSS to remain in compliance with applicable legal requirements for pooled trusts governed by 42 U.S.C. 1396(p) and Minn. Stat. § 256B.056 and Minn. Stat §501B.89.

JOINDER AGREEMENT
FOR
LSS SPECIAL NEEDS POOLED TRUST

This is a legal document. You are encouraged to seek independent, professional advice before signing.

This Joinder Agreement ("Joinder Agreement") is by and between Lutheran Social Service of Minnesota ("LSS" and "Trustee") and [name]______________________________, a Minnesota resident ("Grantor"), for the benefit of [name]____ ("Beneficiary") for the purpose of enrolling in and adopting the LSS Special Needs Pooled Trust Agreement ("Pooled Trust") which is incorporated herein by reference.

1. ***Adoption of Special Needs Pooled Trust Agreement***. The Grantor, hereby agrees to transfer the sum of ____ ($ _____________) for the benefit of the Beneficiary into the Pooled Trust sub-account number _______________ ("Sub-Account") to be administered by the Trustee in accordance with the terms and conditions contained in the Pooled Trust Agreement.

2. ***Distributions of the Remainder upon the Beneficiary's death.*** All unspent amounts in the Beneficiary's Sub-Account at the Beneficiary's death (after payment of the LSS Remainder Share) must be used to reimburse the state or states for medical services received ("State Reimbursement Claims"). If there are funds remaining in the Beneficiary's Sub-Account after the Trust's Remainder Share has been satisfied and after the State claims have been satisfied, such amounts are available to be distributed to heirs or descendants of the Grantor as provided under Section 3 of this Joinder Agreement.

3. ***Pooled Trust's Remainder Share.*** Federal and State regulations allow the Pooled Trust to retain a remainder share upon the death of a beneficiary. The LSS Pooled Trust shall retain a remainder share of 10% of the value of a Sub-Account as of the date of termination and prior to payment of any amounts to the State(s).

The Trust's Remainder share shall be used in the discretion of the Trustee for the direct or indirect benefit of other Beneficiaries of the Trust.

If funds remain after distributions of the Trustee's Remainder Share, payment of allowable expenses and taxes, payments to the State of Minnesota and/or any other state(s) for State Reimbursement Claims, remaining funds in the Sub-Account, if any, will be distributed pursuant to Schedule B of this Joinder Agreement.

4. ***No Early Termination of Sub-Account.*** The Trust provides that a Sub-Account may not be terminated prior to the Beneficiary's death.

5. ***Locating Descendants or Heirs of Beneficiaries.*** Grantor acknowledges that the Pooled Trust may incur additional costs if the Recipients listed in Schedule B of this Joinder Agreement cannot be located easily. Grantor acknowledges and agrees that the Trustee may recover its reasonable costs and expenses associated with locating such Recipients.

6. ***Fees***. Grantor agrees to pay the fees in accordance with Schedule A that is attached hereto and that may be amended from time to time in the sole discretion of the Trustee. If fees are not paid in advance by Grantor, the Trust Funds Manager and Trustee are authorized to charge such fees to a Beneficiary's Sub-Account. The Trustee shall give notice of any amendment to Schedule A at least thirty (30) days prior to the effective date of the amendment by giving written notice to the Grantor or Legal Representative. Please note that fees are not refundable.

7. ***Informational Forms***. Schedule B contains the relevant information regarding the Beneficiary and eligibility for participation in the Pooled Trust and Grantor has completed this Schedule B accurately and truthfully with the intention that LSS will rely on the information provided in establishing the Sub-Account and managing the funds deposited into the Sub-Account.

8. ***Management of Sub-Account***. The Trust Sub-Account will be managed and administered for the benefit of the Beneficiary. Pending the preparation of the Beneficiary's case assessment and supplemental needs plan, disbursements for any non-support items for the benefit of the Beneficiary may be made when, in the discretion of the Trustee, such supplemental needs are not being provided by any public agency, or are not otherwise being provided by any other source of income available to the Beneficiary. The Grantor recognizes that all disbursements are discretionary, as directed by the Trustee. With this in mind, the Grantor may express Grantor's desires as to how funds in the Sub-Account might be used in the forms attached as Schedule B.

9. ***LSS Contact Information.*** Contact information for Pooled Trust and the Trust Funds Manager are included on Schedule C, and may be amended from time to time.

10. ***Amendment.*** The provisions of this Joinder Agreement may be amended as the Grantor and the Trustee may jointly agree, so long as any such amendment is consistent with the Pooled Trust Agreement and the then-applicable law. Provided, however, that after a Sub-Account is funded, the Grantor may not revoke a transfer pursuant to this Joinder Agreement.

11. ***Taxes.*** The Grantor acknowledges that the Trustee has made no representation to the Grantor that contributions to the Trust are deductible as charitable gifts, or otherwise. Grantor acknowledges that the Trustee has made no representations as to the gift or tax consequences of directing funds to the Trust and has recommended that the Grantor seek independent legal and tax advice. Sub-Account income, whether paid in cash or distributed in other property, may be taxable to the Beneficiary subject to applicable exemptions and deductions. Professional tax advice is recommended. Sub-Account income may be taxable to the Trust, and when this is the case, such taxes shall be payable from the applicable Sub-Accounts. Upon the Beneficiary's death, taxes due from the trust to the State(s) or federal government because of the death of the beneficiary and inclusion of the trust in the estate may be paid (except inheritance taxes) prior to reimbursement of the State(s) for medical assistance.

12. ***Additional Sub-Accounts*.** If the Grantor intends to enroll more than one Beneficiary under a Trust Sub-Account, an additional agreement is required between the Grantor and the Trustee regarding such matters as the enrollment fee or consultation fees for funded enrollments, Special Assessments, and other fees (as described on Schedule A).

13. ***Federal and State Law Control*.** This Trust managed by the Trustee is a pooled trust, governed by the laws of Minnesota (Minn. Stat. § 256B.056 and/or Minn. Stat §501B.89) in conformity with the provisions of 42 U.S.C.§ 1396p, amended August 10, 1993, by the Omnibus Budget Reconciliation Act of 1993. To the extent there is a conflict between the terms of the Trust or this Joinder Agreement and the governing law, the law and regulations shall control. The Trustee may amend the Pooled Trust and/or this Joinder Agreement from time to time in its discretion to meet the requirements of applicable law.

14. ***Acknowledgments By Grantor*.**

Each Grantor acknowledges:

(i) Unless waived below, that he or she has been advised to have the Pooled Trust Agreement and this Joinder Agreement reviewed by his or her own attorney prior to the execution of this Joinder Agreement;

(ii) that the Trust Funds Manager is a financial institution and is not licensed or skilled in the field of social services;

(iii) that the Trust Funds Manager may conclusively rely upon the Trustee to identify programs that may be of social, financial, developmental or other assistance to Beneficiaries;

(iv) that the Trust Funds Manager, its agents and employees, as well as their agents' and employees' heirs and legal personal representatives, shall not in any event be liable to any Grantor or Beneficiary or any other party for its acts as Trust Funds Manager so long as the Trust Funds Manager acts reasonably and in good faith;

(v) the uncertainty and changing nature of the guidelines, laws, and regulations pertaining to governmental benefits and each Grantor agrees that the Trustee will not in any event be liable to any Grantor or Beneficiary or any other party for any loss of benefits or any other liability as long as the Trustee acts reasonably in good faith;

(vi) that upon execution of the Joinder Agreement by Grantor and the Trustee, and the funding of a Sub-Account for a Beneficiary, that this Trust, as to Grantor and Beneficiary, is irrevocable. Each Grantor acknowledges that after the funding of a Sub-Account, the Grantor shall not have further interest in and does thereby relinquish and release all rights in, control over, and all incidents of interest of any kind or nature in and to the contributed assets and all income thereon;

(vii) that he or she has not been provided, nor is he or she relying upon, any representation of or any legal advice by LSS in deciding to execute this Joinder Agreement;

(viii) that he or she is entering into this Joinder Agreement voluntarily, as his or her own free act and deed;

(ix) that if he or she has not had the LSS Pooled Trust Agreement or the Joinder Agreement reviewed by his or her own attorney, that he or she voluntarily waives and relinquishes such right;

(x) that if he or she has not had the LSS Pooled Trust Agreement or the Joinder Agreement reviewed by his or her own CPA, that he or she voluntarily waives and relinquishes such right;

(xi) that he or she has been provided a true and correct copy of the LSS Pooled Trust Agreement and this Joinder Agreement prior to the signing of this Joinder Agreement;

(xii) that he or she has reviewed and understands to his or her full satisfaction the legal, economic and tax effects of these instruments;

(xiii) that the LSS Pooled Trust or its designee may be a Remainder Beneficiary of a portion of the Sub-Account established hereby upon the death of the Beneficiary as provided in this Joinder Agreement; and

(xiv) that Trustee shall file an annual accounting with the Minnesota Department of Human Services for any Sub-Account where the Beneficiary is receiving Medicaid benefits or as otherwise required by law.

15. ***Federal Taxes; Indemnification by Grantor.*** Each Grantor acknowledges that a trust Sub-Account may be treated as a grantor trust for federal income tax purposes as provided under IRC § 671 et. seq. and the income tax regulations thereunder. In such event, all allocable income, gains or losses shall be reported on the Grantor's federal income tax return and taxable to the Grantor. Each Grantor acknowledges that the Grantor, the primary representative, or the Beneficiary shall be responsible for mailing their own federal and/or state income tax returns to report the income of the Trust which is taxable to them as their interest may appear. Each Grantor hereby indemnifies the Trustee and the Trust Funds Manager from any and all claims for income tax liabilities of his or her Sub-Account which is treated as a grantor trust for federal income tax purposes.

16. ***Accounting Period.*** The accounting period for the Sub-Account shall be the last day of ______ of each year of the Sub-Trust.

IN WITNESS WHEREOF, the undersigned Grantor(s) have reviewed and signed this Joinder Agreement, understand it, and agree to be bound by its terms, and the Trustee has accepted this Joinder Agreement. The parties hereby execute this Joinder Agreement to be effective as of the ____ day of ____, 20____.

Lutheran Social Service of Minnesota
as Trustee of the LSS Special Needs Pooled Trust

By:

Grantor signature	Authorized Signature
Grantor signature	Typed name & title

STATE OF MINNESOTA)
) ss.
COUNTY OF ________________)

This instrument was acknowledged before me by ______________________________ and ____, as Grantor(s), on the ____ day of ____, 20____.

____
Notary Public

STATE OF MINNESOTA)
) ss.
COUNTY OF ________________)

This instrument was acknowledged before me by ______________________________, an authorized representative of Lutheran Social Service of Minnesota, on the ____ day of ____ __________________, 20____.

____
Notary Public

SCHEDULE A

TO THE LSS SPECIAL NEEDS POOLED TRUST JOINDER AGREEMENT

FEE INFORMATION

The following Fees are established as of January 1, 2015 for sub-accounts to the LSS Special Needs Pooled Trust. All fees will be deducted from sub-account balances. LSS and Securian Trust Company, as the Trust Fund Manager, each reserve the right to change its fees by giving Client no less than thirty days advance written notice.

FEES TO LSS:

1. One Time Enrollment Fee	$1,000.00
2. Hourly Fee Rate*	$85.00/hour

* Hourly Fees will be charged only for work performed by LSS employees in reference to the sub-account management.

FEES TO SECURIAN TRUST COMPANY:

Fees are based on the combined market value of all of the assets of the sub-accounts in the Pooled Trust, and then divided proportionately and charged to each sub-account monthly.

The annual fee is as follows:

First	$1.0 Million	1.25%
Next	$2.0 Million	1.00%
Next	$2.0 Million	0.75%
Excess over	$5.0 Million	0.50%

Additional fees may be charged for extraordinary and/or special services.

SCHEDULE B

TO THE LSS SPECIAL NEEDS POOLED TRUST JOINDER AGREEMENT

INFORMATION FOR SUB-ACCOUNT

LSS Special Needs Pooled Trust Sub-Account Number:	
Sub-Account Tax Identification Number:	

1.	Beneficiary:					SSN:	
	Address:						
	Telephone:	Day:		Cell:		Evening:	
	Birth date:			Place of birth: Hospital:			
	Mother:					SSN:	
	Father					SSN:	

2.	Grantor[1]:					SSN:	
	Address:						
	Telephone:	Day:		Cell:		Evening:	
	Birth date:						
	Relationship to Beneficiary (if someone other than the Beneficiary):						

[1] The Grantor must be the Beneficiary, the parent, grandparent, or the legal guardian of such individual Beneficiary, or alternatively established by the court on behalf of the Beneficiary. Any individual Grantor, other than the Beneficiary or parent or grandparent, must provide documented evidence of his or her legal authority to sign this Joinder Agreement on behalf of the Beneficiary (i.e. copy of a durable Power of Attorney, Paperwork from the Court appointing as a Conservator or Guardian of the Beneficiary). In addition, all Grantors must provide a birth date and social security number when completing the Joinder Agreement. Please note that the birth date and social security number are required in order to open up the Sub-Account with the Special Needs Pooled Trust and are required as part of the "Know Your Client" under the United States Patriot Act.

3.	Conservators, Guardians or other Legal Representatives[2] who are authorized to receive information, communicate with the Trustee and may request funds on behalf of the Beneficiary if the Beneficiary is unable to do so			SSN:	
	Address:				
	Telephone:	Day:	Cell:	Evening:	
	Birth date				
	Legal Relationship to Beneficiary:				
	Legal Representative	Unless the Grantor requests otherwise and until the Grantor is no longer able to serve as such, the Grantor shall be the Beneficiary's Legal Representative. When the Grantor is no longer able to act as the Beneficiary's Legal Representative, the Guardian or representative listed above shall be the Legal Representative (with a court-appointed Guardian or Conservator, if any, taking precedence). If the Conservator, Guardian or Legal Representative listed above ceases to serve, please list below, in order, the persons that you would like to be successor Legal Representatives:			

1st Alternate Legal Representative:			SSN:	
Address:				
Telephone:	Day:	Cell:	Evening:	
Birth Date				
Relationship to Beneficiary:				

2nd Alternate Legal Representative:			SSN:	
Address:				
Telephone:	Day:	Cell:	Evening:	
Birth Date				
Relationship to Beneficiary:				

If none of the named Legal Representatives or successors is able to serve, how would you like the Trustee to select another Legal Representative (i.e., family member, public official, non-profit corporation, court appointment)?

[2] If the Beneficiary has a Legal Representative (e.g., legal guardian, conservator, duly appointed agent acting under a durable Power of Attorney, trustee, or other legally appointed representative acting on behalf of the beneficiary, parent of a minor Beneficiary or other legal fiduciary), insert the name, address and relationship of such person to the Beneficiary. In addition, all individuals listed under this section must provide a birth date and social security number when completing the Joinder Agreement. Please note that the birth date and social security number are required in order to open up the Sub-Account with the Special Needs Pooled Trust and are required as part of the "Know Your Client" under the United States Patriot Act.

Current Benefits	
1. Does Beneficiary receive Supplemental Security Income (SSI)?	☐ Yes ☐ No
2. If the answer to question 1 was yes, how much per month?	$ /month
3. Does Beneficiary receive Supplemental Security Disability (SSDI)?	☐ Yes ☐ No
4. If the answer to question 3 was yes, how much per month?	$ /month
5. Does Beneficiary receive Medical Assistance?	☐ Yes ☐ No
6. If the answer to question 5 was yes, what is the Medical Assistance card number?	Card #
7. In the space below, list all other forms of government assistance that the Beneficiary receives:	
8. If the Beneficiary is covered under any policy of health insurance, what is the insurer's name and address, and what is the policy number?	
Insurer:	
Address:	
Policy Number:	
9. If the Beneficiary is covered under any prepaid funeral or burial insurance plan, what is the insurer's name and address, and what is the policy number?	
Insurer:	
Address:	
Policy Number:	
Disability	
10. What is the nature of the Beneficiary's disability?	
11. If the Beneficiary's condition has been medically diagnosed, what is the diagnosis?	
12. What is the prognosis at this time?	
13. Source of Funds (check one): ☐ Beneficiary's funds ☐ Third party funds with support obligation for Beneficiary	Describe source:

Grantor's Desires as to Anticipated Special/Supplemental Needs:

Grantor's Acknowledgment as to Handling of Sub-Account Remainder upon Termination

☐ I acknowledge that:

- Upon Termination of the Sub-Account, the Trustee will pay to LSS its 10% Remainder Share to continue to be held in the trust for other disabled beneficiaries. Any funds remaining after payment of the 10% Remainder Share shall be used to repay the appropriate State(s) for amounts they have paid for my support.
- Any remainder after LSS and the State(s) are paid should be paid over to the Recipient(s) listed below.
- **I understand that if I do not list anyone below, or if none of the Recipients listed below are living at the time this Sub-Account is terminated, any remainder will be transferred to an LSS Pooled Trust Sub-Account for the benefit of other disabled beneficiaries.**

Recipient:				SSN:	
Address:					
Telephone:	Day:		Cell:	Evening:	
Relationship to Grantor:				Percentage:	

Recipient:				SSN:	
Address:					
Telephone:	Day:		Cell:	Evening:	
Relationship to Grantor:				Percentage:	

Recipient:				SSN:	
Address:					
Telephone:	Day:		Cell:	Evening:	
Relationship to Grantor:				Percentage:	

Please note the distribution of the Remainder of the Sub-Account will be after payment of the applicable amounts under Article 6 of the Trust Agreement. Please ensure that the applicable percentages to the Recipients above total 100%.

SCHEDULE C
TO THE LSS SPECIAL NEEDS POOLED TRUST JOINDER AGREEMENT

CONTACT INFORMATION

For information regarding a Beneficiary's Sub-Account, or for requests for disburse-ments, call or write LSS at:

LSS SPECIAL NEEDS POOLED TRUST
LUTHERAN SOCIAL SERVICE OF MINNESOTA
ATTENTION: LSS TRUST ADMINISTRATOR
1605 Eustis Street, #310
St. Paul, MN 55108
651-310-9400

It is not the intent of LSS to provide legal advice. Attorneys working with families should be experienced in trust and government benefit issues. LSS urges attorneys who are not experienced in these areas for persons with disabilities to direct families on to attorneys who have such experience.

Please submit this checklist with the Joinder Agreement

ATTORNEY'S CHECKLIST FOR SELF-FUNDED SUB-ACCOUNTS
LSS SPECIAL NEEDS POOLED TRUST

☐ My client has been advised of the tax consequences of Trust Sub-Account profit.

☐ I have advised my client that the Pooled Trust cannot disburse funds for basic needs (shelter or food) but is a supplemental trust. The funds are budgeted for supplemental items which are appropriate to the Sub-Account Beneficiaries' needs. The trust account can approve a disbursement for a pre-paid burial plan but cannot approve disbursements after the Beneficiary's death for a funeral.

☐ I have advised my client that federal law requires that all unspent amounts in a Beneficiary funded Sub-Account at the Beneficiary's death (remaining after payment of the remainder share) must be used to reimburse the State or States for medical services received. The remainder share of 10% of the Pooled Trust for other indigent Beneficiaries is paid before the State or States reimbursements.

☐ There are no Medicaid liens against these funds.

☐ There are no other liens or claims against the Trust Sub-Account funds.

☐ The Beneficiary of the Trust meets the definition of having a disability according to the Social Security definition (*check appropriate options*). The Beneficiary is currently eligible for SSI ☐ SSDI ☐ Medicaid ☐ or the Beneficiary has obtained a disability determination by _______________ or for recipients with long-term care Medicaid over the age of 65 ☐.

