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2016 Fundamentals of Special Needs Trusts Administration Webinar

Friday, April 29, 2016

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Stetson University College of Law &
The Center for Excellence in Elder Law
present:
2016 Fundamentals of
Special Needs Trusts
Webinar

April 29, 2016
Stetson University College of Law
Gulfport, Florida

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Center for Excellence in Elder Law

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The Fundamentals of Special Needs Trust Administration Webinar
Friday, April 29 2016

A half-day webinar for Special Needs Trust Trustees, Financial Planners, Money Managers and Attorneys involved in Special Needs Trust Administration

1:00-1:10pm EDT
Welcome and Announcements — **Professor Rebecca Morgan**

1:10-2:10pm EDT
There's No Place Like Home…An Update on Housing Issues for Beneficiaries with Special Needs
Robert B. Fleming

This session will cover a number of topics regarding housing for beneficiaries, including whether the trust should buy a home for the beneficiary (and if so, how it will be titled) and HUD housing programs available for beneficiaries.

2:10-3:10pm EDT
Surviving the SSA Review Process — **René H. Reixach**

Notices from Social Security are often cryptic at best, so you will need an appointment of representative form signed by the SSI applicant/beneficiary for Social Security to talk to you. It can be helpful to find out who is the trust reviewer in the regional office where decisions are made, since often the field office doesn't know either the rules or the reason for the decision. Examine an example of a cryptic notice and a memorandum for an administrative law judge hearing on the issue of paying back to the "State" as opposed to the "states" as well as a recent SSI administrative message concerning court order SNTs that is unfamiliar to some field offices and limits the need to re-evaluate SNTs.

3:10-4:10pm EDT
Having Your Cake and Eating It Too: Protecting the Grantor's Eligibility for Medicaid and SSI Benefits by Funding a Trust for Another Disabled Person — **Shirley B. Whitenack**

Federal law allows grantors who need or will need Medicaid and/or SSI benefits to fund long term care to transfer assets outright to a disabled person or to a trust for the sole benefit of a disabled person without incurring a penalty period for the grantor or jeopardizing the disabled beneficiary's eligibility for Medicaid and SSI. This session will address the federal requirements for making such transfers and the provisions that the trust must contain to protect the public benefits that the grantor and the disabled beneficiary must access.

4:10- 4:40pm EDT
The New ABLE POMS — **Robert B. Fleming & Shirley B. Whitenack**

As various states enact enabling legislation to allow ABLE accounts, this session will take a close look at the POMS covering ABLE accounts and make some predictions on the utility of Able accounts for SNT beneficiaries.

4:40-5:00pm
Question and Answer Panel — **Robert B. Fleming & Shirley B. Whitenack**

The day's speakers will problem solve for the audience. Registrants may (and are encouraged to) submit their questions and problems in advance.

Robert B. Fleming
Attorney at Law
Fleming & Curti PLC
Tucson, Arizona

Robert Fleming is the author of The Elder Law Answer Book, now available from Aspen Publishers. He is a Fellow of both the American College of Trust and Estate Counsel and the National Academy of Elder Law Attorneys. He has been certified as a Specialist in Estate and Trust Law by the State Bar of Arizona's Board of Legal Specialization, and he is also a Certified Elder Law Attorney by the National Elder Law Foundation. Robert is a member of the State Bar of Arizona (he was President of the Young Lawyers Section in 1978, Chair of the Probate and Trust Section in 1992, and chair of the Mental Health and Elder Law Section in 1999), and the Pima County Bar Association (he was President in 1986). Robert is also a member of the Special Needs Alliance, the premier national organization of lawyers working with "special needs" trusts, and the Elder Law Alliance, an elite national group of a dozen lawyers with a common interest in improving the practice of elder law.

While serving as the Pima County, Arizona, Public Fiduciary (the Tucson area's public guardian's office), Robert was one of the litigants in the Arizona Supreme Court case of *Rasmussen v. Fleming*, which established the right of incompetent patients (through their guardians) to refuse life-sustaining treatment when there is little prospect of recovery. He has also been actively involved in reviewing care at the Arizona State Hospital, and served as the Chair of the City of Tucson's city retirement plan for eight years.

Fleming & Curti, P.L.C. prides itself on use of up-to-date technology in the practice of law. In addition to speaking regularly on the use of Time Matters™ case management and HotDocs™ document assembly software, Robert also manages an independent e-mail listserver for Time Matters™ users; interested lawyers and staff members can subscribe online. You may want to check out the TimeMatters list archives. The firm also operates smaller listservers for other software programs used in the office, including Televantage, the telephone communications package in use at Fleming & Curti, PLC.