I have advised my client that, under 42 U.S.C. § 1396(p)(c), certain transfers of assets for **less** than fair market value (including but not limited to the purchase of an annuity that will not pay back to the purchaser the amount paid for it) can result in a period of ineligibility for certain types of Medicaid, including long-term care Medicaid, home or community-based waiver services, home health care services, home and community care for functionally disabled elderly individuals, and personal care services; and I have further advised my client that the act of joining the LSS Pooled Trust is not considered such a transfer of assets for less than fair market value, but I have so advised my client that if such a transfer of assets for less than fair market value has occurred, as would be penalized under 42 U.S.C. § 1396(p)(c), joining the LSS Pooled Trust will not avoid or mitigate the penalty period. If my client is over the age of 65 I have advised my client of the position currently being taken by the government that such transfer may result in a period of ineligibility and I have provided the Trustee with a Transfer Penalty Acknowledgement signed by my client as required by the Trustee.

Attorney name, print or type	Client name, print or type
______________________	______________________
______________________	______________________
Signature	Signature
______________________	______________________
Date	Date

I (We) have read the above Attorney Checklist and waive review by an attorney: ☐

______________________	______________________
Signature	Signature
______________________	______________________
Date	Date

(Re)Introduction to Pooled Trusts

Laurie Hanson
Long, Reher & Hanson, P.A.
2015 Special Needs Trusts Nat'l. Conference

What is a Pooled Trust?

- ✓Separate sub-accounts;
- ✓Multiple beneficiaries;
- ✓Sub-accounts are pooled for administration and investment.

Pooled Special Needs Trust

- ✓Creature of statute;
- ✓Maintained by non-profit;
- ✓Multiple beneficiaries living with disabilities;
- ✓Assets excluded for Medicaid (MA) and SSI.

History of Pooled Trusts

- 1st pooled disability trusts 70s/80s;
- Prior to '93:
  - ✓ No transfer penalties;
  - ✓ Limited estate recovery;
  - ✓ No payback requirement;
  - ✓ Choice of remainder beneficiaries.

OBRA '93

- ✓ Address abuses - Medicaid Millionaires/MQTs;
- ✓ Transfer penalties extended to irrevocable trust;
- ✓ Revocable trusts available;
- ✓ Irrevocable trusts available if distribution under any circumstances;

OBRA '93

42 USC 1396p(d)(4) trusts are exempt from rules:

- No transfer penalties;
- Assets excluded.

Be aware of differences among states.

First Party Pooled SNT
Statutory Requirements

- ✓ Disabled beneficiary of any age;
- ✓ Trust established/managed by non-profit;
- ✓ Separate account for each beneficiary – pooled for investment and management;
- ✓ Fund with beneficiary's assets/income;
- ✓ Assets excluded.

First Party Pooled SNT

- ✓ Sub-account established by executing joinder agreement – information varies;
- ✓ Joinder agreement executed by beneficiary, parent, grandparent, guardian or court;
- ✓ Beneficiary's assets used to fund – funding by person with authority;
- ✓ Sub-account must be used for beneficiary's sole benefit.

First Party Pooled SNT

At beneficiary's death, amount not retained by non-profit must be paid to state for benefits received.

- States differ on amount non-profit can retain.
- Trustee must comply with rules regarding expenses after beneficiary's death.

Advantages:

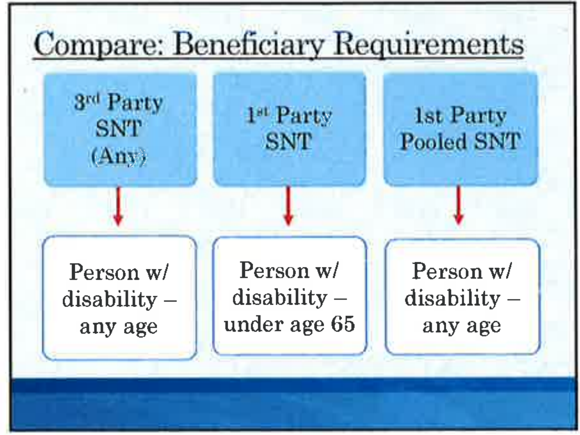
- ✓ Funds insufficient to justify court proceeding;
- ✓ Competent beneficiary wishes to self-settle;
- ✓ No other appropriate trustee;
- ✓ Pooled trust generally less expensive than standard SNT.

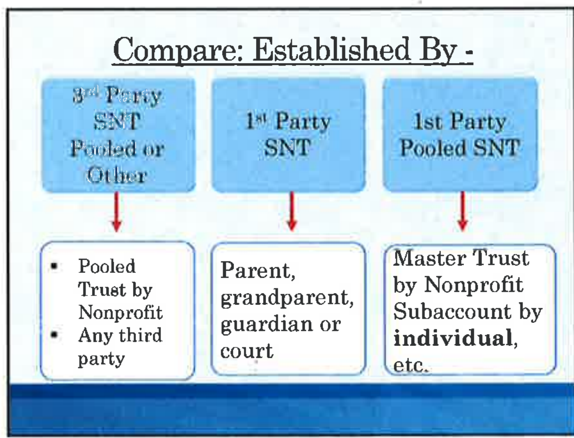
Third Party Pooled SNT

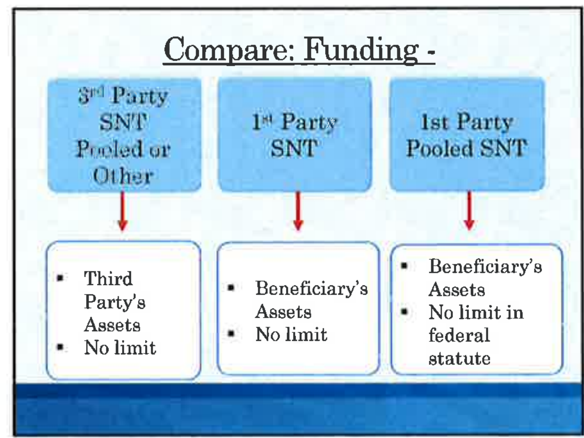
- ✓ Funded by third party;
- ✓ Appropriate when:
  - No available trustee;
  - Funds insufficient to warrant professional trustee;
  - Services desired, e.g. care management and monitoring.

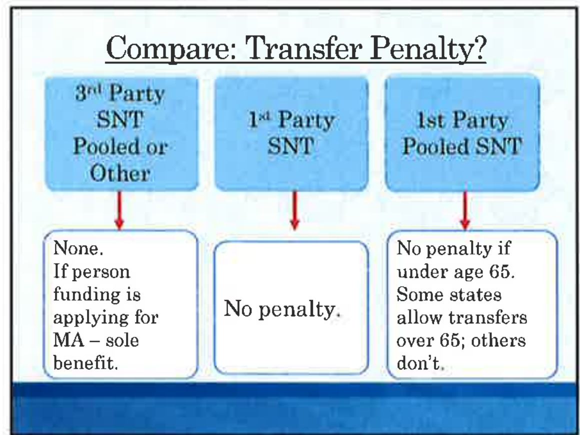
Funding Pooled SNT

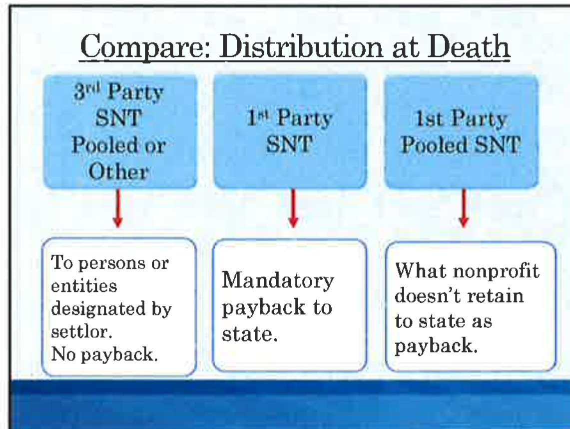
- ✓ Age 64 and under – no penalty in any state;
- ✓ 19 states allow funding by beneficiary over age 64;
- ✓ 22 states impose period of ineligibility for transfers by beneficiary over 64 – per se;
- ✓ Five states – in litigation, or developing fair market value criteria.


Compare: Beneficiary Requirements
3rd Party SNT (Any)
1st Party SNT
1st Party Pooled SNT
Person w/ disability – any age
Person w/ disability – under age 65
Person w/ disability – any age


Compare: Established By -
3rd Party SNT Pooled or Other
1st Party SNT
1st Party Pooled SNT
Pooled Trust by Nonprofit
Any third party
Parent, grandparent, guardian or court
Master Trust by Nonprofit Subaccount by individual, etc.


Compare: Funding -
3rd Party SNT Pooled or Other
1st Party SNT
1st Party Pooled SNT
Third Party's Assets
No limit
Beneficiary's Assets
No limit
Beneficiary's Assets
No limit in federal statute


Compare: Transfer Penalty?
3rd Party SNT Pooled or Other
1st Party SNT
1st Party Pooled SNT
None. If person funding is applying for MA – sole benefit.
No penalty.
No penalty if under age 65. Some states allow transfers over 65; others don't.


Compare: Distribution at Death
3rd Party SNT Pooled or Other
1st Party SNT
1st Party Pooled SNT
To persons or entities designated by settlor. No payback.
Mandatory payback to state.
What nonprofit doesn't retain to state as payback.

CONCLUSION
Laurie Hanson
Long, Reher & Hanson, P.A.

Basics of Special Needs Trusts

Thursday, October 15, 2015

Breakout Session 3
3:30 P.M. – 4:20 P.M.

Understanding Mandatory and Optional Medicaid Recipients and Services; Relation to Waiver Services

Presenter:
G. Mark Shalloway
Attorney at Law
Shalloway & Shalloway, P.A.
West Palm Beach, FL

- Materials
- PowerPoint

Stetson University College of Law presents:
2015 SPECIAL NEEDS TRUSTS
THE NATIONAL CONFERENCE
October 14-16, 2015
The Vinoy Renaissance Resort & Golf Club
St. Petersburg, Florida

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

Understanding Mandatory and Optional Medicaid Recipients and Services, and the Relation to Waiver Services.

G. Mark Shalloway, CELA.

Understanding Mandatory and Optional Medicaid Recipients and Services and the Relation to Waiver Services.

Medicaid overview

Medicaid is a very broad array of healthcare services delivered through a state and federal partnership program on a medical and financial needs-based basis. Medicaid was passed in 1965 under title XIX of the Social Security Act. Essentially Medicaid provides healthcare services to low- income and asset-based aged, blind or disabled individuals. Federal program administration is assigned to the Centers for Medicare and Medicaid services (CMS) of the Department of Health and Human services (HHS). Each state has its own proprietary - named Medicaid agency to incorporate federal minimum requirements and promulgate state requirements to be operational at the local level.

State agencies administer the Medicaid program at the local level subject to federal requirements mandating minimum benefits and programs. Within the federal oversight, fall two populations of coverage: categorical/mandatory and medically needy/optional. Benefits and services will vary among the states. However to receive federal funding, states must provide mandatory services to certain populations.

Generally services under a state must be developed under a Medicaid plan approved by the federal government delivering programs and benefits available throughout the entire state. There are waivers from the federal government for certain exceptions discussed *infra.*

Medicaid and Long-term Services and Support (LTSS)

Medicaid provides acute and long-term support services (LTSS) to millions of low income Americans, and is the primary payer for institutional and community-based long-term care services. Originally Medicaid was first passed into law, long-term care services were primarily funded and delivered in a traditional nursing home setting. However trending starting in the late 1980's early 1990's increased the development and funding of waivers from the federal requirement that one reside in a nursing home to receive Medicaid covered services and allow for that individual to be "diverted"away from a nursing home, arguably at the Medicaid recipients' request and at a lower cost to the taxpayer per Medicaid recipient covered. There is still an historical institutional bias of Medicaid utilization and funding. Some of which is warranted due to the medical co-morbidities and overall fragility of the individual truly requiring care in an institutional-based setting. Moreover, the economies of scale do not always create a lower-cost delivery system for long-term care services at a private residence where the ratio of caregiver to Medicaid recipient would be one to one. In contrast, long-term care in a nursing home may be deliverable to an individual who could be cared for along with others by that one same caregiver on staff. Still under the umbrella of home and community-based care includes assisted living. This is a residential group model of living of typically medically more stable individuals who may have a portion of their care paid for by Medicaid. In contrast nursing homes are medical-based group models of living. In the context of special needs trusts, individuals with diminished capacity measure their needs in terms of functional impairment due to cognitive and physical deficits. These same individuals will continue to require acute care or skilled care delivered by physicians nurses and therapists. However unskilled custodial care described as activities of daily living will also be needed. Activities of daily living includes

dressing, bathing, toileting, transferring, ambulating, continence of bladder or bowel or both. An additional need for long-term care services includes instrumental activities of daily living for assistance such as meal preparation, housekeeping, medication management, transportation and supported employment.

Institutional Long Term Care

Advances in public health demonstrate in 2010, 29% of Medicaid long-term support service beneficiaries received only institutional services. The institutional care setting includes nursing homes, intermediate care facilities for persons with mental retardation and mental hospital services for people age 65 and older. These institutions are licensed in the state certified facilities that will absorb the expenses of care for eligible individuals. Such institutional coverage includes inpatient, comprehensive services and room and board.

Home and Community-based Services (HCBS) Programs

HCBS allow Medicaid beneficiaries to receive services in their homes and communities specifically their private residence, adult daycare and assisted-living. One can track the growth and popularity of these programs in the numbers. In 2001 there were 2.1 million enrollees by 2011, there were 3.2 million enrollees. These 3.2 million people accessed LTSS through one of three main Medicaid HCBS programs. Of this total population, 813,955 individuals received home health state plan services across the United States, and 960,752 individuals received personal care state plans in 32 US states. 1.45 million persons were serviced through section 1915 © waivers in 47 US states and DC.

While the proportion of Medicaid long-term services and supports spending for home and community-based services varies by state in 2013 the national share was set at 46%. Spending includes state and federal expenditures. HCBS expenditures include state plan home health services, state plan personal care, targeted case management, hospice, home and community-based care for the functionally-disabled elderly, and services provided under HCBS waivers. Expenditures do not include administrative costs, accounting adjustments, or expenditures in the U. S. territories. (Source: Urban Institute estimates based on data from CMS Form 64 as of September 2014).

Two Types of Populations Eligible for Medicaid: Categorically and Medically Needy

Categorically needy individuals are automatically mandatorily included in the state Medicaid program. In contrast, Medically Needy individuals may receive Medicaid benefits and services from states optionally extending benefits where those individuals exceed income or resources were both about categorically needy definition.

Mandatory Populations

Supplemental Security Income (SSI) states: In the 39 states including the District of Columbia, an individual approved for SSI will automatically be entitled and generally enrolled in Medicaid under 42 CFR section 435.120. Be aware that in some cases an individual may be eligible but must still file an application to establish coverage. SSI eligibility rules apply to determine initially the SSI coverage with respect to age, blind, and disability status along with the asset and income caps.

Section 209 (b) States are eleven in number, and may impose a more stricter Medicaid eligibility requirement than the SSI rules under 42 CFR section 435.121. Applications are not automatically

processed and one must manually enroll.

Additional mandatory populations include individuals who are entitled to mandatory state supplements to federal SSI payments under 42 CFR section 435.130 as well as grand-fathered groups including individuals who were eligible for Medicaid/Social Security/SSI in the 1970s and certain disabled widows and widowers under 42 CFR section 435.131–435.138.

Mandatory Populations: SSI States

To be eligible for SSI, individuals must not have more than $753 in unearned monthly income (or $1120 for couple). Certain exclusions for assets from these resource limitations include a home, personal items and burial account with some of these items having asset values limited.

In addition, persons receiving SSI pending a final determination of blindness or other disability may be part of the mandatory population along with those receiving SSI under agreement with the Social Security Administration to dispose of resources that exceed the SSI dollar limits on resources, or receiving benefits under 1619 (a) or (b) status (blind individuals or those with disabling impairments whose income equals or exceeds a specific SSI limit).

Mandatory Populations: Section 209 (B) States

Section 209 (b) states are permitted to adopt more restrictive eligibility requirements only if the requirements are not more restrictive than the state Medicaid plan in effect on January 1, 1972.

If a state's 1972 Medicaid plan was more liberal than the current SSI program, the state must use the current SSI program requirements (except to the extent the state elects to use more liberal criteria under section 435.601). See 42 CFR section 435.121. For determining income for section 209 (b)

states, a "spend down" procedure must be used. The following states are considered section 209 (b) States: Connecticut, Hawaii, Illinois, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma and Virginia.

Federal Mandatory Populations Requirements

When identifying certain mandatory or categorically eligible populations, the federal government mandates certain minimum protections regarding age, blindness and disability status. Individuals may not be barred from Medicaid due to an age requirement higher than 65. A state's definition of blindness must be the SSI definition or, in section 209 (b) states, no more restrictive than the one used in those states' Medicaid plans on January 1, 1972. See 42 CFR section 435.530(A)(2). With respect to persons with a disability, SSI states must use the SSI definition of disability. Section 209(b) states are permitted to use a more restrictive definition of disability if it is not more restrictive than the definition used in their Medicaid plans on January 1, 1972 pursuant to 42 CFR section 435.540. Federal law permits disability determinations to be made by different agencies depending on the states' configuration.

Optional Populations

States have the option to extend Medicaid benefits to certain groups of categorically and medically needy individuals. Federal law specifies which groups of categorically and medically needy individuals may receive benefits.

Optional Categorically Needy

States may provide Medicaid for persons eligible for but not receiving Aid to Families with Dependent Children (AFDC) now replaced with Temporary Assistance for Needy Families (TANF) providing cash assistance to indigent families with dependent children, to help pay for cost in an assisted living facility, mental health residential treatment facility, and adult family care home. It is not a Medicaid program SSI, or Optional State Supplement (OSS). Further, states may provide Medicaid for persons residing in Medicaid-participating medical institutions or intermediate care facilities who are ineligible for AFDC, SSI, or the OSS only because of their institutional status.

Optional Medically Needy:

States may allow all Medically Needy persons who are aging, blind, disabled, or caretaker relative to qualify for Medicaid. These groups would otherwise be eligible as mandatory or optional groups but for their income or resources or both which are above the required level.

Mandatory Services for the Categorically Needy

The following services are required to be provided to those individuals who are eligible based on a categorical classification and include inpatient hospital services, outpatient hospital services, rural health clinic services, federal qualified health center services, laboratory and x-ray services, nursing facility services, vision services, medical and surgical dental services.

Mandatory Services for the Medically Needy

The following services are required to be provided to those individuals who are eligible based on

medically needy classification and include all of the services provided to the categorically eligible groups listed supra, and ambulatory services for individuals entitled to institutional services, and home health services to any individual entitled to skilled nursing facility services. If a state plan includes services in an institution for mental diseases or in an intermediate care facility for the mentally retarded for any group of the medically needy, additional service requirements apply. The state may also elect to cover additional services for the medically needy. See 42 CFR section 440.220.

Optional Services

The following include a list of optional services for Medicaid eligible individuals and include prescription drugs, dentures, prosthetic devices, and eyeglasses. Also included are medical care services or other types of remedial care furnished by licensed practitioners. Optional services may also include diagnostic, screening, preventative, and rehabilitation services, home health care services, private duty nursing services, clinic services dental services physical therapy and related services and case management services. Optional services will also cover respiratory care, community supported living arrangements, inpatient hospital and nursing facility services for individuals age 65 or older in mental institutions and services and in intermediate care facility for the mentally retarded. Hospice care, primary care case management services, services under the Program for All inclusive Care for the Elderly (PACE) program as well as other medical care and any other type of remedial care. Home and community care for functionally disabled elderly individuals are also included.

Quality of Care

The federal government requires that Medicaid administered by the state in the context of the state plan assure certain standards of quality in the delivery of care pursuant to 42 U.S.C. section 1396a (a) (30) (A). Specifically, the federal statute requires that a state Medicaid plan provide such methods and procedures relating to the payment for care and services as may be necessary to assure that payments are consistent with the quality of care (among other criteria) and are sufficient to enlist enough healthcare providers so that care and services listed under Medicaid are in reality available to the same extent such services are available to the population at large in that same geographic territory.