Robert's primary personal interest is his family (wife Rhonda and their two children Erik and Robyn). The entire family practices Cha Yon Ryu, a combination martial arts discipline incorporating Korean Tae Kwon do, Korean Hapkido, Japanese Karate and Chinese Ch'uanfa. Robert also enjoys antiques (particularly Mission and Arts and Crafts styles), scuba diving and computers.

René H. Reixach, Jr.
Attorney at Law
Woods Oviatt Gilman LLP
Rochester, New York

Rene H Reixach, Jr. is a partner in the firm’s Elder Law and health Care practice Group and responsible for handling all elder law and health care issues.

Mr. Reixach received his J.D degree from Harvard Law School, and his B.A. degree for Yale College.

Prior to joining Woods Oviatt, mr. Reixaxh was the Executive Director of the Finger Lakes health System Agency, a health planning agency covering a nie coujnty region of western New York. In this capacity, he oversaw the local input to the State Department of Rp

Shirley Whitenack
Attorney at Law
Schenck Price Smith & King, LLP
Florham Park, New Jersey

Shirley B. Whitenack is a partner at Schenck, Price, Smith & King, LLP with offices in Florham Park, Paramus, and Sparta, New Jersey and co-chairs the firm's Elder and Special Needs Law Practice Group and the Estates and Trusts Litigation Practice Group. Ms. Whitenack devotes a substantial portion of her practice to elder and special needs law, estate planning and administration and trust and estate litigation. She is on the State of New Jersey roster of approved mediators.

Ms. Whitenack is the President of the National Academy of Elder Law Attorneys (NAELA), a NAELA Fellow, and a member of NAELA's Council of Advanced Practitioners (CAP), an invitation-only group of elder and special needs planning practitioners and has served as an adjunct professor of law in the J.D. and LL.M. in Elder Law Programs at Stetson University College of Law.

Ms. Whitenack is a member of the Special Needs Alliance (SNA), an invitation-only nationwide alliance of special needs planning attorneys, the American Bar Association (Litigation Section and Real Property, Trusts & Estates Section), the New Jersey State Bar Association's (NJSBA) Advisory Committee on Continuing Legal Education and past chair of the NJSBA's Elder & Disability Law Section. Ms. Whitenack is a member of the New Jersey State Bar Foundation's Program Development Committee, the Morris County Bar Association's (MCBA) Estates & Trusts Committee and is past chair of MCBA's Elder Law Committee.

Ms. Whitenack publishes and lectures extensively on topics related to guardianship, elder and special needs law, estate and trust litigation and probate mediation. She is quoted in publications such as the Wall Street Journal, Money Magazine, Barron's, Market Watch and Kiplinger's Personal Finance Magazine.

Ms. Whitenack received the NJSBA's Legislative Service Award in September 2003 for her contribution in drafting and promoting revisions to New Jersey's guardianship statutes and the NJSBA's Amicus Curiae Award in 2004. Ms. Whitenack received GANJI's Recognition Award in October 2003 for her contribution in advocating for the civil rights of incapacitated individuals. She received NJICLE's Distinguished Service Award in 2007 and the Distinguished Service Award from the NJSBA's Elder & Disability Section in 2009. Ms. Whitenack received the Community Health Law Project's Ann Klein Advocate Award in 2011 for improving the lives of people with disabilities and was recognized in 2011 by the Senate and General Assembly of the State of New Jersey in a Joint Resolution for service to those with special needs. In 2012, she was honored by the NJSBA for her long service as a trustee of the New Jersey Institute for Continuing Legal Education and received the NJSBA's Distinguished Legislative Service Award for her contribution to New Jersey's enactment of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Ms. Whitenack received the Morris County Bar Association's Civil Practice Award in 2015.

She is A-V rated by Martindale-Hubbell and has been recognized in *New Jersey Monthly* magazine as one of New Jersey's top 100 Super Lawyers, one of New Jersey's top 50 women Super Lawyers as well as a top Elder Law "Super Lawyer." * She also has been selected by her peers for inclusion in *The Best Lawyers in America*© for Trusts and Estates. Ms. Whitenack is admitted to practice in New Jersey, the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit. She received her undergraduate degree *cum laude* from the State University of New York at Stony Brook and attended Seton Hall University School of Law, where she held the position of Notes and Comments Editor of the Seton Hall Law Review.

* *The "Super Lawyer" and "Best Lawyers in America" designations are peer ratings based upon criteria identified at www.superlawyers.com and www.bestlawyers.com. They are not state certifications.*

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1:10 P.M. – 2:10 P.M.