The Insidious Threat of Medicaid reimbursement Rates

A read of the list of covered services under Medicaid and its various programs appears to be a fairly robust and full spectrum of healthcare policy to its citizenry. One area of advocacy centers on the reality of the ever-present threat of lower reimbursement rates for Medicaid provided services to healthcare providers. This economic reality often results in physicians and facilities declining to accept Medicaid reducing access to care arguably in violation of 42 USC section 1396a and its subparts.

In Conclusion

Consequently, advocacy is required on the part of attorneys and other advisers involved with special needs trusts to assure access to care. Thus the role of public benefits and special needs trusts play only one part in the overall constellation of strategies necessary to assure the highest quality of life

for a person with special needs. Advocates must consider the role of Obamacare health insurance, Medicare and private health insurance along with unpaid caregivers, comprised of family and friends as well as paid private help.

Medicaid: Populations and Services

National Special Needs Trust Seminar
October 2015

Medicaid Overview

- Needs-based government program operated by both the federal government and the states. Administered at local level by state agencies.
- State programs vary. However, to receive federal funding states must provide mandatory services to certain populations.
- States also have the option of using federal funds for other populations and services.
- Services under a state Medicaid plan must be generally available throughout the entire state. 42 USC § 1396a(a)(1). *See* 42 CFR § 431.50 for exceptions.

Medicaid and Long Term Services and Supports (LTSS)

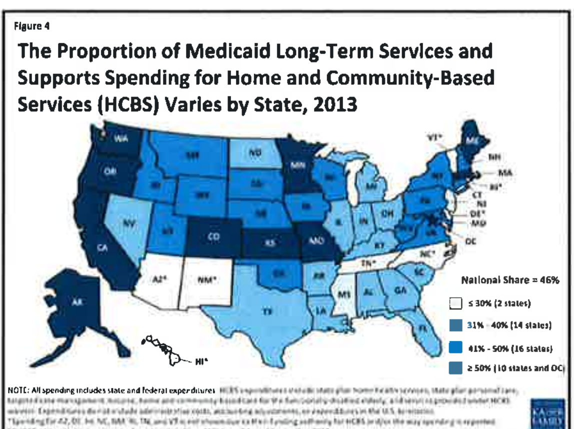
- Medicaid covers acute and LTSS needs of millions of low-income Americans, and is the primary payer for institutional and community-based LTSS.
- LTSS include a range of personal care services, as needed as a result of aging, chronic illness, or disability.
- Services can be delivered in institutional, home and community-based settings.
- Services include:
  - Assistance with activities of daily living (ADLs) and instrumental activities of daily living (e.g. prepping meals, housekeeping, managing medication).
  - Nursing facility care, adult daycare programs, intermediate care facilities for individuals w/ intellectual disabilities, home health aide services, personal care services, transportation, and supported employment as well as assistance provided by a family caregiver.

Institutional Long Term Care

- In 2010, 29% of Medicaid LTSS beneficiaries received solely institutional services.
- Coverage includes inpatient, comprehensive services. Includes room and board.
- Institutions are licensed and state-certified residential facilities that assume costs of care for individuals.
- Types:
  - Nursing Facility Services
  - Services Provided in Intermediate Care Facilities for Persons with Mental Retardation
  - Mental Hospital Services for People Age 65 and Older

Home and Community-based Services (HCBS) Programs

- HCBS allow Medicaid beneficiaries to receive services in their homes and communities.
- Growth in Medicaid HCBS participation.
  - 2001 – 2.1M → 2011 – 3.2M
- 3.2 million people accessed LTSS through one of the three main Medicaid HCBS programs. (2011). Of this population:
  - 813,955 people received home health state plan services (in 50 states and DC)
  - 960,752 received personal care state plan services (32 states).
  - 1.45 million were serviced through § 1915(c) waivers (47 states and DC)



2 Types of Populations Eligible for Medicaid: Categorically and Medically Needy

- Categorically Needy – individuals who are categorically needy must be included in the state's Medicaid program
- Medically Needy – states may extend Medicaid eligibility to persons who would be eligible for Medicaid as categorically needy except that their income and/or resources are above the limit.

Mandatory Populations

- SSI Recipients:
  - SSI states: all SSI recipients eligible for Medicaid. 42 CFR § 435.120
  - § 209(b) States: more restrictive than SSI federal eligibility. 42 CFR § 435.121
- Individuals who are entitled to mandatory state supplements to federal SSI payments. 42 CFR § 435.130
- Grandfathered groups: individuals who were eligible for Medicaid/SS/SSI in the 1970s and other groups such as certain disabled widows and widowers. See 42 CFR § 435.131-435.138.

Mandatory Populations: SSI States

- Aged, blind, and disabled individuals or couples who are receiving or are deemed to be receiving SSI.
- To be eligible for SSI, individuals must not have more than $753 in unearned monthly income (or $1,120 for a couple) and no more than $2,000 in assets (or $3,000 for a couple). There are exclusions (e.g. home, personal items, burial account, etc.). (2015)
- Also eligible: individuals receiving SSI pending a final determination of blindness/disability; receiving SSI under agreement w/ SSA to dispose of resources that exceed the SSI dollar limits on resources, or receiving benefits under § 1619(a) or (b) status (blind individuals or those with disabling impairments whose income equals or exceeds a specific SSI limit).

Mandatory Populations: § 209(b) States

- § 209(b) states are permitted to adopt more restrictive eligibility requirements only if the requirements are not more restrictive than the state's Medicaid plan in effect on 1/1/1972.
- If a state's 1972 Medicaid plan was more liberal than the current SSI program, the state must use the current SSI program requirements (except to the extent the state elects to use more liberal criteria under § 435.601). 42 CFR § 435.121.
- For determining income for § 209(b) states, a "spend down" procedure must be used.
- Connecticut, Hawaii, Illinois, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, and Virginia

Federal Mandatory Populations Requirements

- **Age**: states may not impose an age requirement higher than 65.
- **Blind**: a state's definition of blindness must be the SSI definition or, in § 209(b) states, no more restrictive than the one used in the state's Medicaid plan on 1/1/72. 42 CFR § 435.530(a)(2)
- **Persons w/ a Disability**: SSI states must use the SSI definition of disability. § 209(b) states are permitted to use a more restrictive definition of disability if it is not more restrictive than the definition used in their Medicaid plans on 1/1/1972. 42 CFR § 435.540. Disability determination may be made by different agencies, depending on the states

Optional Populations

- States have the option to extend Medicaid benefits to certain groups of categorically and medically needy individuals. Federal law specifies which groups of categorically and medically needy individuals may receive benefits.
- **Optional Categorically Needy:**
  - May provide Medicaid for persons eligible to receive AFDC, SSI, or optional state supplement but not receiving it.
  - May provide Medicaid for persons residing in Medicaid-participating medical institutions or intermediate care facilities who are ineligible for AFDC, SSI, or the optional state supplement only because of their institutional status.
- **Optional Medically Needy**: may allow all medically needy persons who are Aged, Blind, Disabled, or Caretaker Relative to qualify for Medicaid. These groups would otherwise be eligible as mandatory or optional groups but for their income and/or resources are above the required level.

Mandatory Services for the Categorically Needy

- Inpatient Hospital Services
- Outpatient Hospital Services
- Rural Health Clinic Services
- Federal Qualified Health Center Services
- Laboratory and X-ray Services
- Nursing Facility Services
- Physician Services
- Medical and Surgical Dental Services

Mandatory Services for the Medically Needy

- If a state adopts a medically needy program, it must provide the mandatory services as listed for the categorically needy groups, as well as ambulatory services for individuals entitled to institutional services, and home health services to any individual entitled to SNF services.
- If a state plan includes services in an institution for mental diseases or in an intermediate care facility for the mentally retarded for any group of the medically needy, additional service requirements apply.
- The state may also elect to cover additional services for the medically needy.
- See 42 CFR § 440.220

Optional Services

- Prescription drugs
- Dentures, prosthetic devices, and eyeglasses
- Medical care, or other types of remedial care furnished by licensed practitioners
- Diagnostic, screening, preventive, and rehab services
- Home health care services
- Private duty nursing services
- Clinic services
- Dental services
- Physical therapy and related services
- Case Management Services

Optional services: cont.

- Respiratory care services
- Community supported living arrangements
- Inpatient hospital and nursing facility services (for individuals 65 or over in mental institutions)
- Services in an intermediate care facility for the mentally retarded
- Hospice Care
- Primary Care Case Management Services
- Services furnished under PACE program
- Other medical care and any other type of remedial care
- Home and community care for functionally disabled elderly individuals

Basics of Special Needs Trusts

Thursday, October 15, 2015

Breakout Session 3
3:30 P.M. – 4:20 P.M.

Preparing to Present the SNT to the Court for Approval

Presenter:
Shirley B. Whitenack
Attorney at Law
Schenck, Price, Smith & King, LLP
Florham Park, NJ

- Materials
- Appendix 1-6
- PowerPoint

Stetson University College of Law presents:
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THE NATIONAL CONFERENCE
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The Vinoy Renaissance Resort & Golf Club
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When does a court need to approve and establish a self-settled special needs trust?

Pursuant to 42 U.S.C. §1396p(d)(4)(A), a self-settled special needs trust ("SNT" or "OBRA '93 Trust") funded with the assets of the beneficiary with disabilities can only be established by a parent, grandparent, guardian or a court. Under current law, a competent person with disabilities cannot establish his or her own special needs trust.

Generally, self-settled special needs trusts are funded with assets that the beneficiary has inherited outright, with assets obtained through a settlement or award of a tort claim, and/or with assets titled in the name of the beneficiary. When the victim of a tort claim is a minor or an incapacitated adult, a court generally will need to approve the settlement and therefore, the same court often will establish the special needs trust. When the beneficiary is competent, the trust may be established by a parent or a grandparent. If a competent person does not have a parent or grandparent who can establish the trust, a court will need to establish the trust. While federal law authorizes a guardian of an incapacitated person to establish a self-settled trust on behalf of the ward, most states require the guardian to seek court approval to establish and fund the trust.

The Social Security Administration's Program Operations Manual System and its Impact on Court Actions to Approve and Establish SNTS

The Social Security Administration's ("SSA") Program Operations Manual System ("POMS") is a policy and procedure manual that the agency's employees use in evaluating eligibility for Supplemental Security Income ("SSI") benefits. As a very large number of individuals with disabilities receive monthly SSI benefits as well as categorically linked Medicaid benefits, practitioners must become familiar with and understand the POMS sections dealing with SNTs.

SI 01120.203 of the POMS distinguishes between the individual who physically takes action to establish a self-settled special needs trust and the individual who provides the corpus or transfers his or her own assets into the trust. This section of the POMs notes that a parent or a grandparent of a competent adult with disabilities may establish a “seed” trust using a nominal amount of his or her own money pursuant to state law or may establish an empty or dry trust. Once the trust is established, a competent adult may transfer his or own assets into the trust or another individual with legal authority, *e.g.,* an attorney-in-fact pursuant to a power or attorney, may transfer the assets of the person with disabilities into the trust. (Appendix 2)

The establishment of a special needs trust and the funding of the trust are two different actions that may be taken by different individuals. In all instances, however, the establishment and funding of the trust must be effectuated by individuals with legal authority.

The Eighth Circuit’s analysis of court actions to approve and establish SNTs

In *Draper v. Colvin,* 779 F.3d 556 (8th Cir. 2015) (Appendix 1), the Court of Appeals for the 8th Circuit affirmed a federal district court’s decision affirming the denial of SSI benefits to a young woman who suffered a traumatic brain injury in an automobile accident because her parents acted as her agents under a power of attorney when they established a self-settled special needs trust with assets from a personal injury settlement.

Stephany Draper was 18 years old when she suffered a traumatic brain injury in June 2006. She signed a durable power of attorney designating her parents as her agents. She began receiving SSI benefits in July 2007. Seven months later, on February 12, 2008, her father executed a personal injury settlement statement on behalf of Stephany under which she received $429,259.41. Later that same day, Stephany’s parents signed documents creating the Stephany

Ann Draper Special Needs Trust pursuant to 42 U.S.C.§ 1396p(d)(4)(A). Also on that same day, the settlement proceeds were deposited into the trust.

In September 2008, Stephany received a notice from the SSA that she had been overpaid a total of about $3,000 in SSI benefits from February 2008 through September 2008 because her assets, including those in the trust, exceeded the SSI limit of $2,000. On appeal, the administrative law judge found that the trust did not qualify for an exemption under 42 U.S.C. §1396p(d)(4)(A) because her parents acted as Stephany's agents under the power of attorney when they established the trust even though the power of attorney was not referenced in the trust documents. *Id.* at 558-559.

While an appeal to the Social Security Appeals Council was pending, Stephany's parents obtained a state court order modifying the trust *nunc pro tunc* effective the date the trust documents were signed, to retroactively name the state court as settler of the trust. The Appeals Council, however, denied the request for review and determined that the state court's *nunc pro tunc* order did not "establish" the trust and the district court affirmed.

The Eighth Circuit's application of *Skidmore* deference

The court below determined that the POMs provisions dealing with SNTs warranted deference under *Skidmore v. Swift & Co.,* 323 U.S. 135, (1944). *Skidmore* deference acknowledges that an agency's interpretation of a statute it is charged with implementing "may merit deference … given the 'specialized experience and broader investigations and information' available to the agency." *Id.* at 560 (quoting *Skidmore*, 323 U.S. at 139). The amount of deference depends on several factors, including "(1) the thoroughness of the agency's consideration, (2) the validity of its reasoning, (3) consistency with earlier and later

pronouncements, (4) formality, (5) expertise of the agency, and (6) all those other factors 'which give it power to persuade, if lacking power to control." *Id.* at 561 (quoting *Skidmore* at 140). The Eight Circuit panel agreed that the POMS provisions interpreting 42 U.S.C. §1396p(d)(4)(A) warrant *Skidmore* deference.

The Eighth Circuit's analysis and conclusions

In affirming the district court's decision, the Court of Appeals rejected Stephany's argument that her parents acted in their individual capacities to form a dry or empty trust. It noted that the proceeds of the personal injury settlement were deposited into the trust the same day that it was created. Citing the *Restatement (Third) of Trusts §2 cmt. I* (2003), the 8th Circuit panel stated that a trust is not created under traditional trust law principles until trust property is transferred into the trust. *Id.* at 563. Second, the appellate court stated that under traditional trust law and the POMS, when a trust is formed with an initial existing *res*, someone with a legal interest in the entire res must be involved in the trust's creation in order for the trust to be valid. *Id.* The *Draper* Court concluded that Stephany's parents acted as agents under the power of attorney when they funded the trust with the settlement proceeds because they had no legal interest in the settlement proceeds. Therefore, according to the Court, the trust was established through the actions of Stephany herself and did not qualify as a special needs trust, notwithstanding evidence in the record supporting Stephany's claim that her parents intended to act in their individual capacities. *Id.* at 564.

Turning to the state court's order modifying the trust, the Court of Appeals held that pursuant to the POMS, a court-created trust is valid only if it is required by court order. Noting that the state court did not order the creation of the trust, the *Draper* Court concluded that the

state court's action only served to retroactively approve the trust which is insufficient under the POMS. *Id.*

What can we learn from Draper?

The primary lesson from *Draper* is that the practitioner must be meticulous in using a two step process. First, the trust must be established through the actions of a parent, grandparent, legal guardian or a court and, under current law, never through the actions of the individual with disabilities or his or her agent under a power of attorney. Second, the trust must be funded by someone with legal authority over the property to be deposited into the trust. The individual with disabilities or his or her agent under a power of attorney may have the legal right to fund a trust with the disabled individual's funds after the trust has been formed. A legal guardian usually needs court approval to fund the trust with the disabled beneficiary's money.

SSA Announcement

An SSA Announcement effective May 28, 2015 clarifies the SSA's policy regarding the establishment of special needs trusts by court orders. Appendix 3. A copy of the Announcement can also be accessed at https://attorney.elderlawanswers.com/uploads/media/documents/am-15032.pdf. Among other things, the Announcement states that a court can approve petitions and establish special needs trusts by court order "so long as the creation of the trust has not been completed before the order is issued by the court."

If a court is to establish a special needs trust, the court should execute an order expressly establishing the trust and finding that the establishment of the trust is required. It is not enough for the court to merely approve the establishment of the trust. POMS SI 01120.203B(1)(f) ("In

the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. Approval of a trust is not sufficient.").

Drafting an SNT for the court

Depending on state trust law, the trust document can be in the form of a Declaration of Trust which does not require the judge's signature, a trust that sets forth the parent, grandparent or legal guardian as the nominal grantor with a court order directing the nominal grantor to execute the trust, or a trust document signed by the judge. Our office often drafts a Declaration of Trust because it eliminates the need for anyone but the trustee to sign the document and it ameliorates the concern of judges who do not feel comfortable signing a trust document. Attached as Appendix 4 is precatory language we typically include in our Declaration of Trust for court-ordered SNTs.

The trust document should clearly state the source of the funding. If the trust is to be seeded, "seed trust" language should be included in the trust paragraph dealing with funding. All of the other requirements for self-settled special needs trusts set forth in 42 U.S.C. §1396p(d)(4)(A), 42 U.S.C. § 1382b(e)(5), the POMs and state law should be recited in the trust. The trust should not be signed before it is approved and established by the court.

Petitions for court approval and establishment of SNT

If there is no pending action before a court, the practitioner must determine whether a complaint or petition must be filed requesting the establishment of the trust as well as the proper court and venue. In New Jersey, for example, a complaint requesting the establishment by the court of a special needs trust might be filed with the probate court or a court of general equity. If

there also is a request to approve a tort settlement for a minor or incapacitated person, the action would be filed instead with the Law Division of the New Jersey Superior Court.

It may be necessary to set forth in the complaint or petition the particular facts about the beneficiary and the trustee. The court may require the filing of the consent of the proposed trustee and the beneficiary.

In Florida, the practice is to establish a "voluntary" guardianship for competent adults. A physician's statement that the individual is disabled but competent is obtained. A petition for "voluntary" guardianship is then filed. The court appoints the guardian at a hearing where the attorney files a separate petition authorizing the establishment of a special needs trust. After the special needs trust is signed, the attorney petitions the court to dismiss the guardianship.

Notice requirements

Consideration must be given to notice requirements. In some states, the proposed special needs trust must be submitted to the Medicaid agency for pre-approval. *See, e.g.,* Georgia Medicaid Manual, Section 2346, which requires the attorney to The attorney should send the special needs trust to DCH Legal Services two months prior to execution and/or judicial approval. http://www.georgiamedicaidlaw.net/gamedicaid/2346.pdf. Other states may require the attorney to serve copies of the complaint and accompanying papers upon the Social Security Administration or the state or local Medicaid agency if the beneficiary is already accessing SSI and Medicaid benefits. In some jurisdictions such as Orleans County, New York, the attorney must obtain the consent of the attorney for the local department of social services.

Briefing the issues

It may be necessary to file a brief with the complaint or petition. The brief should set forth the court's authority to establish the special needs trust. While 42 U.S.C. §1396p(d)(4)(A) authorizes a court to establish the trust, the court may be concerned over whether it has subject matter jurisdiction to establish a self-settled trust. In 2000, the New Jersey Legislature enacted legislation to expressly authorize courts to establish special needs trusts pursuant to 42 U.S.C. §1396p(d)(4)(A) and set forth factors to be considered by the court prior to establishing the trust. N.J.S.A. 3B:11-36, -37. Other states may have statutes or other legal authority authorizing the court to establish a self-settled trust on behalf of a beneficiary with disabilities in addition to federal law.