There's No Place Like Home…An Update on Housing Issues for Beneficiaries with Special Needs

Presenter:
Robert B. Fleming
Attorney at Law, Fleming & Curti PLC
Tucson, Arizona

- Materials
- PowerPoint

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There's No Place Like Home

2016 Fundamentals of Special Needs Trusts Administration

April 29, 2016

Robert B. Fleming
Fleming & Curti, PLC
330 N. Granada Ave.
Tucson, Arizona 85701
www.FlemingAndCurti.com

Trustees and Managing Real Property

Experienced trustees of special needs trusts agree that the purchase of residential real estate is a decision fraught with trouble and occasionally even legal danger. Obviously, the beneficiary of a special needs trust needs a place to live. It is frequently true that the trust is the only source of funds to pay for and maintain that residence. Sometimes the need to purchase a residence is compelling – in other cases, less so. There are plenty of problems to anticipate and plan for, and it helps to consider the possibilities in the abstract, and in advance.

First-, or Third-Party Trust?

Considerations will be very different for first-party and third-party trusts. There are at least two important principles about first-party trusts to keep in mind: (1) the Medicaid payback provision, and (2) federal and state regulations governing, and sometimes limiting, trust expenditures.

First-party trusts: Payback

Because a key element of a self-settled special needs trust is the requirement of a provision mandating payback of Medicaid expenditures,[1] there is a problematic reality in home ownership by the self-settled special needs trust. In a typical situation, the beneficiary and family may live in the home together. The special needs trust might, in fact, have only a fractional interest in the home. That means that upon the beneficiary's death, the family can effectively become homeless.

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[1] 42 U.S.C. §1396p(d)(4)(A), requiring that "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." (Referring to the State Medicaid plan). Though the approach is different for the beneficiary of a pooled trust (see 42 U.S.C. §1396p(d)(4)(C)), the result is the same from the perspective of the beneficiary's family: the Medicaid payback is only avoidable to the extent that remaining funds are held by the non-profit acting as trustee.

It would be logical to assume that Medicaid rules protecting family members' residential rights in other situations might apply here, but they do not.[2] Although a family member with a co-tenancy interest in the residence might be protected under general Medicaid eligibility rules, they will not (except, perhaps, in California) be protected from the trust's payback language.

First-party trusts: Management of trust expenditures

The growing tendency of state governments to more closely monitor and regulate first-party trust expenditures has been echoed by the Social Security Administration's implementation of increasingly restrictive provisions in its Program Operation Systems Manual (the POMS). That may create problems with payment for some housing-related expenses when the home is owned by the trust (or, indeed, when the home is owned directly by the trust's beneficiary). Before seriously considering purchase of a home in a first-party special needs trust, the trustee must have calculated how to ensure payment of taxes, insurance, upkeep, utilities and improvements.

First-party trusts: Pooled trusts

Most, but not all, pooled trust shares are first-party trusts, just accumulated for convenience. In the case of first-party pooled trusts, all of the considerations for other first-party trustees apply – and at least two other considerations are added:

1. If the pooled trust includes a retention on the death of the beneficiary, the trustee may suddenly find itself acting as landlord for the bereaved family of the deceased beneficiary – and with a fiduciary duty to other trust beneficiaries to assure that the property is not subject to waste and generates suitable income. This can be a very uncomfortable situation for the trustee.
2. Most pooled trusts are proud of their modest costs and efficient administration – and rightly so. The more that individual sub-trusts (or accounts) require individualized attention, however, the harder it is for the trustee to manage the differing expectations and responsibilities involved in different accounts. The mere possibility of home ownership in a pooled trust should be carefully considered at the inception, and appropriate policies, limitations and fees set before any real estate purchase.

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[2] Except in California, which has long confused Medicaid estate recovery principles with special needs trust payback requirements (see *Shewry v. Arnold*, 125 Cal.App.4th 186 (2004)). The California approach has not been followed in other jurisdictions, and in fact even California has inched away from the *Shewry v. Arnold* holding in the more recent case of *Herting v. California Department of Health Care Services*, 235 Cal.App.4th 607 (2015).

Of course, not all pooled trusts are first-party. For a third-party pooled trust, the considerations should be identical to those for any other third-party trust.

Third-party trusts: effect on Supplemental Security Income (and, perhaps, Medicaid)

Normally, ownership of the home in a first-party trust will not create problems for Supplemental Security Income benefits or Medicaid – though there may be restrictions on the trustee's ability to cover related expenses. But if a third-party trust owns a home in which the beneficiary lives rent-free, the home might itself be treated as "in-kind support and maintenance," resulting in a reduction of Supplemental Security Income (SSI) benefits. In some (limited) cases, that reduction might actually lead to elimination of the SSI benefits altogether, and thereby loss of Medicaid eligibility.

The problem is easy to overstate, however. The POMS treat rent-free shelter as in-kind support and maintenance[3] *except* when the SSI recipient has an "ownership interest" in the property. But where the home is owned by "a trust which is not a resource for SSI purposes" (e.g. – either a first- or third-party special needs trust), the home is not a countable resource.[4] In that situation, the rent-free shelter is not in-kind support and maintenance.