Hearings and court orders

The court typically fixes a date and time for a hearing on the petition or complaint. The hearing may require appearances of the petitioner and other interested parties or the court may dispense with the need for appearances and may issue a decision based on the papers that were filed. The court will then issue an order establishing the trust. The order should expressly state that a special needs trust is required and that the court is approving and establishing the trust. The order may include a direction to a legal guardian, parent or grandparent to sign the trust document. Following is language typically included in the orders prepared by our office:

IT IS FURTHER ORDERED THAT the court having found that although the amount of the settlement received by Susan Smith is reasonable, it may be insufficient to meet all of the needs of Susan Smith for the remainder of her life, and therefore the Court must dictate the purposes for which the settlement funds can be used to ensure that Susan Smith derives significant benefit from the settlement and therefore, the Court hereby orders that the settlement funds shall be paid to the Trustee of the special needs trust created for the benefit of Susan Smith known as the Susan Smith Special Needs Trust; and

IT IS FURTHER ORDERED THAT plaintiff, having submitted to the Court for review the proposed Susan Smith Special Needs Trust, such trust is approved. For the purposes of 42 U.S.C. §1396p(d)(4)(A) and 42 U.S.C. § 1382b(e)(5), the Susan Smith Special Needs Trust shall be deemed to have been established by this Court.

Trust execution

The trust should be executed and funded **after** the court order is issued to avoid a *Draper* problem. As noted in the POMS and in *Draper*, court approval of a completed SNT will not qualify under the special needs trust exception. The issuance of the court order may take up to several months after the petition is filed depending on the jurisdiction.

Special Needs Trust Fairness Act

The Special Needs Trust Fairness Act of 2015 is designed to permit competent adults with disabilities to establish their own special needs trusts. The federal law on pooled trusts, 42 U.S.C. §1396p(d)(4)(C), allows individuals with disabilities to place their funds into a pooled non-profit trust but the words "the individual" was omitted in 42 U.S.C. §1396p(d)(4)(A) in the section setting forth the parties that can establish a self-settled special needs trust.

At the time of this writing, the United States Senate has unanimously passed the Act. A hearing before the House Energy & Commerce Committee Subcommittee on Health held a hearing on the Act on September 18, 2015. The passage of the Act will obviate the need to seek court orders establishing special needs trusts for competent adults. There still will be a need to seek court approval, however, in cases where the beneficiaries are minors or are incapacitated.

APPENDIX !

Stephany Draper, Plaintiff - Appellant v. Carolyn W. Colvin, Acting Commissioner of the Social Security Administration, Defendant - Appellee; National Academy of Elder Law Attorneys; Special Needs Alliance, Amici on Behalf of Appellant

No. 13-2757

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

779 F.3d 556; 2015 U.S. App. LEXIS 3261; Unemployment Ins. Rep. (CCH) P15,370; 214 Soc. Sec. Rep. Service 21

October 9, 2014, Submitted
March 3, 2015, Filed

PRIOR HISTORY: [**1] Appeal from United States District Court for the District of South Dakota - Sioux Falls.
Draper v. Colvin, 2013 U.S. Dist. LEXIS 96237 (D.S.D., July 10, 2013)

COUNSEL: For Stephany Draper, Plaintiff - Appellant: Richard D. Casey, Lynn & Jackson, Sioux Falls, SD; R. Eric Solem, Solem & Mack, Englewood, CO.

For Carolyn W. Colvin, Acting Commissioner of the Social Security Administration, Defendant - Appellee: Stephanie Carlson Bengford, Assistant U.S. Attorney, Kevin Koliner, Assistant U.S. Attorney, U.S. Attorney's Office, Sioux Falls, SD; John Jay Lee, Supervisory Attorney, Social Security Administration, Office of the General Counsel, Region VIII, Denver, CO.

For National Academy of Elder Law Attorneys, Special Needs Alliance, Amici on Behalf of Appellant(s): Ron M. Landsman, Rockville, MD; Craig C. Reaves, Reaves Law Firm, P.C.

JUDGES: Before MURPHY, SMITH, and GRUENDER, Circuit Judges.

OPINION BY: GRUENDER

OPINION

[*558] GRUENDER, Circuit Judge.

Stephany Draper appeals from the district court's[1] decision affirming the termination of her Supplemental Security Income ("SSI") payments. The district court held that Draper was not eligible for SSI benefits because the funds in her trust raised her assets above the eligibility limit. We affirm.

1 The Honorable Karen E. Schreier, then Chief Judge, United States [**2] District for the District of South Dakota.

I.

Eighteen-year-old Stephany Draper suffered a traumatic brain injury in a car accident in June 2006. Draper executed a durable power of attorney, authorizing her parents, John and Krystal Draper, to, among other things: (1) "demand, sue for, recover, collect, and receive" every sum of money belonging to or claimed by Draper; (2) "compromise or compound any claim or demand;" and (3) "fund, transfer assets to, and to instruct and advise the trustee of any trust wherein [Draper is] or may be the trustor, or beneficiary."

Draper began receiving SSI payments in July 2007. Approximately seven months later, on February 12, 2008, John Draper signed a personal-injury settlement statement on Draper's behalf, under which Draper received $429,259.41. Later that day, Draper's parents, without referencing the power of attorney, signed documents creating the Stephany Ann Draper Special Needs Trust. As explained in the trust document, Draper's parents intended for the trust to qualify under *42 U.S.C. ß*

1396p(d)(4)(A), meaning that it would provide for Draper's needs without "displac[ing] or supplant[ing] public assistance or other sources of support that may otherwise be available to the beneficiary." The [**3] trust listed as its funding source only "the proceeds of the settlement of a liability claim," referring to the money Draper received in the personal-injury settlement. The trust was funded with the $429,259.41 sum in a single deposit on the same day that her parents executed the trust agreement.

In September 2008, Draper received notice from the Social Security Administration ("SSA") that she had been overpaid a total of about $3,000 in SSI benefits from February through September 2008 because her assets, including the funds in the trust, exceeded the SSI-eligibility limit of $2,000. The SSA also informed Draper that her SSI payments would cease. Draper appealed the agency decision to an Administrative Law Judge ("ALJ").

The ALJ found that Draper had been overpaid SSI benefits because her special-needs trust was not exempt from being counted as a personal asset under *ß 1396p(d)(4)(A)*. To reach this conclusion, the ALJ relied on the SSA's interpretation of *ß 1396p(d)(4)(A)* set forth in its Program Operations Manual System ("POMS"), a policy and procedure manual that agency employees use in evaluating eligibility for SSI benefits. According to the POMS, Draper's parents had to act as third-party creators when establishing [**4] the trust in order for it to be exempt under *ß 1396p(d)(4)(A)*. *POMS SI 01120.203B(1)(g)*. The ALJ found that the [*559] trust did not qualify because Draper's parents acted as Draper's agents under the power of attorney when they established the trust. Accordingly, the ALJ held that Draper was ineligible for SSI benefits.

Draper requested review by the Social Security Appeals Council. While her appeal was pending and in an effort to remedy the trust's non-compliance, Draper's parents obtained a state court order modifying the trust *nunc pro tunc*, effective February 12, 2008, which retroactively listed the state court, rather than Draper's parents, as the trust's settlor. The Appeals Council denied Draper's request for review and determined that the state court's order modifying the trust did not provide a basis for altering the ALJ's decision. The district court affirmed the judgment of the SSA, likewise holding that the trust failed to meet the requirements laid out in the POMS. Draper now appeals.

II.

We review *de novo* the district court's decision affirming the denial of SSI benefits. *Byes v. Astrue, 687 F.3d 913, 915 (8th Cir. 2012)*. We will reverse the findings of an agency only if they are not supported by substantial evidence or result from an error [**5] of law. *42 U.S.C. ß 405(g)*; *Mason v. Barnhart, 406 F.3d 962, 964 (8th Cir. 2005)*. "Substantial evidence is 'less than a preponderance,' but 'enough that a reasonable mind would find it adequate to support the Commissioner's conclusions.'" *Travis v. Astrue, 477 F.3d 1037, 1040 (8th Cir. 2007)* (quoting *Dunahoo v. Apfel, 241 F.3d 1033, 1037 (8th Cir. 2001)*). "If substantial evidence supports the Commissioner's conclusions, this court does not reverse even if it would reach a different conclusion, or merely because substantial evidence also supports the contrary outcome." *Id.* "Whether the ALJ based his decision on a legal error is a question we review de novo." *Juszczyk v. Astrue, 542 F.3d 626, 633 (8th Cir. 2008)*.

Draper contends the SSA erred by concluding that her trust did not qualify under *ß 1396p(d)(4)(A)* because her parents satisfied the qualifying-trust criteria or, alternatively, because the state court's retroactive action naming itself as settlor remedied any initial non-compliance. Our review requires us to examine whether Draper's parents or the state court properly established a qualifying trust. To complete this task, we begin our analysis with the text of the statute. We then examine whether the SSA's interpretation of any ambiguities in the statute's text warrants deference. Finally, we explore whether Draper's parents took the steps necessary to comply with the qualifying-trust requirements when creating the Stephany [**6] Ann Draper Special Needs Trust.

A.

Under Title XVI of the Social Security Act, "[e]very aged, blind, or disabled individual who is determined . . . to be eligible on the basis of his income and resources shall . . . be paid benefits by the Commissioner of Social Security." *42 U.S.C. ß 1381a*. When such an unmarried individual's personal resources exceed $2,000, he or she loses eligibility for SSI benefits. *42 U.S.C. ß 1382(a)(3)(B)*. Certain assets are exempt from being counted against this $2,000 limit, however, including special-needs trusts under *ß 1396p(d)(4)(A)*. *42 U.S.C. ß 1382b(e)(5)*. The question at issue in this case is whether the Stephany Ann Draper Special Needs Trust qualifies under this statute.

As in any review of agency interpretations of federal law, we begin our analysis with the text of the statute, *42 U.S.C. ß 1396p(d)(4)(A)*, incorporated by *42 U.S.C. ß 1382b(e)(5)*. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council,* [*560] *Inc., 467 U.S. 837, 842-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*. We examine whether the statute's language speaks to the two issues raised by the parties in this case: (1) whether parents acting under power of attorney may create and fund a qualifying trust and (2) whether a court's *nunc pro tunc* order modifying

a trust such that the court is listed as its original settlor operates to "establish" retroactively a qualifying trust. *Section 1396p(d)(4)(A)* defines a qualifying trust as:

> A trust containing the assets of an individual [**7] under age 65 who is disabled (as defined in *section 1382c(a)(3)* of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

We agree with the district court that Congress, in the text of *ß 1396p(d)(4)(A)* and *ß 1382b(e)(5)*, did not speak directly to the questions at issue here. Specifically, the text does not answer whether parents exercising power of attorney for their child may create and fund a qualifying trust nor does it explain what process a court or a parent must follow to "establish" such a trust. Neither *ß 1396p(d)(4)(A)* nor *ß 1382b(e)(5)* provides a definition of "parent" or "establish," and we find no other indication that Congress contemplated these issues when incorporating *ß 1396p(d)(4)(A)*'s language into *ß 1382b(e)(5)*.[2] *See Chevron, 467 U.S. at 851* (discussing textual ambiguity). We therefore conclude that the text is ambiguous on these points and that Congress left a gap for the agency to fill in overseeing the daily administration of the special-needs trust exception. *See Schweiker v. Gray Panthers, 453 U.S. 34, 43, 101 S. Ct. 2633, 69 L. Ed. 2d 460 (1981)* (noting Congress has [**8] granted the agency administering the Social Security Act "exceptionally broad authority to prescribe standards"); *Team-Bank, N.A. v. McClure, 279 F.3d 614, 618-20 (8th Cir. 2002)* (stating that an agency may fill statutory gaps through interpretation). Accordingly, we find that the agency had authority to interpret the statute, and we next examine whether the SSA permissibly construed *ß 1396p(d)(4)(A)* in the POMS. *See United States v. Mead Corp., 533 U.S. 218, 229, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001)*.

> 2 If anything, *ß 1396p(d)(2)(A)* provides a definition of "establish" contrary to Draper's position. However, we acknowledge that it is unclear whether *ß 1396p(d)(2)(A)* applies to *ß 1396p(d)(4)(A)* and whether Congress incorporated definitions from *ß 1396p(d)(2)(A)* into *ß 1382b(e)(5)*.

B.

The district court determined that the POMS provisions at issue warrant deference under *Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944)*. *Skidmore* deference recognizes that an agency's interpretation of the statute it is charged with implementing "may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *Mead, 533 U.S. at 234* (quoting *Skidmore, 323 U.S. at 139*). Such deference operates along a spectrum. *Id. at 228*. The amount of deference afforded to an agency interpretation under *Skidmore* turns on several factors, including: [*561] (1) the thoroughness of the [**9] agency's consideration, (2) the validity of its reasoning, (3) consistency with earlier and later pronouncements, (4) formality, (5) expertise of the agency, and (6) all those other factors "which give it power to persuade, if lacking power to control." *Id. at 228-29* (quoting *Skidmore, 323 U.S. at 140*).

We conclude that the district court properly held that the provisions in the POMS interpreting *ß 1396p(d)(4)(A)* warrant *Skidmore* deference. According respect under *Skidmore* here is consistent with the Supreme Court's conclusions that "[t]he Social Security Act is among the most intricate ever drafted by Congress," *Schweiker, 453 U.S. at 43*, and that Congress routinely relies on agencies to fill gaps in the statutes they administer. *See 42 U.S.C. ß 405(a)* (giving the Commissioner "full power and authority to make rules and regulations and to establish procedures" to administer the Social Security Act); *Chevron, 467 U.S. at 843* (noting that Congress explicitly and implicitly delegates authority to agencies to fill statutory gaps); *see also Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385-86, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003)* (granting the POMS provisions examined in that case respect under *Skidmore*); *Gragert v. Lake, 541 F. App'x 853, 856 n.1 (10th Cir. 2013)* (stating that the POMS warrants respect under *Skidmore*); *Carillo-Yeras v. Astrue, 671 F.3d 731, 735 (9th Cir. 2011)* (stating that the POMS may be entitled to respect under *Skidmore* "to the extent it provides a persuasive interpretation of an ambiguous [**10] regulation"); *accord Davis v. Sec'y of Health & Human Servs., 867 F.2d 336, 340 (6th Cir. 1989)* ("Although the POMS is a policy and procedure manual that employees of the [administering agency] use in evaluating Social Security claims and does not have the force and effect of law, it is nevertheless persuasive.").

We further agree with the district court's conclusion that the POMS provisions at issue here--namely, those in

POMS SI 01120.203B--warrant relatively strong *Skidmore* deference. The relevant POMS provisions fall squarely within the SSA's area of expertise. *See Hagans v. Comm'r of Soc. Sec., 694 F.3d 287, 303 (3d Cir. 2012)* (explaining that the SSA "has a great deal of expertise in administering" the Social Security program). In addition, the POMS provisions demonstrate valid reasoning; that is, the detailed process required for establishing qualifying special-needs trusts contained in the POMS is consistent with "Congress's command that all but a narrow class of an individual's assets count as a resource when determining the financial need of a potential SSI beneficiary." *Draper v. Colvin, No. CIV. 12-4091-KES, 2013 U.S. Dist. LEXIS 96237, 2013 WL 3477272, at *9 (D.S.D. July 10, 2013)* (citing *42 U.S.C. ß 1382b*). Finally, the provisions interpreting *ß 1396p(d)(4)(A)* are part of a relatively long-standing and consistent interpretation that ensures universal applicability of the statute. *Id.*; *see Sai Kwan Wong v. Doar, 571 F.3d 247, 261 (2d Cir. 2009)* (noting that "the deference [**11] due to an agency interpretation is at the high end of the spectrum of deference when the interpretation in question is not merely ad hoc but is applicable to all cases" (quoting *Estate of Landers v. Leavitt, 545 F.3d 98, 110 (2d Cir. 2008)*); *cf. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988)* (declining to grant deference to an interpretation that emerged during litigation rather than through earlier agency action). Draper has not pointed to any contrary interpretation of *ß 1396p(d)(4)(A)* advanced by the SSA since the special-needs trust exception [*562] was incorporated into *ß 1382b*. For these reasons, we conclude the district court correctly held that Draper had to comply with the requirements listed in the POMS to establish a qualifying trust.

C.

We next examine whether Draper's trust complied with the POMS provisions interpreting *ß 1396p(d)(4)(A)*. *POMS SI 01120.203* provides a detailed process for creating a qualifying trust under this statute: "[T]o qualify for the special needs trust exception, the assets of the disabled individual must be put into a trust established through the actions of the disabled individual's: parent(s); grandparent(s); legal guardian(s); or a court." *POMS SI 01120.203B(1)(f)*. When a parent seeks to establish a trust for a legally competent adult, the POMS states that the parent "may establish a 'seed' trust using [**12] a nominal amount of his or her own money, or if State law allows, an empty or dry trust." *Id.* After a seed trust or an "empty" or "dry" trust is established, "the legally competent disabled adult may transfer his or her own assets to the trust or another individual with legal authority (e.g., power of attorney) may transfer the individual's assets into the trust." *Id.* Importantly, "[t]he special needs trust exception does not apply to a trust established through the actions of the disabled individual himself or herself." *Id.* Regarding the funding of the trust, the POMS provides the following:

> The person establishing the trust with the assets of the individual or transferring the assets of the individual to the trust must have legal authority to act with respect to the assets of that individual. Attempting to establish a trust with the assets of another individual without proper legal authority to act with respect to the assets of the individual will generally result in an invalid trust.
>
> . . .
>
> [A] trust established under a [power of attorney] will result in a trust we consider to be established through the actions of the disabled individual himself or herself because the [power of attorney] [**13] merely establishes an agency relationship.

POMS SI 01120.203B(1)(g).

Draper contends that her trust, at its inception, satisfied each of the POMS criteria. Specifically, she alleges that her parents, acting in their individual capacities, created a valid, qualifying, special-needs trust for her benefit. Only after the trust was established, she argues, was it funded with proceeds from the personal-injury settlement. Draper contends that this sequence of events conformed with both South Dakota law, *see S.D. Codified Laws ß 55-1-4* (noting that, under South Dakota law, an express trust is created when the "trustor indicat[es] with reasonable certainty . . . [t]he subject, purpose, and beneficiary"), and with the requirements set forth in the POMS.

Draper presents two theories supporting her conclusion. First, she argues that evidence in the record shows that her parents, acting in their individual capacities, formed a trust without a *res*--a so-called "empty" or "dry" trust[3]--and that this "empty" trust only later was funded [*563] with her personal-injury settlement proceeds. Thus, she argues that her parents complied with *POMS SI 01120.203B(1)(f)* because *POMS SI 01120.203B(1)(f)* permits this sequence of events in states recognizing "empty" [**14] trusts. Assuming without deciding that South Dakota law permits "empty" trusts, we nevertheless find that Draper's argument fails. The evidence shows that Draper's trust was not designed as an "empty" trust. Instead, the trust had an initial *res*--

the proceeds of the personal-injury settlement. The trust agreement executed on February 12, 2008 made this fact explicit, stating that "[t]his trust *is* funded with the proceeds of the settlement of a liability claim" (emphasis added), a $429,259.41 sum, which was transferred into the trust in a single deposit that same day. Thus, we see no evidence of an intent to create an "empty" trust to comply with the POMS, and we find no error in the district court's conclusion on this basis.

3 We note that the terms "dry" and "empty" trust, as used in trust law, sometimes refer to something other than a trust formed without assets. *See, e.g.*, 1 H. Tiffany, Real Property ß 247 (3d ed. 1939) (defining dry trusts); Norman Veasey, *Kutak Symposium: Professional Responsibility and the Corporate Lawyer, 13 Geo. J. Legal Ethics 331, 344 (2000)* (mentioning empty trusts). However, the parties here agree that the POMS intended to refer to a trust created without an existing *res*.