Sadly, though, that is not the end of the inquiry. While rent-free shelter is not a problem, payments of other amounts may be treated as "in-kind support and maintenance" (ISM).[5] So while a third-party trust may be able to hold title to the beneficiary's residence, and allow the beneficiary to reside there rent-free, payment by the trust of utilities, taxes, or mortgage will usually create ISM problems and therefore reduce any SSI benefit the beneficiary might receive.

Of course, that may not always be an important consideration. In a classic case where the beneficiary receives the full SSI benefit ($733, in 2016), the effect of payment by the trust of taxes and utilities will reduce the SSI benefit to no less than $468.[6] Since a homeowner with $733 in total income is

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[3] POMS §SI 00835.370

[4] POMS §SI 01120.200(F)

[5] POMS §SI 00835.465(D)(1) provides the list of items which are treated as ISM: food, mortgage (including property insurance **required** by the mortgage holder), real property taxes (less any tax rebate/credit), rent, heating fuel, gas, electricity, water, sewer, garbage removal and condominium fees (to the extent that they include identifiable elements of the other categories).

[6] Because of the "Presumed Maximum Value" rule of POMS §SI 00835.300, the calculation proceeds as follows: the maximum reduction in benefits is 1/3 of the maximum federal benefit rate ($733/3 = $244.33). Add $20 to that figure, yielding $264.33. This is the PMV – subtract that from $733 and the remaining benefit is $468.67, which is rounded down to $468. Simple, no? Then add in the state benefit, which varies and is available in some, but not all, states. Oh, and recalculate in 2016, when benefit rates change.

undoubtedly receiving support from some other source already, the result is simply that the cost of home ownership goes up by as much as $265 per month.

One interesting notion, not yet fully developed/explored: the Achieving a Better Life Experience (ABLE) Act of 2014 may provide a new mechanism to simplify home ownership for an SSI beneficiary. Assuming someone (a third-party trust, a supportive family member, or *maybe* a first-part special needs trust) can contribute up to the maximum $14,000/year to an ABLE Act account for the beneficiary/homeowner, payments *from* that ABLE Act account for mortgage payments, rent, utilities or taxes will not count as ISM.[7] Stay tuned.

In many cases, the trust beneficiary is not receiving SSI at all. In that situation there may be some effect on Medicaid eligibility from the trust's home ownership, though state rules differ markedly and states with expanded Medicaid under the Affordable Care Act may have made it much easier for a third-party trust beneficiary to qualify.

Beneficiary is a minor

Another problem arises when the beneficiary is a minor child. Because a parent has the duty to support his or her minor child,[8] and can even be assessed support payments for an adult child with a disability that existed before majority,[9] payment of expenses identified as the parent's duty can discharge that duty. This is important because relieving the parent's obligation of support benefits the parent, and at least the first-party special needs trust must be "for the benefit of" the beneficiary.[10]

Thus, payment by the first-party special needs trust for "clothing, food, shelter, medical and dental care and education" (in the words of the Texas statute) can sometimes be problematic, and the trustee must consider the effect. Perhaps more significantly, though, is the problem that payments of family living expenses can more directly benefit others living in the home –

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[7] See POMS § SI 01130.740(C)(4): "Do not count ABLE account distributions as income – A distribution from an ABLE account is not income but is a conversion of a resource from one form to another [citation omitted]. Do not count distributions from an ABLE account as income of the designated beneficiary, regardless of whether the distributions are for non-housing QDEs [qualified disability expenses], housing QDEs, or non-qualified expenses."

[8] Cf. Texas Statutes §151.001(a)(3): a parent has "the duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education."

[9] Cf. Texas Statutes §154.302

[10] Note that the federal statute (42 U.S.C. §1396p(d)(4)(A)) does not require that the trust be for the sole benefit of the beneficiary. Nonetheless, the "sole benefit" principle is frequently read into the statute, and imbues the entire POMS treatment of first-party special needs trusts.

and perhaps can benefit them to the exclusion of the intended beneficiary. So, for instance, if a minor beneficiary has two parents and three siblings living with her in a 4,000 square foot home with barriers that prevent her from even visiting some of the rooms, it may be hard to justify payment of the entire bills for utilities, taxes and upkeep.

Having considered that scenario, it is worth asking: what changes on the day after the described minor's 18th birthday? While payments for home-related expenses may no longer discharge her parents' duty to support her, is it any less clear that household expenses directly benefit others living in the home, and probably disproportionately so? Does it compound the problem (or at least make it more emotionally telling) when each of her siblings turns 18, attends the local community college but does not move away?

New Jersey's Medicaid regulations are a good indication of the approach of many – and a growing number of – states. New Jersey provides an example:

> *For example, if the trust acquires housing for the benefit of the trust beneficiary, and other family members also live in that house, the trust document shall provide that the trustee shall require and collect a pro rata contribution for the expenses of uses incurred, and shall return such contribution to the trust. Such collections shall be reflected in the annual required trust accounting.*[11]

Court supervision

Sometimes (but not by any means in every case), the special needs trust may be subject to court supervision. That will introduce multiple considerations for the trustee to balance when making any decision. Now there are general trust/accounting rules, public benefits eligibility rules, public agency oversight rules **and** court oversight rules to be weighed in making any distribution.

Judges vary widely in their sophistication, attention, and philosophy. It is hard to generalize reliably, and it is important to be familiar with not only state and local rules governing distributions and accounting practices, but also individual judges' preferences and triggers. A few generalizations might be appropriate, but pay attention to differences in your community:

1. A court-supervised trust is much more likely to require family members to pay rent, and to have that rent calculated on some

[11] Jew Jersey Administrative Code 10:71-411(g)1ii(1)(A). See also *In re A.N.*, 430 N.J.Super 235, 63 A.3d 764 (App. 2013), holding that the probate court's decision that allowing family members to live in the home without payment of rent did not violate the trust's principles, but that the New Jersey Medicaid agency was permitted to make the ultimate decision about the effect of the arrangement.

rational basis (e.g.: a fractional share of the overhead costs for each resident, with the trust beneficiary paying no more than her fractional share of costs).

2. It is at least somewhat likely that the court will require any home purchase to be titled to the trust – meaning that the payback requirement of a first-party trust will work to force sale of the home on the death of the beneficiary.
3. Court supervision will undoubtedly increase costs of maintaining the home, since decisions about major improvements, even some routine repairs, and all sorts of other fairly ordinary expenditures will need to be submitted to the court.
4. Let's face it. Some judges are quirky. Remember the judge in Washington who decided that a corporate trustee's well-crafted investment policy statement was just too scary in a time of volatile investment returns.[12] You simply don't know when you might face that level of review.[13]

Titling the residence

Assuming a trustee has made the decision to purchase a residence for the beneficiary, how should the residence be titled? There are at least these options:

1. To the trust (actually, to the trustee with an indication of her role as trustee). This may be the most common approach and may be mandated in some circumstances – especially when the trust is first-party trust. Of course, titling the home to a third-party trust is an easy choice, since it (a) is not subject to the payback requirement, and will actually be better at avoiding estate recovery if the beneficiary reaches age 55, and (b) minimizes additional problem of ISM calculations, and (c) helps continue the trust's protection against the beneficiary's creditors or tendency to make improvident gifts or encumbrances.
2. To the beneficiary as an individual. This may (a) permit the home to bypass the payback requirement in a first-party trust but

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[12] *In Re Mark Anthony Fowler Special Needs Trust*, 160 Wn. App. 1001 (2011). The trustee was ultimately vindicated by the Court of Appeals, and without having been forced to either liquidate the trust's investments or forego trustee's fees. But the process took almost three years, and the trustee's comfort level must certainly have been negatively affected.

[13] Perhaps you prefer to consider the trial judge in *In Re the Irrevocable Supplemental Needs Trust of Jennifer Collins*, #A04-1018 (Minn. App. 2004, unreported), in which the Court of Appeals reversed a trial judge's disapproval of expenditures for a Disney World trip, a snowmobile purchase and tickets to a Britney Spears concert for a 13-year-old beneficiary. One reason the trial judge had disallowed $400 of the Disney World trip, incidentally, was because other family members had gone along – a holding analogous to the "sole benefit" analysis often applied to living arrangements subsidized or paid for by a special needs trust.

simultaneously (b) cause expenditures in connection with the property to be treated as impermissible trust transfers for the benefit of the beneficiary and his cotenants or heirs.

3. In joint names with the beneficiary and others caring for, or living with, him. This will, of course, usually require that the cotenants contribute an appropriate amount to the value of the home. Query whether their contribution can be by way of a loan encumbering the property – if so, there should be an agreement making clear that upon foreclosure or sale the encumbrance is first applied to the cotenants' share (and even then the possibility of future loss of value makes this problematic, since the trust may end up subsidizing their loss).
4. Placing a lien or other appropriate encumbrance against existing property reflecting the trust's (or the trust beneficiary's) interest gained by making significant investments in the property. See, for instance, *In the Guardianship of Hollis*,[14] an unreported decision in which the corporate trustee was ultimately exonerated for its decision to place a lien against the parents' home for the $67,000 paid for a swimming pool at their residence but to leave the property in the parents' name.