This finding brings us to Draper's [**15] second theory--even if the trust was not designed to be "empty," her parents still complied with the POMS because they acted only in their individual capacities when establishing her trust. We disagree. First, under traditional trust-law principles, establishing a non-empty trust requires more than the execution of trust documents; the funding of the trust with its initial *res* plays a key role. *See Restatement (Third) of Trusts ß 2 cmt. i* (2003) (noting that "merely entering into . . . an agreement or instrument of trust does not initially create a trust because of the absence of trust property, [but] a trust may . . . be created later if and when a transfer of trust property to the trustee is made with reference to that agreement or instrument"). Second, when a trust is formed with an initial, existing *res*, like the trust at issue here, both the POMS and traditional trust law hold that someone with a legal interest in the entire *res* must be involved in the trust's creation; otherwise, the trust is invalid. *POMS SI 01120.203B(1)(g)* ("Attempting to establish a trust with the assets of another individual without proper legal authority . . . will generally result in an invalid trust."); *Restatement (Third) of Trusts ß 41 cmt. b* (2003) ("[O]ne cannot create a trust of property [**16] of which another has sole and complete ownership.").

Draper's parents, in their individual capacities, had no interest in the entire sum constituting the trust's initial *res*, Draper's personal-injury settlement proceeds.[4] Instead, they held an interest in the full settlement sum only in their capacity as Draper's agents exercising the power of attorney. Because Draper wishes to avoid a finding that her parents created an invalid trust, we find substantial evidence in the record that Draper's parents necessarily were acting as her agents when they incorporated all of her settlement proceeds and thus when they established the Stephany Ann Draper Special Needs Trust. When Draper's parents exercised the power of attorney in this way--by funding a trust wherein Draper was the beneficiary[5]--the POMS "consider[ed] [the trust] to be established through the actions of the disabled individual . . . herself." *POMS SI 01120.203B(1)(g)*. Therefore, according to the POMS, the trust did not qualify under *ß 1396p(d)(4)(A)*. *POMS SI 01120.203B(1)(f)* (noting that "[t]he special [*564] needs trust exception does not apply to a trust established through the actions of the disabled individual himself or herself").

4 In a motion filed in the district court, [**17] Draper's parents conceded that they did not contribute any of their own funds to the trust's initial *res* and that they did not create a seed trust for their daughter.

5 This action expressly was permitted by the power of attorney.

Admittedly, some evidence in the record supports Draper's claim that her parents intended to act in their individual capacities. Draper's parents identified themselves individually as settlors and trustees, and the trust document explicitly states that it was established "pursuant to *42 U.S.C ß 1396p(d)(4)(A)*," a provision which notes that a third party, such as a parent, must create the special needs trust for the benefit of the disabled person. Nevertheless, as discussed above, other facts provide substantial evidence to support the conclusion that Draper's parents acted using the power of attorney when establishing the trust. *See Travis, 477 F.3d at 1040* ("If substantial evidence supports the Commissioner's conclusions, this court does not reverse even if it would reach a different conclusion, or merely because substantial evidence also supports the contrary outcome.").

Importantly, the POMS provides the specific steps Draper's parents had to follow if they wished to create a qualifying trust under *ß 1396p(d)(4)(A)*. First, [**18] Draper's parents, acting as individuals, needed to establish an "empty" trust or a seed trust with their own assets as the trust's initial *res*. *POMS SI 01120.203B(1)(f)*. Only after the "empty" trust was formed or the seed trust was funded could Draper or her parents, using power of attorney, transfer Draper's money into the already-established trust. *Id.* Substantial evidence in the record supports the SSA's finding that Draper's parents did not take these initial actions, nor did they dissolve and recreate the trust to comply with the POMS at any point during this lengthy litigation. Accordingly, we cannot find in her favor. In reaching this conclusion, we recognize that we draw a hard line. However, we are not persuaded that we must find in favor of Draper because her parents

came "close enough" to meeting the requirements laid out in the POMS. Only by enforcing compliance with the letter of the POMS can the agency oversee the vast SSI program, effectively administer the Act, and consistently distribute benefits to disabled individuals.

D.

Finally, we agree with the SSA's finding that the state court's *nunc pro tunc* order did not "establish" the trust under *ß 1396p(d)(4)(A)*. *See Browning v. Sullivan, 958 F.2d 817, 823 n.4 (8th Cir. 1992)* (describing our procedure [**19] for reviewing decisions based on evidence submitted to the Appeals Council but not the ALJ). *POMS SI 01120.203B(1)(f)* notes that court-created trusts comply with *ß 1396p(d)(4)(A)* only if "the creation of the trust [is] required by court order." The facts here show that the South Dakota court did not order the special-needs trust's creation. Instead, the court merely assigned itself a retroactive role in the already-established Stephany Ann Draper Special Needs Trust. We find that this action functioned as an "approval," an action insufficient to comply with *ß 1396p(d)(4)(A)*. *See POMS SI 01120.203B(1)(f)* ("Approval of a trust by a court is not sufficient."). Thus, we affirm the SSA's determination that the state court's action did not bring the trust into compliance with the POMS.

III.

We therefore conclude that the agency and the district court correctly held that the Stephany Ann Draper Special Needs Trust is a countable resource for SSI purposes and that Draper is not entitled to SSI benefits as long as the funds in her [*565] trust raise her resources above the $2,000 eligibility limit. We affirm.

APPENDIX 2

Program Operations Manual System (POMS)

Effective Dates: 05/14/2013 - Present

TN 48 (05-13)

SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00

Topic	Reference
Introduction to Medicaid Trust Exceptions	SI 01120.203A
Policy—Exception To Counting Medicaid Trusts	SI 01120.203B
Policy—Waiver For Undue Hardship	SI 01120.203C
Procedure— Developing Exceptions To Resource Counting	SI 01120.203D
Procedure—Development Of Undue Hardship Waiver	SI 01120.203E
Procedure—Nonprofit Associations	SI 01120.203F
Procedure—Follow-Up To A Finding Of Undue Hardship	SI 01120.203G
Procedure—Reevaluating Revocable Trusts Processed Under The Policy In Effect From 1/1/2000 Through 1/31/2001	SI 01120.203H

A. Introduction to Medicaid trust exceptions

We refer to the exceptions discussed in this section as **Medicaid trust exceptions** because sections 1917(d)(4)(A) and (C) of the Social Security Act (the Act) (42 U.S.C. § 1396p(d)(4)(A) and (C)) set forth exceptions to the general rule of counting trusts as income and resources for the purposes of Medicaid eligibility and can be found in the Medicaid provisions of the Act. While these exceptions are also Supplemental Security Income (SSI) exceptions, we refer to them as Medicaid trust exceptions to distinguish them from other exceptions to counting trusts provided in the SSI law (e.g., undue hardship) and because the term has become a term of common usage.

Development and evaluation of Medicaid trust exceptions are based on the type of trust under review. There are two types of Medicaid trusts to consider:

- Special Needs Trusts
- Pooled Trusts

B. Policy for exception to counting Medicaid trusts

1. Special needs trusts established under Section 1917(d)(4)(A) of the Act

a. General rules for special needs trusts

NOTE: Although this exception is commonly referred to as the **special needs** trust exception, the exception applies to any trust meeting the following requirements and does not have to be a strict **special needs** trust.

The resource counting provisions of Section 1613(e) do not apply to a trust:

- Which contains the assets of an individual **under age 65** and who is **disabled**; and
- Which is **established for the benefit of such individual through the actions of a parent, grandparent, legal guardian or a court**; and
- Which 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.

CAUTION: A trust which meets the exception to counting the trust under the SSI statutory trust provisions of Section 1613(e) must still be evaluated under the instructions in SI 01120.200, to determine if it is a countable resource. If the trust meets the definition of a resource (SI 01110.100B.1.), it would will be subject to regular resource-counting rules.

b. Under age 65

To qualify for the special needs trust exception, the trust must be established for the benefit of a

disabled individual under age 65. This exception does not apply to a trust established for the benefit of an individual age 65 or older. If the trust was established for the benefit of a disabled individual prior to the date the individual attained age 65, the exception continues to apply after the individual reaches age 65.

c. Additions to trust after age 65

Additions to or augmentation of a trust after age 65 (except as outlined below) are not subject to this exception. Such additions may be income in the month added to the trust, depending on the source of the funds (see SI 01120.201J) and may be counted as resources in the following months under regular SSI trust rules.

Additions or augmentation do not include interest, dividends or other earnings of the trust or portion of the trust meeting the special needs trust exception. If the trust contains the irrevocable assignment of the right to receive payments from an annuity or support payments made when the trust beneficiary was less than 65 years of age, annuity or support payments paid to a special needs trust are treated the same as payments made before the individual attained age 65 and do not disqualify the trust from the special needs trust exception.

d. Disabled

To qualify for the special needs trust exception, the individual whose ássets were used to establish the trust must be disabled for SSI purposes under section 1614(a)(3) of the Act.

e. Established for the benefit of the individual

Under the special needs trust exception, the trust must be established for 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, as described in SI 01120.201F.2. Other than trust provisions for payments described in SI 01120.201F.2.b. and SI 01120.201F.2.c., any provisions that:

- provide benefits to other individuals or entities during the disabled individual's lifetime, or
- allow for termination of the trust prior to the individual's death and payment of the corpus to another individual or entity (other than the State(s) or another creditor for payment for goods or services provided to the individual), will result in disqualification for the special needs trust exception.

Payments to third parties for goods and services provided to the trust beneficiary are allowed under the policy described in SI 01120.201F.2.b.; however, such payments should be evaluated under SI 01120.200E through SI 01120.200F and SI 01120.201I to determine whether the payments may be income to the individual.

f. Who established the trust

The special needs trust exception does not apply to a trust established through the actions of the disabled individual himself or herself. To qualify for the special needs trust exception, the assets of the disabled individual must be put into a trust established through the actions of the disabled individual's:

- parent(s);
- grandparent(s);
- legal guardian(s); or
- a court.

In the case of a legally competent, disabled adult, a parent or grandparent may establish a "seed" trust using a nominal amount of his or her own money, or if State law allows, an empty or dry trust. After the seed trust is established, the legally competent disabled adult may transfer his or her own assets to the trust or another individual with legal authority (e.g., power of attorney) may transfer the individual's assets into the trust.

In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. Approval of a trust by a court is not sufficient.

NOTE: Under 1613(e) of the Act, a trust is considered to have been "established by" an individual if any of the individual's (or the individual's spouse) assets are transferred to the trust other by will. Alternatively, under the Medicaid trust exceptions in 1917(d)(4)(A) and (C) of the Act, a trust can be "established by" an individual who does not provide the corpus of the trust, or transfer any of his/her assets to the trust, but rather someone who took action to establish the trust. To avoid confusion, we use the phrase "established through the actions of" rather than "established by" when referring to the individual who physically took action to establish a special needs or pooled trust.

g. Legal authority and trusts

The person establishing the trust with the assets of the individual or transferring the assets of the individual to the trust must have legal authority to act with respect to the assets of that individual. Attempting to establish a trust with the assets of another individual without proper legal authority to act with respect to the assets of the individual will generally result in an invalid trust.

For example, a parent establishing a seed trust for his adult child with his or her own assets has legal authority over his own assets to establish a trust. He or she only needs legal authority over his child's assets if he or she actually takes action with the child's assets, e.g., transfers them to a previously established trust.

A power of attorney (POA) is legal authority to act with respect to the assets of a disabled individual. However, a trust established under a POA will result in a trust we consider to be established through

the actions of the disabled individual himself or herself because the POA merely establishes an agency relationship.

h. State Medicaid reimbursement requirement

To qualify for the special needs trust exception, the trust must contain specific language that provides that upon the death of the individual, the State(s) will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). The State(s) must be listed as the first payee and have priority over payment of other debts and administrative expenses except as listed in SI 01120.203B.3.a.

The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s). Medicaid payback may also not be limited to any particular period of time, i.e. payback cannot be limited to the period after establishment of the trust.

NOTE: Labeling the trust as a **Medicaid pay-back trust**, **OBRA 1993 pay-back trust**, trust **established in accordance with 42 U.S.C. § 1396p**, or as an **MQT**, etc. is not sufficient to meet the requirements for this exception. The trust must contain language substantially similar to the language above. An oral trust cannot meet this requirement.

Instruction

APPENDIX 3

Identification Number AM-15032 Effective Date: 05/28/2015
Intended Audience: All RCs/ARCs/ADs/FOs/TSCs/PSCs/OCO/
OCO-CSTs/ODAR
Originating Office: ORDP OISP
Title: Policy Clarification for Trusts
Type: AM - Admin Messages

Program: Title XVI (SSI)
Link To Reference: See References at the end of this AM.

Retention Date: November 28, 2015

A. Purpose

This administrative message provides reminders regarding our current policy on special needs trusts and clarifies our policies on court establishment of trusts and the reevaluation of previously excepted trusts.

B. Background on court ordered trusts and the reevaluation of trust resource determinations

We are clarifying our policy regarding the establishment of special needs trusts by court orders, as set out in SI 01120.203B.1.f. The special needs trust exception can be met when courts approve petitions and establish trusts by court order so long as the creation of the trust has not been completed before the order is issued by the court. [emphasis added] In addition, the reevaluation of previously excepted trusts during posteligibility (PE) events is not necessary unless there is an amendment to the trust or a clarification or change in policy that may affect the trust resource determination.

C. Policy for exception to counting trusts that meet the requirements of section 1917(d)(4)(A) of the Social Security Act
The resource counting provisions of section 1613(e) of the Act do not apply to a trust:

- which contains the assets of an individual under age 65 and who is disabled; and
- which is established for the benefit of such individual through the actions of a parent, grandparent, legal guardian or a court; and
- which 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.
For more information on the special needs trust exception, see SI
01120.203.

1. Who established the trust
The special needs trust exception does not apply
to a trust established through the actions of the
disabled individual himself or herself. To
qualify for the special needs trust exception,
the assets of the disabled individual must be put
into a trust established through the actions of the disabled individual's:
- parent(s);
- grandparent(s);
- legal guardian(s); or
- a court.

2. Courts establishing trusts
In the case of a special needs trust established
through the actions of a court, the creation of
the trust must be required by a court order for
the exception in section 1917(d)(4)(A) of the Act
to apply. That is the special needs trust
exception can be met when courts approve
petitions and establish trusts by court order, so
long as the creation of the trust has not been
completed before, the order is issued by the
court. Court approval of an already created
special needs trust is not sufficient for the
trust to qualify for the exception. The court
must specifically either establish the trust or
order the establishment of the trust.

[emphasis added]

a. Example of a court ordering establishment of a trust

John Jackson is a legally competent adult who
inherited $250,000 and is an SSI recipient. His
sister, Justine Jackson, petitioned the court to
create and order the funding of the John Jackson
Special Needs Trust. Justine also provided the
court with a draft of the trust document. A month
later the court approved the petition and issued
an order requiring the creation and funding of
the trust. This trust meets the requirement in SI

01120.203B.1.f. The fact that the trust beneficiary is a competent adult and could have established the trust himself is not a factor in the resource determination.

b. Example of a court-established trust
A beneficiary wins a lawsuit in the amount of $50,000. As part of the settlement, the judge orders the creation of a trust in order for the beneficiary to receive the $50,000. As a direct result of this court order, a trust was created with the beneficiary's settlement money. The trust document lists the $50,000 as the initial principal amount in Schedule A of the trust. This trust meets the requirement in SI 01120.203B.1.f.

c. Example of a court-approved trust
Jane Smith is ineligible for SSI benefits because she has a self-established special needs trust that does not meet the requirements for exception in SI 01120.203. Jane petitioned the court to establish an amended trust and to make the decision retroactive, so her original trust would become exempt from resource counting from the time of its creation. The court approved the petition and issued a nunc pro tunc order stating that the court established the trust as of the date on which Jane Smith had previously established the trust herself. The amended trust does not meet the requirement in SI 01120.203B.1.f. The court did not establish a new trust; it merely approved a modification of a previously existing trust.

d. Example of a court-approved trust
Dan Peters is the trust beneficiary of a special needs trust. His sister petitioned the court to establish the Dan Peters Special Needs Trust and submitted Dan's already created special needs trust to the court along with the petition. Although the court order states that it approves and establishes the trust, the court simply approved the existence of the already established special needs trust. This trust does not meet the requirement in SI 01120.203B.1.f.

3. Reopening of erroneous trust resource determinations

Do not voluntarily reopen cases where we
erroneously determined that the trust was
countable because the court was petitioned to
establish the trust. The SSI claimant, recipient
or representative payee must file an appeal or
request reopening if he or she disagrees with our
determination. If reopening is necessary per SI
04070.015, follow the administrative finality rules in SI 04070.010.

For pending claims or cases under review in the
appeal process, use this policy clarification to
assist you in making the trust resource determination.

D. Policy for reevaluating trust resource determinations

Evaluate all trusts where a claimant, recipient,
or deemor alleges ownership of a trust that needs
a trust resource determination (such as a new or
amended trust) in all initial claims and PE
events to determine the resource status of the trust.

For PE events, do not reevaluate the trust
resource determination unless there is new and
material evidence, such as an amendment to the
trust or a clarification or change in policy that
may affect the trust resource determination.
However, evaluate all trust income implications,
such as trust distributions and payments, if any.
For resource status changes in PE events, see SI 01120.200J.7.

E. References

SI 01120.200 Trusts - General, Including Trusts
Established Prior to 1/1/00, Trusts Established
with the Assets of Third Parties and Trusts Not
Subject to Section 1613(e) of the Social Security Act
SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00
EM-14026 REV Regional Centralization of SSI Trust
Reviews - Business Process Using the SSI Trust Monitoring System (SSITMS)

Direct all program-related and technical
questions to your RO support staff or PSC OA
staff. RO support staff or PSC OA staff may refer
questions or problems to their Central Office contacts

------------------End Announcement

Appendix 4

DECLARATION OF
THE SUSAN SMITH IRREVOCABLE SPECIAL NEEDS TRUST

THIS DECLARATION OF SPECIAL NEEDS TRUST is made this _______ day of September, 2015, as authorized by Hon. Judy Trueheart, J.S.C., Superior Court of New Jersey, Somerset County, Law Division (hereinafter referred to as the "Grantor"), by Order dated September 1, 2015, regarding the settlement proceeds from *Smith vs. Jones, et. al.*, Docket No. SOM-L-2468-11, to be paid to or for the benefit of Susan Smith (hereinafter referred to as the "Beneficiary"), and The Professional Trust Company, with offices located at 123 Main Street, Luna, New Jersey, and successors therefor, as Trustee (hereinafter called the "Trustee").