On balance, it will almost always make more sense (and probably be preferable) to title the home to the trust. One important exception: when a home is being purchased at the time of settlement of a personal injury action, and a first-party trust is being established contemporaneously, the trustee/conservator/beneficiary might decide to make the purchase directly and to title it in the beneficiary's name individually, to avoid the payback requirement. Appropriate plans need to have been made to cover future costs of maintenance of the residence (not just physical maintenance, but also taxes, insurance, upkeep, and utilities).

What could go wrong?

"I don't know why the house burned down," reported one parent of a special needs trust beneficiary. "The meth lab was outside."[15]

There are an extraordinary variety of ways for things to go wrong, of course. Some of those already seen by special needs trustees:

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[14] #14-13-00659 (Tex.App. 11-4-2014, memorandum decision)

[15] Thanks to fellow attorney (and fellow trustee) Robert Fechtman of Indianapolis, Indiana, for this anecdote. Now that I've credited him once, Udall's Law allows me to use the story in the future without attribution.

Family will stop paying rent

Experienced special needs trustees report this as the highest-frequency problem with trust ownership of a home. It takes only a little thought to recognize that family members with limited resources will quickly determine that it is unlikely that they will be evicted for non-payment of rent, and that they will be given considerable latitude.[16]

Perhaps the best response to this reality is for the trustee to have a contingency plan (perhaps not shared with the family members, if it is possible to keep it confidential) for the likely non-payment of rent. Planning should certainly consider this possibility.

Family will stop paying for utilities, taxes, etc.

As with rent, family members may quickly figure out that there is little risk (to them) in withholding payments for utilities, taxes, insurance, and even simple maintenance. The risk to the trust (and the trustee) is, however, substantial: if payments are not made, the property could be lost (in a fire, to unpaid taxes, or to gradual deterioration) and the trust's interest compromised. As with rent, it is important for the trustee to have a contingency plan for the non-payment of these expenses.

Sometimes the trustee expects that the expenses will be paid from the beneficiary's Supplemental Security Income or Social Security Disability Insurance income, and there will be sufficient income to do so. That is not enough protection for the trustee, though, as family members are notorious for not using the beneficiary's income and assets as anticipated.[17]

Family may have little experience in home maintenance

A few illustrations from real life might shed light on this point, and how it differs from the previous one:

1. One family apparently failed to notice a leak in the shower/tub until significant damage was done to the bathroom tile. When they finally

[16] Although it is not, strictly speaking, "about" non-payment of rent, the appellate court comments, in an aside, about that fact in deciding the unpublished case of *Haywood v. Edwards*, #317114 (Mich. App. 10-14-2014): "…the trust paid 100 percent of the utilities, property taxes, home repairs, homeowner's insurance, lawn care, and vehicle insurance and repairs. Although all three women resided in the home purchased with trust funds, no rents were received from [the beneficiary's mother] or [the beneficiary's sister]."

[17] Cf. *State v. Melvin*, #M2012-02661-CCA-R3-CD (Tenn. Crim. App. 1-23-2014, unpublished). In that case, the beneficiary's brother was criminally charged for his misapplication of the beneficiary's disability income to his own benefit – despite the beneficiary's interest in the family home the two of them had inherited. While the notion of a special needs trust is only tangentially involved, it is a good illustration of how these kinds of assumptions can go wrong.

reported problems to the trustee, the cost of repairs was in excess of $20,000 – and that did not include the mold remediation required as a result of two years of constant moisture in the bathroom.

2. Most people probably understand that air conditioners' filters need to be changed periodically. In one real-life case, the family did not – and a decade's worth of missed filter changes ultimately required replacement of the entire heating/cooling unit.
3. Another family asked for, and was authorized to purchase, a new washer and dryer because of problems with the older units. On a home visit a year later, the trustee discovered the new units sitting in the middle of the living room, unconnected – while the old, damaged units were causing damage to the laundry room (from improper venting of the dryer and overflow from the washer).
   Apparently the family did not know how to hook up the new units or ask for help.

The point: a trustee should not assume that all new homeowners either know or can figure out how to maintain a home. If they realize that they have no ownership interest in the home, they may have not incentive to learn how to be homeowners. Part of the trustee's obligation on purchase of a home has to be providing assistance with the management of the home.

Property may decline in value

This concept was largely unheard of, and unconsidered, between the birth of special needs trusts and 2008. Then, as you may have heard, the real estate marketplace changed. So what happens when the property declines in value?[18] Do cotenants' shares of the property abate first? Can the trust simply abandon property with no net value? Should the trust make expenditures that reduce encumbrances, or increase value, in an attempt to avoid loss of the property to creditors or depreciation? What if the effect of the trustee's actions is to save the credit rating or financial interest of a non-cooperative family member (or, conversely, to allow a credit rating to deteriorate by not taking affirmative action)?

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[18] *Matter of Special Needs Trust of Perkins v. Reed*, 2014 Ohio 2414 (Oh. App. 2014) involves the attempt by a former trustee to collect fees for his administration of the special needs trust prior to resignation. The problem: on his watch the trust's major asset, the beneficiary's residence, had been allowed to deteriorate to the point that its value was a fraction of its original purchase price. His fees were reduced by 60% by the probate court; on appeal, the reduction was upheld and the language of the opinion makes clear that the appellate court disapproved of his actions. His primary defense: the trust arrangement was voluntary, and he could not make the beneficiary live a more orderly life. None of the judges considering his argument seemed to have been impressed by it.

Property may require extensive renovations or modifications, or otherwise be unsuitable

One common problem: family often insist on selecting a home away from services, because they value privacy, or open property, or suburban living. Meanwhile, beneficiaries (and families) may have unreasonable expectations about the use of trust funds for improvements or modifications.[19]

Consider, for example, what is probably still the leading case in the country on the use of trust protectors – especially in special needs trusts. In *Robert T. McLean Irrev. Trust v. Ponder*,[20] the core of the problem was the trustee's alleged misuse of trust funds to pay for, among other things, extensive home revisions requested by the beneficiary. The reported decision deals with allegations that a trust protector was required, and failed, to review those expenditures and remove and replace the trustee who made the expenditures. Importantly, the successor trustee reached an undisclosed settlement with the original trustee(s).

Purchase of the home may be subject to technical objections

When a home purchase is contemplated, it is important to review the trust document (and, if appropriate, state Medicaid rules and local court rules) to assure compliance with any limitations. Careful compliance with those rules should be observed.[21]

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[19] Even the settlor of a third-party special needs trust might have unreasonable expectations that need to be addressed. That appears to have been the case in *Duross v. Bank of the West*, #B240011 (Cal.App. 2013, unpublished). In that California Court of Appeals decision, the appellate court affirms a trial court decision authorizing expenditure of over $300,000 for improvements to the $300,000 home of the beneficiary's court-appointed guardian. The facts spelled out in the opinion are complicated, and they also involve a loss on the sale of the settlor's original residence because of a decline in value from the time of preparation of the trust to the sale of the residence. Interestingly, the trust included an express authorization for expenditure of up to 25% of its total value on the anticipated improvement; the actual cost of the improvement was slightly more than the 25% figure.

[20] 418 S.W.3d 482 (Mo.App. 2013). This is actually the *McLean* case's second trip to the Missouri Court of Appeals, with the first reported decision at *Robert McLean Irrevocable Trust v. Davis*, 283 S.W.3d 786 (Mo.App. 2009).

[21] While it is difficult to parse exactly what happened from reading the appellate decisions, this appears to be one of the primary objections leading to a challenge of the trustee's management of the trust in *Anderson v. Dussault*, 181 Wn.2d 360 (2014). The Washington Supreme Court decision does not resolve the complaint, but simply reverses a probate court dismissal and remands for further review. But it is worth noting that the challenge was filed by a trust beneficiary after she reached majority and despite the fact that annual court accountings had included all of the later-challenged expenditures – including the alleged purchase of a home titled to the beneficiary's mother's boyfriend in a manner that, according to the beneficiary, violated the trust's terms for purchase of residential property.

Suitability of the home may change too quickly

When a trust beneficiary's family moved to Hawaii, it seemed like a bit of a stretch to immediately purchase a condominium for the beneficiary to be near her family, but her parents were insistent. They could not imagine not having their daughter near them, and they did not want to face moving her twice. They reasonably argued that such a move would itself be detrimental, and so they prevailed.

Big surprise: the beneficiary did not like Hawaii, missed her friends and siblings back on the mainland, and lasted just one year before moving away from her condominium. The twin results: a significant loss to the trust (because, of course, all this took place in 2008-2009), and a lesson in the value of patience.

Too often trust beneficiaries and their families are unable to imagine life changes. That's the job of a professional trustee, and it is important to articulate and defend the value of moving slowly – and sometimes of immobility.

Potential trustees may decline to accept

Many corporate trustees avoid taking on trusts with significant real estate holdings. That can be for at least three reasons: (1) a reduction in investment assets, which corporate fiduciaries tend to think of as both their institutional strength and their calculation base for fee-setting, (2) the relative difficulty in managing individual real estate holdings (e.g.: overseeing tax payments, insurance and upkeep), and (3) the antipathy toward real estate as a trust asset, since the trustee may ultimately be held liable for such esoteric things as CERCLA[22] violations.

The last of those reasons, the potential liability under CERCLA, may seem like an absurd concern for the ordinary residential real estate holding. Indeed, the cases in which trustees have been held liable (or might have been held liable) tend to involve obvious environmental challenges, like management of a garbage dump.[23] Still, corporate trustees tend to be very conservative in their assessment of risks and the potential for liability.