WITNESSETH THAT:

WHEREAS, the Court intends to establish an OBRA '93 trust pursuant to 42 U.S.C. § 1396p(d)(4)(A) for the management and distribution of any property of SUSAN SMITH (the "Beneficiary") transferred thereto during the lifetime of the Beneficiary, except as otherwise provided under Paragraph THIRD hereof; and

WHEREAS, the Court intends this Trust to be in compliance with the medical assistance program ("Medicaid") provisions of 42 U.S.C. § 1396p(d)(4)(A), the Supplemental Security Income ("SSI") provisions of 42 U.S.C. § 1382b(e)(5), and the New Jersey Division of Developmental Disabilities ("DDD") general eligibility and contribution to care and maintenance provisions authorized by N.J.S.A. 30:6D-23-32 and provided in N.J.A.C. 10:46D-1.1-6.1; and

WHEREAS, the Court intends this Irrevocable Special Needs Trust to be funded with certain assets of the Beneficiary for the sole benefit of the Beneficiary; and

WHEREAS, 42 U.S.C. § 1396p(d)(4)(A) and 42 U.S.C.§ 1382b(e)(5), in applicable part, provide that assets of a disabled individual under age 65 held under an irrevocable trust created by the court shall not be treated as an available asset so long as such trust provides at its

termination for "Medicaid" to have a first right of reimbursement for any such benefits paid to or for the benefit of the disabled individual; and

WHEREAS, 42 U.S.C. § 1382c(a)(3)(A) - 1382c(a)(3)(C), in applicable part, provides that an individual shall be considered "disabled" if (1) he or she is unable to engage in any substantial gainful activity by reason of any 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 twelve months, or (2) he or she is under the age of eighteen (18) and has a medically determinable physical or medical impairment, which results in severe functional limitations 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 twelve months; and

WHEREAS, as of the date of this Trust Agreement, the Beneficiary, SUSAN SMITH, is a minor, age six (16), and is a disabled individual as provided under 42 U.S.C. § 1382c(a)(3) for purposes of receiving Social Security Disability benefits; and

WHEREAS, at no time during the existence of this Trust Agreement shall the Beneficiary serve as Trustee of any trust created hereunder; and

WHEREAS, the Court intends that this Trust conform with the Medicaid provisions of 42 U.S.C. § 1396p(d)(4)(A), the SSI provisions of 42 U.S.C. § 1382b(e)(5), and the New Jersey Division of Developmental Disabilities ("DDD") general eligibility and contribution to care and maintenance provisions authorized by N.J.S.A. 30:6D-23 to -32 and provided in N.J.A.C. 10:46D-1.1 to -6.1, and, accordingly, that the assets assigned to this Trust shall not be considered available income or as an asset for purposes of determining the Medicaid and/or SSI eligibility and/or DDD eligibility of the Beneficiary, nor shall the assignment of said assets to this Trust be considered a transfer of assets for less than fair market value for the purpose of determining the Medicaid ineligibility of the Beneficiary as further provided in 42 U.S.C. § 1396p(c)(2)(B)(iv) and/or the SSI eligibility of the Beneficiary as further provided in 42 U.S.C. § 1382b(c)(1)(C)(ii); and/or the DDD eligibility of the Beneficiary as further provided in N.J.S.A. 30:6D-23-32 and N.J.A.C. 10:46D-1.1-6.1; and

WHEREAS, as soon as possible after the execution of this Trust Agreement, all of the right, title and interest in and to the property described in the annexed SCHEDULE A shall be transferred to the Trustee, and any such other property as any other person or fiduciary may from time to time transfer to the Trustee for the benefit of the Beneficiary consistent with the provisions of Paragraph THIRD of this Trust Agreement; and

WHEREAS, it is the intent of this Trust Agreement to preserve the trust property to the maximum extent possible in order to provide for the supplemental care and special needs of the Beneficiary during the Beneficiary's lifetime; and

WHEREAS, it is the intent of this Trust Agreement that the purpose of said trust is to use the trust property to supplement, and not to supplant, impair or diminish any benefits or assistance of any Federal, State or other governmental entity or agency, or any private or charitable agencies or organizations, for which SUSAN SMITH may otherwise be eligible or which the Beneficiary may be receiving.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements herein contained, and the sum of One Dollar and other good and valuable consideration, receipt whereof is hereby acknowledged, the parties hereto agree as follows:

Appendix 5

Irrevocable Special Needs Trust Agreement

THIS AGREEMENT, made as of the day of , 2015, by and between: Mavis Rich, residing at @@, hereinafter called the Grantor; and Robert Rich, residing at @@, and successors therefor, hereinafter called the Trustee;

WITNESSETH THAT:

WHEREAS, by Judgment of the Superior Court of New Jersey, Chancery Division, Probate Part, dated March 5, 2015, the Grantor was appointed guardian of the person and property of Mary Rich, her daughter; and

WHEREAS, the Grantor desires to establish an OBRA '93 trust pursuant to 42 U.S.C. § 1396p(d)(4)(A) for the management and distribution of any property of the Grantor's ward, Mary Rich (the "Beneficiary"), transferred thereto during the lifetime of the Beneficiary, except as otherwise provided under Paragraph THIRD hereof; and

WHEREAS, the Grantor desires to execute this Trust in compliance with the medical assistance program ("Medicaid") provisions of 42 U.S.C. § 1396p(d)(4)(A), the Supplemental Security Income ("SSI") provisions of 42 U.S.C. § 1382b(e)(5), and the New Jersey Division of Developmental Disabilities ("DDD") general eligibility and contribution to care and maintenance provisions authorized by N.J.S.A. 30:6D-23-32 and provided in N.J.A.C. 10:46D-1.1-6.1; and

WHEREAS, the Grantor intends to fund this Irrevocable Special Needs Trust Agreement with certain assets of the Beneficiary for the sole benefit of the Beneficiary; and

WHEREAS, 42 U.S.C. § 1396p(d)(4)(A) and 42 U.S.C.§ 1382b(e)(5), in applicable part, provide that assets of a disabled individual under age 65 held under an irrevocable trust created by the guardian of such a disabled individual shall not be treated as an available asset so long as such trust provides at its termination for "Medicaid" to have a first right of reimbursement for any such benefits paid to or for the benefit of the disabled individual; and

WHEREAS, 42 U.S.C. § 1382c(a)(3)(A) - 1382c(a)(3)(C), in applicable part, provides that an individual shall be considered "disabled" if (1) he or she is unable to engage in any substantial gainful activity by reason of any 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 twelve months, or (2) he or she is under the age of eighteen (18) and has a medically determinable physical or medical impairment, which results in severe functional limitations 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 twelve months; and

WHEREAS, as of the date of this Trust Agreement, the Beneficiary, Mary Rich, is an incapacitated adult, age 25 and is a disabled individual as provided under 42 U.S.C. § 1382c(a)(3) for purposes of receiving Social Security Disability benefits; and

WHEREAS, the Grantor intends that at no time during the existence of this Trust Agreement shall the Beneficiary serve as Trustee of any trust created hereunder; and

WHEREAS, the Grantor intends that this Trust conform with the Medicaid provisions of 42 U.S.C. § 1396p(d)(4)(A), the SSI provisions of 42 U.S.C. § 1382b(e)(5), and the New Jersey Division of Developmental Disabilities ("DDD") general eligibility and contribution to care and maintenance provisions authorized by N.J.S.A. 30:6D-23 to -32 and provided in N.J.A.C. 10:46D-1.1 to -6.1, and, accordingly, that the assets assigned to this Trust shall not be considered available income or as an asset for purposes of determining the Medicaid and/or SSI eligibility and/or DDD eligibility of the Beneficiary, nor shall the assignment of said assets to this Trust be considered a transfer of assets for less than fair market value for the purpose of determining the Medicaid ineligibility of the Beneficiary as further provided in 42 U.S.C. § 1396p(c)(2)(B)(iv) and/or the SSI eligibility of the Beneficiary as further provided in 42 U.S.C. § 1382b(c)(1)(C)(ii); and/or the DDD eligibility of the Beneficiary as further provided in N.J.S.A. 30:6D-23-32 and N.J.A.C. 10:46D-1.1-6.1; and

WHEREAS, as soon as possible after the execution of this Trust Agreement, all of the right, title and interest in and to the property described in the annexed SCHEDULE A shall be transferred to the Trustee, and any such other property as any other person or fiduciary may from time to time transfer to the Trustee for the benefit of the Beneficiary consistent with the provisions of Paragraph THIRD of this Trust Agreement; and

WHEREAS, it is the intent of this Trust Agreement to preserve the trust property to the maximum extent possible in order to provide for the supplemental care and special needs of the Beneficiary during the Beneficiary's lifetime; and

WHEREAS, it is the intent of this Trust Agreement that the purpose of said trust is to use the trust property to supplement, and not to supplant, impair or diminish any benefits or assistance of any Federal, State or other governmental entity or agency, or any private or charitable agencies or organizations, for which the Grantor's ward, Mary Rich, may otherwise be eligible or which the Grantor's said ward may be receiving.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements herein contained, and the sum of One Dollar and other good and valuable consideration, receipt whereof is hereby acknowledged, the parties hereto agree as follows:

Appendix 6

In the Matter of **JACK BEANSTALK**, An incapacitated person	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: PROBATE PART BERGEN COUNTY DOCKET NO. Civil Action **JUDGMENT AUTHORIZING THE ESTABLISHMENT AND FUNDING OF A SPECIAL NEEDS TRUST**

THIS MATTER having been opened to the Court by Schenck, Price, Smith & King, LLP, attorneys for plaintiff, Lucinda Powers, Guardian of the Person and Property of Jack Beanstalk, upon the filing of an Order to Show Cause and Verified Complaint for the approval and establishment of a Special Needs Trust for the benefit of Jack Beanstalk and for permission to fund said Special Needs Trust from the assets of Jack Beanstalk; and notice having been given to the interested parties set forth in paragraph 8 of the Verified Complaint, and the Court having reviewed the papers filed by plaintiff in support of the application, and the Court having heard oral argument; and good cause having been shown that the Special Needs Trust is required for the reasons stated on the record:

IT IS on this ______ day of _____________, 2015 **ORDERED that:**

1. The form of Special Needs Trust for the benefit of Jack Beanstalk, attached to the Verified Complaint as Exhibit C, hereby is approved.

2. The Court hereby authorizes and directs the guardian, to execute and establish the Jack Beanstalk Irrevocable Special Needs Trust for the benefit of Jack Beanstalk;

3. The Guardian shall transfer assets owned by Jack Beanstalk to the Jack Beanstalk Irrevocable Special Needs Trust;

4. Plaintiffs' counsel shall serve a copy of this judgment upon all interested parties within seven days of receipt.

____

Honorable Seymour Young, J.S.C.

PREPARING TO PRESENT THE SPECIAL NEEDS TRUST TO THE COURT FOR APPROVAL

www.spsk.com

When does a court need to establish an SNT?

- Minors
- Incapacitated individuals
- Competent individuals who do not have a parent or grandparent to establish the trust

The POMS

- Social Security Administration (SSA) policy and procedure manual
- Used by SSA employees in evaluating eligibility for Supplemental Security Income ("SSI") benefits
- Practitioners drafting SNTs should become familiar with the relevant POMs provisions
- SI 01120.203

Establishing vs. Funding SNT

SI 01120.203 distinguishes between individual who physically takes action to establish self-settled SNT and individual who provides corpus or transfers assets into SNT

Seed trusts

- POMS allows parent or grandparent of competent adult to establish seed trust or establish empty or dry trust depending on state law

- Establishment and funding are two different actions that may be taken by different individuals
- In all instances individuals must have legal authority to establish and/or fun SNT

Draper v. Colvin

- 779 F.3d 556 (8th Cir. 2015)
- Ruling: parents who established SNT impermissibly did so as agents under POA

Skidmore Defense

- *Skidmore v. Swift & Co.*, 323 U.S. 135 (1944)
- Agency interpretation of statute it is charged with implementing may merit deference
- Amount of deference depends on several factors:
  - Thoroughness of agency's consideration
  - Validity of its reasoning
  - Consistency with earlier and later pronouncements
  - Formality
  - Expertise of agency
  - Other factors giving it power to persuade if lacking power to control

Eighth Circuit Analysis

- Parents had no legal interest in funds transferred to the trust
- Parents established the trust as agents under the POA
- Trust did not qualify under SNT exception
- Court-created trust is valid only if required by court order.
- Modification *nunc pro tunc* failed because court did not order creation of the trust - it merely approved its establishment

Lessons learned from *Draper*

- Must use two step process
  - Must be established by parent, grandparent, guardian or court, not by individual or agent under POA
  - Trust must be funded by someone with legal authority
    - Competent beneficiary or agent under POA can fund trust with beneficiary's assets
  - Court must require, not merely approve SNT

SSA Announcement effective May 28, 2015

- Court can approve petitions and establish SNTs by court order so long as creation of the trust has not been completed before the order is issued.
- Practice tip: Present proposed but not executed trust to court

Drafting trust for the court

- Declaration of Trust
- Trust signed by parent, grandparent or guardian as nominal grantor with court order directing the execution of the trust by those nominal grantors
- Trust should state source of funding
- Trust should state whether it is seeded
- Trust should not be signed before submission to court for approval and establishment

Petitions for court approval and establishment

- File in the court that has subject matter jurisdiction over the approval and establishment of the SNT
- Give notice to agencies and others entitled to notice
  - Some Medicaid agencies require the SNTs to be submitted to them in advance for approval
- File brief and any other required pleadings

Court order

- Make sure the order states that the SNT is approved and established by the court if it is a court-created trust.
- The trust should be signed after the court order is issued.

Special Needs Trust Fairness Act

- SNTFA is designed to permit competent adults with disabilities to establish their own special needs trusts, just as the current law permits them to establish sub-accounts in pooled trusts

Basics of Special Needs Trusts

Thursday, October 15, 2015

Breakout Session 3
3:30 P.M. – 4:20 P.M.

There's More to Public Benefits than SSI and Medicaid

Presenter:
Janet L. Lowder
Attorney at Law
Hickman & Lowder.Co. LPA
Cleveland, OH

- Materials
- PowerPoint

Stetson University College of Law presents:
2015 SPECIAL NEEDS TRUSTS
THE NATIONAL CONFERENCE
October 14-16, 2015
The Vinoy Renaissance Resort & Golf Club
St. Petersburg, Florida

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

THERE'S MORE TO PUBLIC BENEFITS THAN SSI AND MEDICAID

By Janet L. Lowder, CELA
Hickman & Lowder Co., L.P.A.
Cleveland, Ohio 44114
October 15, 2015

I. INTRODUCTION

When planning for an incompetent or disabled individual we often focus on the most common benefits –SSI and Medicaid, SSDI and Medicare, or some combination of three or all four of these benefits. We need to look beyond these in order to coordinate and maximize the use of public benefits for support of the individual. We also need to determine what benefits the other members of the beneficiary's family are receiving. If we focus only on the Medicaid and SSI of the disabled beneficiary, the family as a whole might be worse off as a result of decisions made.

When analyzing an individual's situation to determine whether and what kind of trust is needed, the attorney must balance the use of trust funds against all available public benefits, the cost of the individual's needs and life expectancy, and sometimes establish priorities among eligibility for competing types of benefits. In order to be an effective SNT practitioner, in-depth knowledge of all public benefits is critical. Once the trust is created and properly funded, managing disbursements from the trust to coordinate with the public benefits important to the individual and the family is essential.

This presentation will focus on the less common public benefit programs and how they interact with special needs trusts. These benefits include Section 8 and other subsidized housing, Supplemental Nutrition Assistance Program (SNAP, fka food stamps), Low-Income Heating Energy Assistance Program (LIHEAP or just HEAP) and Child Health Insurance Programs (CHIP.) These programs all have rules and regulations which have varying income, asset, and transfer-related eligibility and continuing benefit criteria. We must understand how the creation of and distributions from a special needs trust impacts these benefits.

II. SECTION 8 AND SUBSIDIZED HOUSING - 24 C.F.R. § 5.600 et seq.

Federal housing assistance programs began in the first half of the 20th century to address the country's housing crisis during the Great Depression. The Section 8 program was introduced in the 1970s. Section 8 and subsidized housing programs are needs-based programs, with benefit amount and eligibility usually determined by countable income, although some state and local subsidized housing programs also impose a maximum amount of allowable resources. The Section 8 benefits are administered by local, public housing authorities (PHAs). The numbers of units subsidized by a local housing authority under its Section 8 programs is determined by Congressional funding.

There are several types of Section 8 programs, but the most common is the Section 8 voucher obtained through a state or local housing authority. There are two primary types of vouchers – the Housing Choice Voucher (HCV) Program and the Project-Based Eligibility for a voucher is based on low income and need for housing. Eligibility for both is very similar. The Section 811 Supportive Housing for Persons with Disabilities also provides rental assistance for families which have at least one adult member with a disability.

A. Housing Choice Voucher Program

The HCV Program provides rental subsidies for tenants who choose units in the private market. Once received, the Housing Choice voucher can be used anywhere in the country and with any public or private housing landlord that will accept the voucher and payment terms. At least 75 percent of the families admitted to a public housing agency's (PHA) HCV program during the fiscal year must have income at or below 30 percent of the area median income. Rent payment standards are set by the PHA between 90% and 110% of the fair market rent for the geographical area.

A family renting a unit at or below the payment standard generally pays 30 percent of monthly adjusted income. A family renting a unit above the payment standard pays 30 percent of monthly adjusted income, plus the amount of rent above the payment standard. The rent paid to the owner in the voucher program must always be reasonable in relation to the rent charged for comparable unassisted units.

B. Project-Based Voucher Program

The Project-Based Voucher Program provides rental assistance for eligible families who live in specific housing developments or units. Up to 20% of a PHA's voucher program can go towards project-based housing. A voucher in one community does not mean transferability to housing in another community, but after one year of assistance, a family may move from a project-based voucher unit. They may switch to the PHA's tenant-based voucher program when the next voucher is available or to another comparable program if such a program is offered.

No more than 25% of units in a multifamily project may have project-based voucher assistance, except for units designated for families that are elderly, disabled, and/or receiving supportive services.

C. Section 811 Supportive Housing for Persons with Disabilities – 24 CFR Part 891

The Section 811 program provides capital advances to non-profit groups to develop affordable housing for persons with disabilities with the availability of supportive services, and also has a rental assistance program which was implemented in 2012. This assistance comes in the form of project rental assistance alone. It is available to families in which one adult has a physical or mental disability, or a chronic mental illness. The family income must be either very low-income (less than 50% of the median income for the area), or extremely low-income income (less than 50% of the median income for the area), depending on the source of funds for the project.

D. Eligibility Requirements – General

Section 8 benefits are for families, which can include a single individual. Elderly or disabled individuals or families are given preference. An "elderly family" is one in which the head, spouse or sole individual is at least 62 years old. "Near-elderly family" is defined as ages between 50 and 62. A "person with disabilities" is defined as a person determined disabled by the Social Security Administration or HUD, and does not include an individual whose disability is based solely on drug or alcohol addiction.

Housing programs are available only to citizens or non-citizens who have eligible immigration status. §5.508. All family members residing in the unit generally must be citizens

or have eligible status.

E. Eligibility Requirements - Financial

1. Resource Eligibility - 24 C.F.R. § 5.603

There is no resource limit for Section 8, but income from net family resources is counted for eligibility purposes. Net resources include net cash value of assets other than necessary personal property, as well as any assets disposed of for less than fair market value during the two years preceding the application or redetermination. For assets disposed of in the two-year period, income will be imputed to the beneficiary for two years at the current passbook savings rate.

Keep in mind that local housing authorities are allowed to make more restrictive rules such as limiting the amount of countable income or total assets. Generally, assets received after receiving subsidized housing or Section 8 voucher will not disqualify the individual for eligibility regardless of the amount of the assets, but assets may effectively create enough income that will otherwise reduce the subsidy to zero and causing the voucher or subsidy to be lost.

Transfer to a SNT may be considered a disposal for less than FMV, with income imputed to the individual from the transfer. As long as a tenant or any member of the tenant's family cannot revoke or control a trust, the trust assets will not be considered a resource of the individual.

2. Income Eligibility - 24 C.F.R. § 5.609

The primary eligibility criteria for all housing programs is limitation of income. Countable income is based upon "regular" income received by the recipient including public benefits such as Social Security, retirement or disability, Supplemental Security Income, and direct or in-kind income from any third party source, including a SNT.

Income received from net family assets is also included. Actual income from the first $5,000 of assets count, and income from net resources over $5,000 is counted as the greater of the actual income received or a percentage of value based on the current passbook savings rate. If no interest income is actually received from a savings or other type of account, then minimum income will be imputed by the administrator. Income used to pay medical expenses reduces other countable income. As the amount of the

countable monthly income goes up, the subsidy is reduced to the point that the monthly countable income replaces the subsidy.

Receipt of a lump sum is not counted as income to the tenant. Temporary, non-recurring, or sporadic income or gifts are not counted as income. Income distributed to the tenant from a trust is counted as income. Regular, recurrent distributions from a trust, even when payment it made to a third party, are also treated as income.

3. Calculation of Rent

Once the income amount is established, then the recipient usually pays 30 percent of that amount as rent each month, and the program pays the other 70 percent. The program administrator determines the fair market value for the unit upon which the total payment is based.

There are restrictions on use of Section 8 for family-owned units, and a unit cannot be owned by the recipient, including a beneficial interest in a trust. According to HUD regulations, a Section 8 tenant may not be related by blood or marriage to the owner of the unit they rent under the Section 8 program. Exceptions may only be granted in rare cases as a reasonable accommodation for a person with disabilities who requires a specially-modified unit and such a unit is only available from a relative. We have been successful in obtaining the exception for individuals with developmental disabilities and mental illness, even without a need for a physical accommodation. Each PHA may have different rules and documentation requirements to qualify for an exception.

In no case is a Section 8 tenant permitted to rent a unit from a relative if the relative also lives in the unit. Therefore, the owner must provide verification that they do not live in the unit to be assisted through the Section 8 program.

4. Treatment of Trusts

Nothing in the Section 8 rules expressly recognizes or safeguards SNTs, as do Medicaid and SSI law. Assets in a self-settled or third-party supplemental needs trust are not counted for income purposes at the trust level. However, "regular" distributions from the trust will be counted as income to the individual and be added to the base income amount each month. The term "regular" is not defined in the statute, but by all accounts

includes regular monthly distributions such as for rent or utility payments. Some administrators consider trust distributions for a particular purpose as regular if made only quarterly, but others consider payments made more than once a year for the same purpose as regular.

Keep in mind that if the tenant holds the funds in her own name, and simply withdraws amounts as needed, then only the interest income into the account counts as income when determining the subsidy. If Section 8 or other subsidized housing is the only needs based program involved, and the recipient is able to manage funds, it is often more advantageous not to have a SNT, especially in periods of low interest rates. Of course, if the individual also needs Medicaid and SSI, this approach will not work. In that case, a decision must be made as to which program is more important.

In the case of *Finley* v. *City a/Santa Monica* (Cal. Sup. Ct., County of Los Angeles, No. BS 127077, May 25, 2011) the trial court overturned this counting of "regular" distributions as income to the tenant. The trial court ruled that since a settlement held in an individual's own account would not count as income for the amount or frequency of withdrawals to pay for an individual's needs, then the housing authority could not dissimilarly count all regular distributions from a self-settled trust as income in excess of interest income. This was a well-reasoned decision which attorneys hoped would have a significant impact on PHA's outside California, until the *DeCambre* case.

In the recent Massachusetts case of *DeCambre v. Brookline Housing Authority,* (D. Mass., No. 14-13425-WGY, March 25, 2015) the federal district court determined that Brookline PHA's determination that the disbursement of funds for the beneficiary of a Special Needs Trust was countable income for her Section 8 voucher was not unreasonable. The SNT disbursed over $60,000 in a year, after which the PHA determined that Ms. DeCambre was no long eligible for her housing voucher. The payments were made for her car, phone, internet service, veterinary care, medical and dental care, and travel expenses, all of which would have been appropriate expenditures from a SNT. The Court does not decide what distributions from Decambre's trust should fall into the "temporary, nonrecurring or sporadic income" exception, but it states that payments made by the trust for telephone, cable and internet expenses – the regular, recurring expenditures -- should not be considered income, because the expenses were something an SNT should normally cover.

5. HUD Handbooks and Guidebooks:

7420.10G Section 8 Housing Choice Voucher Guidebook
http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/guidebooks/7420.10G

7465.1 Public Housing Occupancy Handbook
http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/pihh

4350.03 Occupancy Requirements of Subsidized Multifamily Housing Programs
http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsgh/4350.3

4571.2 Section 811 Supportive Housing for Persons with Disabilities
http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsgh/4571.2

III. SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP)

SNAP (formerly the Food Stamp Program) is a federally created program through the U.S. Department of Agriculture (USDA). Eligibility is based upon need, and there is both categorical eligibility and income eligibility. Participants are now given an Electronic Benefit Transfer (EBT) card that looks much like a credit card, which reduces much of the stigma associated with the old food coupons. With the EBT cards, participants may purchase "eligible food" – food for human consumption but not alcoholic beverages, tobacco, and hot foods or hot food products prepared for immediate consumption. Eligible food can also include seeds and plants to grow food in the participant's garden, meals on wheels, and meals in certain group living arrangements for elderly or disabled individuals.

More than 75 percent of all food stamp participants are in families with children. Almost 25 percent of participants are elderly people or people with disabilities. The federal government pays the full cost of the food stamp benefits, but it splits the cost of administration with the states. SNAP is administered through Food and Nutrition Services, a division of United States Department of Agriculture.

SNAP benefits are available to almost all low-income households. A SNAP household can be a household of one, including both a person who lives alone, or a person who lives with others but usually buys food and cooks alone. If the SNAP recipient purchases food and cooks meals with the people with whom he or she lives, then everyone is included in the SNAP household, meaning everyone's income and assets are included in determining eligibility. Spouses and individuals under the age of 22 living with their parent(s) or step-parent(s) are considered to be one SNAP household even if household members do not eat together.

A. ***Categorical Eligibility -*** If an individual in the household is receiving SSI, any service under Temporary Aid to Needy Families (TANF), or General Assistance, the household will automatically be eligible for Food Stamps regardless of assets or countable income. As of July 21, 2014, 43 jurisdictions have implemented what the U.S. Department of Agriculture (USDA) has called "broad-based" categorical eligibility. These jurisdictions generally make all households with incomes below a state-determined income threshold eligible for SNAP. States do this by providing households with a low-cost TANF-funded benefit or service such as a brochure or referral to an "800" number telephone hotline. There are varying income eligibility thresholds within states that convey "broad-based" categorical eligibility, though no state has a gross income limit above 200% of the federal poverty guidelines. In all but five of these jurisdictions, there is no asset test required for SNAP eligibility. Categorically eligible families bypass the regular SNAP asset limits. However, their net incomes (income after deductions for expenses) must still be low enough to qualify for a SNAP benefit.

   The amount of the benefit is calculated based on number of people in the household and the net income. It is possible to be categorically eligible for SNAP but have net income too high to actually receive a benefit.

B. Eligibility through Federal Income and Resource Tests

Under SNAP rules, households without automatic eligibility must meet three tests:

1. ***Assets*** must fall below certain limits, set by the state. Forty-five states have waived the asset test for SNAP. The federal rules state that households without an elderly or disabled member must have assets of $2,250 or less, and households with an elderly or disabled member must have assets of $3,250 or less, but in those states that impose an asset test, the limit is higher, ranging from $5,000 to $25,000. Exempt assets include the home, resources belonging to household members receiving SSI or TANF, and most retirement plans. How vehicles are counted varies by state – some exempt only one car with a value of $4,650 or less, while many states exempt all the household vehicles, regardless of value. Individuals are not required to pursue assets they are entitled to but not receiving.
2. ***Trusts as Resources*** – In states that have waived the asset test, or if the trust beneficiary is eligible for SSI, the trust will not be counted as a resource. If the beneficiary is not eligible for SSI, or in states with a resource test, SNAP rules will apply.

   Trust funds are counted as a resource if the fund is legally available for use by the financial group for items covered by program benefits. If a trust is revocable by a member of the assistance group, the total value is a countable resource and distributions from the trust are unearned income. Any payment to someone other than members of the assistance group from a revocable trust is an improper transfer.

   An irrevocable trust and income produced by the trust are unavailable if the following conditions are met:

   a. The trust arrangement is unlikely to end during the certification period, and no household member has the power to revoke the trust arrangement or change the beneficiary during the certification period;

   b. The trustee administering the funds is one of the following:

      i. A court;

      ii. An institution, corporation, or organization which is not under the direction or ownership of any household member, or

      iii. A person appointed by the court who has legal limits placed on the use of the funds;

c. Trust investments made on behalf of the trust do not directly involve or assist any business or corporation under the control, direction, or influence of a household member; **and**

d. The irrevocable trust is either

   i. Set up or funded by a non-household member, or

   ii. Funded from a household member's own assets and the trustee uses the funds solely to pay the educational or medical expenses of any person named by the household creating the trust.

The important things to consider when evaluating a trust's impact on SNAP eligibility are (1) is the person categorically eligible or do the SNAP rules apply; (2) is it a first or third party trust; (3) who is the trustee, and are there court-imposed requirements; (4) does any household member have control over the trust or trustee; and (5) your state rules concerning trust distributions. In most states where there is no asset test, distributions from the trust will not be counted as income to the beneficiary.

C. ***Transfer of Assets*** – In states where there is an asset test, eligibility is denied if an individual makes a disqualifying transfer of assets within three months of applying for SNAP. Transfers must be reported at the time of application and at redetermination, as well as when the transfer occurs, if already on benefits. The following transfers are not considered disqualifying transfers:

a. The resource was exempt, or owning the resource did not cause the group to exceed the resource limit, so transferring it does not change eligibility (GP-A.29);

b. The resource is transferred between people in the same financial group, since it is still counted regardless of who owns it;

c. The resource was sold or traded for compensation near, equal to, or greater than its fair market value;

d. The transfer settled a legally enforceable claim against the resource or client;

e. The transfer was court-ordered;

f. The transfer happened because the client was a victim of fraud, misrepresentation or coercion and legal steps have been taken to recover the resource;

g. The resource is an annuitized annuity;

h. The transfer is between members of the filing group and an ineligible student;

i. The resource was transferred for reasons other than to qualify for benefits, e.g., a parent placing funds in an education trust fund.

The length of the period of disqualification depends on the amount transferred, ranging from one month for transfers less than $250, to 12 months for transfers of $5,000 or more.

D. ***Gross monthly income*** — income before any of the program's deductions are applied — generally must be at or below 130 percent of the poverty line. For a family of three, the poverty line in federal fiscal year 2015 is $1,650 a month. Thus, 130 percent of the poverty line for a three-person family is $2,144 a month, or about $25,700 a year. If each member of the household is receiving TANF, SSI or, in some states, general assistance, the household does not need to meet any income tests. If a household includes an elderly person or a disabled person, they only have to meet the net income test explained below. States may increase the gross income limit, and 27 states had done so by July, 2014. With most of those using 185% or 200% of the federal poverty limit.

E. ***Net income,*** or income after deductions are applied, must be at or below the poverty line.

Deductions are allowed as follows:

- 20 percent of earned income;
- A standard deduction of $155 for households sizes of 1 to 3 people and $165 for a household size of 4 (higher for some larger households);
- A dependent care deduction when needed for work, training, or education;

- Medical expenses for elderly or disabled members that are more than $35 for the month if they are not paid by insurance or someone else;
- Legally owed child support payments;
- Some States allow homeless households a set amount ($143) for shelter costs; and
- Excess shelter costs that are more than half of the household's income after the other deductions. Allowable costs include the cost of fuel to heat and cook with, electricity, water, the basic fee for one telephone, rent or mortgage payments and taxes on the home. (Some States allow a set amount for utility costs instead of actual costs.) The amount of the shelter deduction cannot be more than $490 unless one person in the household is elderly or disabled. (The limit is higher in Alaska, Hawaii and Guam.)

F. *Calculation Examples*[1]

Gross Income Computation Example	
Determine household size.....	4 people with no elderly or disabled members.
Add gross monthly income...	$1,500 earned income + $550 social security = $2,050 gross income.
If gross monthly income is less than the limit for household size, determine net income.	$2,050 is less than the $2,584 allowed for a 4- person household, so determine net income.

Subtract Deductions to Determine Net Income and Apply the Net Income Test	
Subtract 20% earned income deduction	$2,050 gross income
	$1,500 earned income x 20% = $300. $2,050 - $300 = $1,750
Subtract standard deduction	$1,750 - $165 standard deduction for a household size of 4 = $1,585

[1] Examples taken from http://www.fns.usda.gov/snap/eligibility

Subtract dependent care deduction.....	$1,585 - $361 dependent care = $1,224
Subtract child support deduction......	0
Subtract medical costs over $35 for elderly and disabled.........	0
Excess shelter deduction........	
Determine half of adjusted income.......	$1,224 adjusted income/2 = $612
Determine if shelter costs are more than half of adjusted income........	$700 total shelter - $612 (half of income) = $88 excess shelter cost
Subtract excess amount, but not more than the limit, from adjusted income........	$1,224 - $88 = $1,136 Net monthly income
Apply the net income test....	Since the net monthly income is less than $1,988 allowed for a household of 4, the household has met the income test.

CALCULATION OF BENEFIT AMOUNT

The amount of benefits the household receives is called an allotment. The net monthly income of the household is multiplied by .3, and the result is subtracted from the maximum allotment for the household size to find the household's allotment. This is because SNAP households are expected to spend about 30 percent of their resources on food.

(October 1, 2014 through September 30, 2015)

People in Household	Maximum Monthly Allotment
1	$ 194
2	$ 357
3	$ 511
4	$ 649

5	$ 771
6	$ 925
7	$ 1,022
8	$ 1,169
Each additional person	$ 146

Benefit Computation	**Example**
Multiply net income by 30%… (Round up)	$1,136 net monthly income x .3 = 340.8 (round up to $341)
Subtract 30% of net income from the maximum allotment for the household size...	$649 maximum allotment for 4 - $341 (30% of net income) = $308, SNAP Allotment for a full month

If a household applies after the first day of the month, benefits will be provided from the day the household applies.

G. Heat and Eat Program

"Heat and Eat" is a term used to describe a streamlining practice that 15 states and the District of Columbia use to determine Supplemental Nutrition Assistance Program (SNAP) benefit levels for eligible households. It was designed to account for the fact that families in states with higher energy costs often find themselves in an untenable position during the winter as they are forced to decide whether to turn on the heat or keep food on the table. In calculating a household's monthly SNAP benefits, certain deductions from income are allowed, including the "excess shelter deduction," of which utility costs are a factor. A household may receive a higher SNAP benefit if the family qualifies for more deductions. States may use a "standard utility allowance" (SUA), an average of the state's utility costs, instead of collecting an applicant's utility bill. Prior to 2014, receipt of any amount of Low-Income Home Energy Assistance Program (LIHEAP, discussed below) benefits could qualify a household for the SUA, increasing the likelihood that they would qualify for the "excess shelter deduction," and therefore a higher SNAP benefit.

Section 4006 of Title IV in the Agriculture Act of 2014, commonly known as the Farm Bill of 2014, changed this standard. LIHEAP payments of $20 per year or less no longer entitle a household to automatically qualify for the SUA. This means that families receiving

$20 or less in LIHEAP assistance will not qualify for "Heat and Eat." These changes took effect on March 7, 2014, for SNAP recipients. Since then, most of the 15 states involved have increased their minimum LIHEAP subsidy to $20, avoiding the consequences of this change in the law.

IV. LOW INCOME HOUSING ENERGY ASSISTANCE PROGRAM (LIHEAP) 42 U.S.C. §§ 8621-8630, 45 C.F.R. § 96.

LIHEAP is a program through which the federal government makes annual grants to states, tribes, and territories to operate home energy assistance programs for low-income households. The LIHEAP statute authorizes two types of funds: regular funds (sometimes referred to as formula or block grant funds), which are allocated to all states using a statutory formula, and emergency contingency funds, which are allocated to one or more states at the discretion of the Administration in cases of emergency as defined by the LIHEAP statute.

States may use LIHEAP funds to help low-income households pay for heating and cooling costs, for crisis assistance, weatherization assistance, and services (such as counseling) to reduce the need for energy assistance. More than half of the funds are spent for heating assistance. The states can decide how benefits are provided and which agencies administer the program. The agency administering the program must coordinate with other low income programs, including the Weatherization Assistance program (WAP), and the states are encouraged to follow the WAP rules for eligibility.

A. *Eligibility*

Federal LIHEAP requirements are minimal and leave most important program decisions to the States. The law governing LIHEAP sets up most requirements as part of a list of "assurances" that grantees must make when they apply to HHS for funds.42 U.S.C. 8622(5). These include outreach to eligible individuals, especially those with elderly or disabled member, or those with high energy burdens. Owners and renters must be treated equitably.

A household consists of an "individual or group of individuals who are living together as one economic unit for whom residential energy is customarily purchased in common or who make undesignated payments for energy in the form of rent.

Eligibility Based on Income: Grantees have the option of setting LIHEAP eligibility for households at or below 150% of the federal poverty income guidelines or, if greater, 60% of the state median income. States may adopt lower income limits, but no household with income below 110% of the poverty guidelines may be considered ineligible.

• *Eligibility Based on Receipt of Other Benefits:* States may choose to make eligible for LIHEAP assistance any household in which at least one member is a recipient of Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), benefits under the Supplemental Nutrition Assistance Program (SNAP), or certain needs-tested veterans' programs.

The LIHEAP statute does not impose an asset test in establishing eligibility, but states may choose to limit client assets. LIHEAP assistance does not reduce eligibility or benefits under other state or federal aid programs. For example, this means that a LIHEAP payment would not count toward the income or resources of a family applying for SNAP, housing assistance, or other types of assistance programs. Each year, the LIHEAP Clearinghouse, through a contract with HHS, makes available state eligibility guidelines on its website at http://www.liheapch.acf.hhs.gov/clientel.htm.

B. Level of Benefit

Available benefits are limited by the amount that Congress appropriates each year, so the number of households that are served in a given year depends both on appropriations and how the state uses its funding. Simply meeting the eligibility requirements does not entitle the household to benefits – in 2009 only 21% of eligible households received LIHEAP benefits.

In addition to the federal funding levels, a number of other factors determine the benefit amounts. These include the cost of energy for a given household, the amount of energy consumed and the number of eligible households. Benefits in 2008 ranged from $73 to $1,172, with an average heating benefit of $293.

LIHEAP benefits are often in the form of Percentage of Income Payment Plans. In Ohio the household must have income at or below 150% of the federal poverty

guidelines. Other benefits are one time crisis payments, extended payment plans, and energy assistance for military personnel and their families.

V. CHILDREN'S HEALTH INSURANCE PROGRAM 42 USC § 1397aa, et seq.

The Children's Health Insurance Program (CHIP) provides comprehensive medical benefits to children under age 19. It is estimated that one in three children are covered by Medicaid or CHIP. Since states have flexibility to design their own program within Federal guidelines, benefits vary by state and by the type of CHIP program. CHIP benefits are available as part of Medicaid Expansion or in separate CHIP programs, or a combination of the two, depending on the state.

Under CHIP, the federal government bears a higher percentage of the overall cost than it does under Medicaid, averaging 71 percent nationwide, compared to about 57 percent for Medicaid. CHIP is structured as a block grant to the states, so states can create waiting lists for the program when state revenues run short. By contrast, states must provide Medicaid coverage to all eligible applicants, no matter the cost.

CHIP available through Medicaid expansion provide the standard Medicaid benefit package, as well as Early and Periodic Screening, Diagnostic and Treatment (EPSDT) services. **Under EPSDT, children are guaranteed comprehensive coverage including access to physical and mental health therapies, dental and vision care, personal care services and durable medical equipment that may not be covered or may be limited in CHIP. States are generally prohibited from imposing premiums and cost-sharing for mandatory coverage of children in Medicaid, but states have more flexibility to use premiums and cost-sharing in separate CHIP programs.** If a state provides a separate CHIP program, they can choose from several options to structure the benefit package, using various commercial plans as benchmarks.

CHIP provides medical coverage for uninsured children up to age 19 in families with incomes too high to qualify them for Medicaid. States have broad discretion in setting their income eligibility standards, and eligibility varies across states. Twenty-two states cover children whose families' have income of 200% of the federal poverty level, while 24 set the limit at 250% of FPL or higher. States that choose to expand coverage above 300% of FPL receive an enhanced match from the federal government. The Affordable Care Act (ACA) protects the gains already achieved in children's coverage by requiring states to maintain eligibility

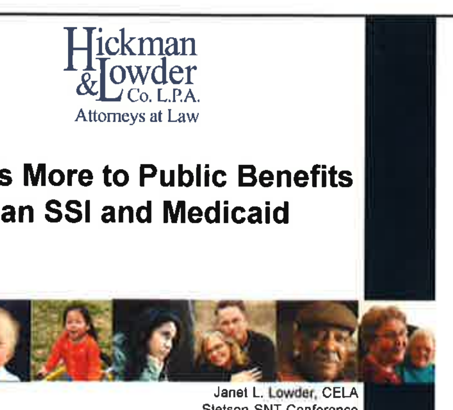
thresholds for children that are at least equal to those they had in place at the time the law was enacted through September 30, 2019.

Under the ACA, there are no waiting periods for coverage, so new guidance limited states' ability to impose waiting periods for CHIP to three months or less starting last year. Prior to the ACA, to be eligible for CHIP, children had to be uninsured, so a number of states had imposed a "waiting period" to be eligible for coverage. The ACA also requires that states provide Medicaid coverage to children aging off of foster care up to age 26 as of 2014. The ACA extended the CHIP program through 2015; however, the law also included a provision that would increase the CHIP matching rates by 23 percentage points from 2016-2019 if the program is reauthorized. The CHIP program has since been extended another two years by the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA):

Information about the various state programs and requirements can be found at: http://www.medicaid.gov/chip/state-program-information/chip-state-program-information.html

VI. CONCLUSION

When determining the type of trust to use, or how to structure a settlement for a person with a disability, the practitioner must carefully review all of the benefits received by the individual, and determine which benefit or benefits are most important to the individual and his family or household. One must then figure out how to balance the eligibility requirements among the benefits. Make sure that you don't overlook the less common benefits, as they can also often be protected, and put the person on a firmer financial footing. The goal is always to preserve the benefits that are critical to the care and financial well-being of the person, leaving the person in the best situation possible in the circumstances.



INTRODUCTION

- Importance of looking at benefits beyond SSI, Medicaid, SSDI, and Medicare when planning for an incompetent or disabled individual
- Presentation will focus on the following less common public benefit programs and how they interact with special needs trusts:
  1. Section 8 and other subsidized housing
  2. Supplemental Nutrition Assistance Program (SNAP) formerly known as the Food Stamp Program
  3. Low- Income Home Energy Assistance Program (LIHEAP)
  4. Child Health Insurance Programs (CHIP)

Case Example

- You are retained to prepare a special needs trust after resolution of a birth injury case for $1.5 million.
- The injured child is 4 years old and on disability Medicaid and Supplemental Security Income (SSI).
- The child's older brother also receives SSI and disability Medicaid.
- The single mother and the 2 other children in the family are on Healthy Families (CHIP) Medicaid. They get food stamps and live in a home near other family members with a Section 8 certificate. Their electric and gas bills are reduced through the HEAP program.

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4

Section 8 and Other Subsidized Housing

- Needs-based programs, with benefit amount and eligibility usually determined by countable income
- Most common type of program is the Section 8 voucher obtained through state or local housing authorities

5

Section 811

Supportive Housing for Persons with Disabilities

- Funds to develop and subsidize rental housing with availability of supportive services for low-income adults with disabilities
- Capital advances to non-profits for development of housing with a supportive services plan
- Project rental assistance – state agency must develop referral system and service delivery
- Very low-income or extremely low-income families are eligible

6

Types of Voucher Programs

- Housing Choice Voucher (HCV) Program
  - Rental subsidies for tenants in the private market
  - Can be used anywhere in the country and with any landlord who accepts vouchers
- Project-Based Voucher Program
  - Rental assistance for individuals for specific housing developments or units
  - Vouchers can not be transferred to other communities

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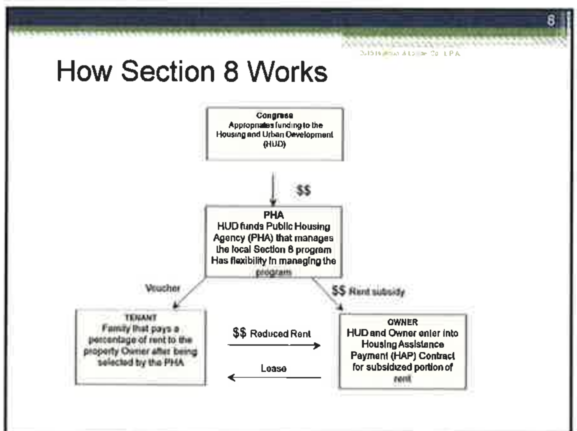
Section 8 Terms to Know

- Area Median Income
- Extremely low income (30% of AMI)
- Annual Income
- Voucher
- Fair Market Rent
- Total Tenant Payment (TTP)
- Public Housing Agencies (PHA, aka MHA)

How Section 8 Works



General Eligibility Requirements

- Open to individuals and families who are US citizens or non-citizens who have eligible immigration status
- Preference is given to the elderly and disabled individuals

Financial Eligibility Requirements

- Resource eligibility
  - No resource limit
  - Income from net family resources is counted
- Income eligibility
  - Limitation of income is primary eligibility requirement
  - Countable income includes (a) public benefits such as SS, SSI, retirement or disability and (b) income from a third party source such as a special needs trust

Annual Income - 42 CFR § 5.609(a)

- All amounts rec'd by any family member
- All amounts anticipated in next 12 months
- Not specifically excluded in § 5.609(c)
- Income from assets held by any member of the family

Income Exclusions - 42 CFR § 5.609(c)

- Most important exclusions include:
  - All lump-sum additions to family assets, such as inheritances, insurance payments, settlements
  - Medical expenses for any family member
  - Temporary, non-recurring or sporadic income

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Treatment of Trusts - 42 CFR § 5.603(b)

- Definition of net family assets includes trusts:
  - Revocable trust is an asset if family member can withdraw
  - Irrevocable trust, or trust not controlled by a family member is not an asset, but any income distributed from the trust fund is counted when determining annual income

Tenant Rent and Subsidy

- Calculation of rent
  - Total Tenant Payment
  - Tenants typically pay 30% of annual income
- Calculation of Subsidy
  - PHA determines fair market rental value of unit
  - FMR less the total tenant payment is the subsidy paid to the landlord

Rental to Family Member

- Property owner can rent a unit to a relative only if the PHA determines that the leasing of a relative's unit would accommodate a person with disabilities
- Check with the local PHA for guidelines and procedure
- Get prior approval

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Treatment of trusts

- Are distributions from trusts counted as income?
- Two cases involving SNTs
- Trial court overturned ruling that a PHA could count "regular" distributions from a trust as income. *Finley* v. *City a/Santa Monica* (Cal. Sup. Ct., No. BS 127077, May 25, 2011)
- Disbursement of funds from a SNT were considered countable income for a Section 8 voucher. *DeCambre v. Brookline Housing Authority*, (D. Mass., No. 14-13425-WGY, March 25, 2015)

Finley v. City of Santa Monica

Opinion of SMHA

- Distributions were regular and periodic payments from the trust and therefore annual income
- The trust itself was not countable
- Rent recalculation
  - Increase in TTP of $101 per month, retroactive for one year ($14 was due to increase in FMR)

Finley v. City of Santa Monica

Opinion of the Court

The Court confronted a contradiction in the rules:

- The lump sum was not countable, whether given to Finley directly or to the SNT under §5.609(c)(3)
- But, expenditures suddenly become income simply because they are made from the trust under §5.603(b)(2)

"If Finley were to . . . place the money under her mattress, she could use it for any purpose . . . . When [the money is] placed in a SNT . . . any distribution . . . is converted to annual income."

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19

Finley v. City of Santa Monica
Opinion of the Court

The Court's resolved the tension between §5.609(c)(3) and §5.603(b)(2) to give the "plain meaning" to both

- The lump sum making up the trust principal is excluded
- Only principal was distributed (the funds did not earn interest)
- The distributed principal originated from excludable income source
- Therefore, the distributions are excluded also

The court did not address the issue of "periodic" payments

20

Finley v. City of Santa Monica
Opinion of the Court

- The Court resolved the tension between §5.609(c)(3) and §5.603(b)(2) to give plain meaning to both
  - The lump sum in the trust is excluded
  - Only principal was distributed, as the funds did not earn interest
  - Because the distributions came from an excludable income source, the distributions are also excluded

21

DeCambre v. Brookline Housing Authority, et. al
U.S. District Court, D. Massachusetts, NO. 14-13425-WGY

Why is this case important?

- Very few court opinions on SNT's and Section 8
  - Specifically analyzes and rejects oft-cited *Finley*
  - Thorough opinion (40 pages, a lot of *dicta*)
- Deference to HUD and the housing authority
  - Significant reliance on HUD advisories and guidebooks
  - Likely to have great weight with housing authorities
  - May embolden more entrenched agencies
- Might advance the trend towards suspicion of first party SNT

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DeCambre v. BHA

- Plaintiff, on Medicaid and SSI, started with rent of $312
- SNT made significant distributions over several years
- Rent increased to $435
- Next recertification found ineligible
- Evicted

DeCambre v. BHA

- Hearing officer found that once a lump sum is put into trust, distributions are counted under the income rules
- Federal court agreed
  - Lump sum loses exclusion when in trust
  - Section 609 then applies to distributions
  - Agency given high level of deference
  - Remanded to agency to determine the nature of the distributions

Resources

- HUD Handbooks and Guidebooks http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/
  - 7420.10G Section 8 Housing Choice Voucher Guidebook - http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11749.pdf
  - 7465.1 Public Housing Occupancy Handbook
  - 4350.03 Occupancy Requirements of Subsidized Multifamily Housing Programs

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25

Supplemental Nutrition Assistance Program (SNAP)

- Formerly known as the Food Stamp Program, it is a needs based program that allows participants to purchase eligible food items
- Available to almost all low-income households
- Almost 25% of participants are elderly or disabled and more than 75% of them are in families with children

26

Household Definition

- Household is defined as all of the people in a residence who purchase food and prepare meals together
- An individual can be a household of 1, even if living with others
- Spouses, and individuals under age 22 living with parent or step-parent are one SNAP household

27

Categorical Eligibility

- Household will automatically be eligible if an individual in the household is receiving SSI, any service under Temporary Aid to Needy Families (TANF), or General Assistance
- 43 states or territories have enacted "broad-based" categorical eligibility which means all households with incomes below a state-determined income threshold are eligible for SNAP
- They provide a minimal cost TANF benefit to give categorical eligibility and bypass the SNAP asset limits

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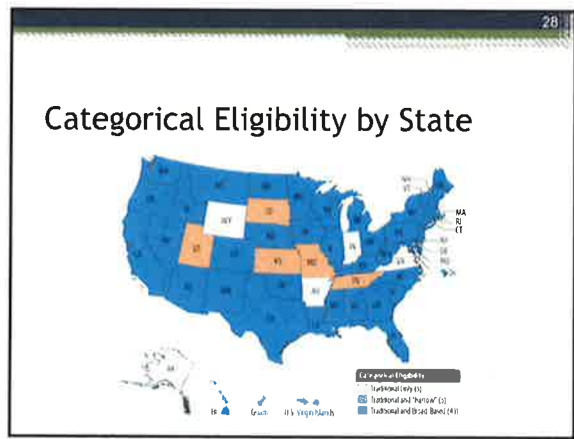

29

Eligibility through Federal Income and Resource Tests

- Households that are not automatically eligible must meet three tests
  1. Assets Test. Assets must fall below state set limits, however 45 states have waived this requirement
  2. Transfer of Assets Test. In states where the asset test applies, individuals may not make a disqualifying transfer of assets within three months of applying for SNAP. There a number of exclusions from the transfer rule.
  3. Income Test - discussed below

30

SNAP Income Eligibility Criteria

- Gross monthly income (income before deductions) must be at or below 130% of the poverty line
  - If each household member getting TANF or SSI (or GA in some states) no income test
  - If household includes an elderly or disabled person must only meet the net income test
- As of July, 2014, 27 states increased the gross income limit to 185% or 200% of FPL
- Net income (income after deductions) must be at or below the poverty line

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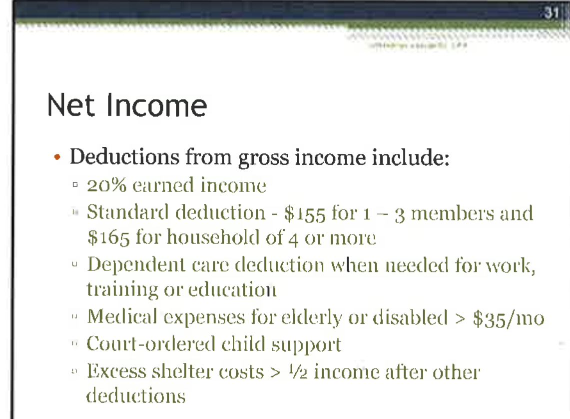
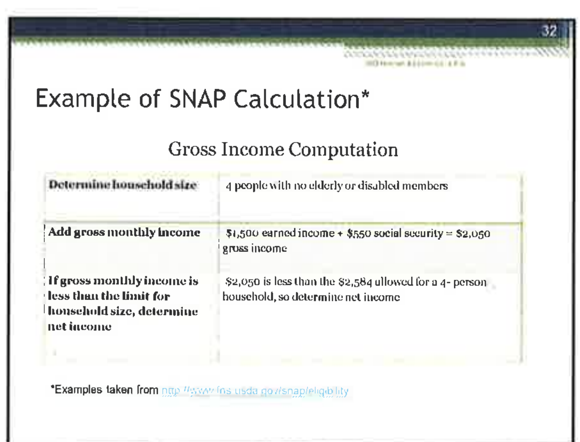
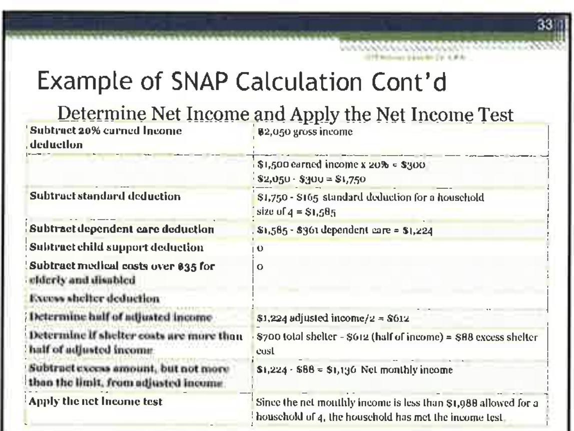




Determine household size	4 people with no elderly or disabled members
Add gross monthly income	$1,500 earned income + $550 social security = $2,050 gross income
If gross monthly income is less than the limit for household size, determine net income	$2,050 is less than the $2,584 allowed for a 4- person household, so determine net income



Subtract 20% earned income deduction	$2,050 gross income
	$1,500 earned income x 20% = $300 $2,050 - $300 = $1,750
Subtract standard deduction	$1,750 - $165 standard deduction for a household size of 4 = $1,585
Subtract dependent care deduction	$1,585 - $361 dependent care = $1,224
Subtract child support deduction	0
Subtract medical costs over $35 for elderly and disabled	0
Excess shelter deduction	
Determine half of adjusted income	$1,224 adjusted income/2 = $612
Determine if shelter costs are more than half of adjusted income	$700 total shelter - $612 (half of income) = $88 excess shelter cost
Subtract excess amount, but not more than the limit, from adjusted income	$1,224 - $88 = $1,136 Net monthly income
Apply the net income test	Since the net monthly income is less than $1,988 allowed for a household of 4, the household has met the income test.

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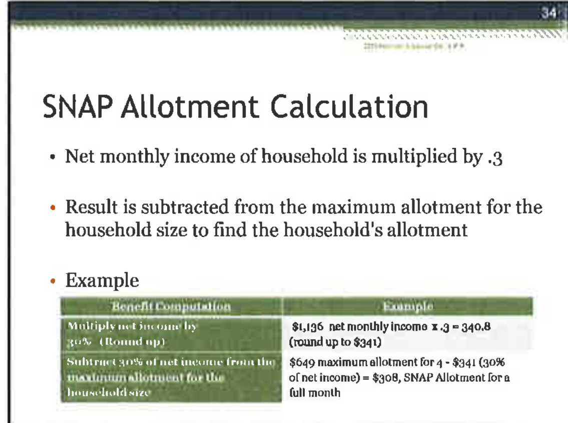

Benefit Computation	Example
Multiply net income by 30% (Round up)	$1,136 net monthly income x .3 = 340.8 (round up to $341)
Subtract 30% of net income from the maximum allotment for the household size	$649 maximum allotment for 4 - $341 (30% of net income) = $308, SNAP Allotment for a full month

Heat and Eat Program

- Some states with higher energy costs use the Heat and Eat Program to determine SNAP benefit levels
- An excess shelter deduction may be applied which would result in a higher SNAP allotment
- Some states may use a "standard utility allowance" (SUA) which is an average of the state's utility costs, instead of collecting an applicant's utility costs
- Participation in the Low- Income Home Energy Assistance Program (LIHEAP) may qualify a household for a SUA

Low- Income Home Energy Assistance Program (LIHEAP)

- Federal government provides grants to states, tribes, and territories to operate home energy assistance programs for low-income households
- Administration and eligibility requirements are established by the states but must fall within federal parameters
- Two types:
  1. Regular funds (sometimes referred to as formula or block grant funds), which are allocated using a statutory formula
  2. Emergency contingency funds, which are allocated at the discretion of the Administration in cases of emergency

37

Low Income Housing Energy Assistance Program (LIHEAP)

- Income. States have option to set eligibility for households at or below 150% of the federal poverty income guidelines or, if greater, 60% of the state median income
- Receipt of Other Benefits. States may determine categorical eligibility based upon receipt of other benefits such as SSI, TANF or SNAP
- No resource test, although states can impose an asset test
- A number of other factors determine level of benefit granted including federal appropriation for the year, number of eligible households, and household energy consumption

38

LIHEAP - Level of Benefit

- Depends on appropriations for the year – only a small percentage of households eligible receive benefits
- Cost energy for the household
- Number of eligible households
- Income
- Benefits are often in the form of Percentage of Income Payment Plans
- Include one-time crisis benefits, extended payment plans

39

Children's Health Insurance Program (CHIP)

- Provides comprehensive medical benefits to children, including coverage for uninsured children up to age 19 in families with incomes too high to qualify them for Medicaid
- When available as part of Medicaid, provides for standard Medicaid services as well as Early and Periodic Screening, Diagnostic and Treatment (EPSDT) services
- States can have CHIP program separate form Medicaid
- Eligibility and benefits vary by state and by type of program
- Information about the various state programs and requirements can be found at: http://www.medicaid.gov/chip/state-program-information/chip-state-program-information.html

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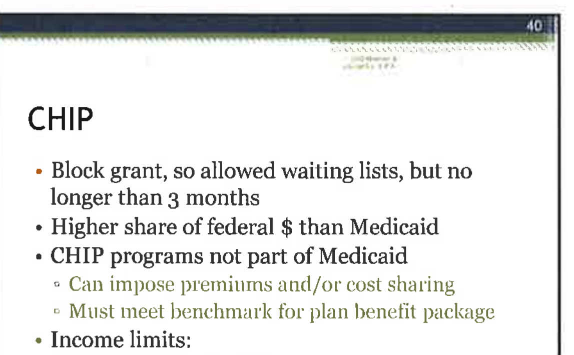

Conclusion

- Before deciding upon a type of trust or how to structure a settlement, determine which benefits are most important to your disabled clients
- Do not overlook less commonly used benefits
- Balance eligibility requirements of benefit programs
- Goal: *Preserve benefits that are critical for the care and well-being of your client*

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