It can sometimes be challenging to find a suitable corporate trustee for any special needs trust. Ownership of any real estate – including even a personal

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For another case in which compliance with court procedures in the purchase of a home ultimately caused problems for the trustee, consider *In Matter of Jones*, 2011 NY Slip Op 50501(U) (NY Sup Ct 2011, unpublished).

[22] The Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

[23] *City of Phoenix v. Garbage Services Co.*, 827 F.Supp. 600 (D.Ariz. 1993). The District Court's holding that a corporate trustee was an "owner" for CERCLA liability purposes was not appealed.

residence – can make that challenge more difficult. Add confusing and conflicting analyses of the effect on public benefits arising from different trust expenditures related to the real estate, and the trust can be an unattractive piece of business for many potential trustees.

Financing will likely not be available

Most Americans think of their home as something akin to jointly-owned property. That is, the usual arrangement is that "the bank" "owns" up to 90% of the home, and monthly mortgage payments are required. That conventional view of home ownership is seldom available in the case of special needs trusts.

It should not be surprising, but it often is: the beneficiary of a special needs trust is usually an unattractive borrower (since they likely rely on public benefits for the payment of minimum living costs), and the trust itself will not be able to borrow money even if it holds significant assets. Lender banks are accustomed to considering earned income, and neither the trust nor the beneficiary is likely to have any.

Does that mean that a trust cannot purchase a residence? Of course not. But the usual mental calculation of a small down payment coupled with regular monthly payments will not be available. The purchase of a home will almost certainly be an all-cash arrangement, and the investment options available to the trust will be constrained as a result.

Managing the home

Once a decision is made to purchase a home (or in cases where a home is received as part of the trust assets), the trustee must make a conscious assessment of what oversight and management will be required. At least the following need to be part of a checklist, to be slavishly followed by the trustee:

1. Rent. Will the beneficiary or other family members be paying any? If not, why not – and have the appropriate entities (the court, Medicaid, SSA) been considered to make sure that there will not be problems? If rent is to be paid, will it be based on fair market value, the ability of family to afford rent, the amount of rent that was previously paid on a different property, or some other calculation? Will the renter(s) sign a rental agreement, or operate on an informal understanding? What is the trustee's plan when the rent is late, is skipped or stops altogether?
2. Taxes. The trustee needs to check taxes at every due date – or just pay them from the trust. State laws differ, but failure to pay the taxes may not cause an immediate catastrophe. Still, the interest rate on unpaid taxes tends to be higher than for most other "loans" the trust might receive. Delinquent taxes are such a common problem that the trustee must have a mechanism for monitoring payment.

3. Insurance. The property has to be insured. Unlike missed tax payments, missed insurance payments can in fact result in an immediate catastrophe. Furthermore, there is more than a single possible vendor – so it is harder for the trustee to monitor payments by a beneficiary, family member or renter. If the trustee is not paying insurance directly, there needs to be a mechanism for checking on status at the point when payments are due. Note that this is, to some extent, the flip side of a point previously made: the conventional approach to home insurance for most homeowners is tied up with the mortgage holder's being named as a loss payee, and being given notice of any insurance termination. The trustee may not have the same control over the insurance arrangement as a mortgage holder would have. Better to have insurance payments made directly by the trust, and to budget for them.
4. Utilities. If a beneficiary, family member or renter fails to pay utilities, the trust's asset will not usually be put at immediate risk (though it might be problematic for the beneficiary). Still, two problems commonly arise: (1) the essential need for continued utilities becomes a point of leverage for the family member who has been assigned responsibility for utilities ("I know I was supposed to pay the electric bill, but you can't let the power get turned off or my son will perish"), and (2) if utilities do get turned off for any length of time, it may be impossible to turn them back on without having the property checked for possible building code violations (either from deterioration of the property or changes in code requirements). The trustee can thus be put into an impossible position: in some cases, it may be simultaneously impermissible and essentially important for the trustee to pay utility bills.
5. Repairs. Even if the beneficiary is expected to be a long-term resident of the property, the trustee needs to make periodic (annual?) visits to review maintenance status. At the same time, the state Medicaid agency might not be willing to permit substantial payments that benefit the entire family. Another conundrum for the trustee.
6. Improvements. What about the new pool, the "therapy" spa, or adding on a bedroom, with separate entrance and bathroom, for a future caretaker? And what if the future caretaker is a family member, or there are small children in residence who will use the pool, or the spa needs to have a (very expensive) lift, solar heater and solar cover? Before purchasing a home, think about budgeting for these and other expenses. Remember that some family members may think of the trust assets as something they need to manipulate the system to get control over.
7. Managing expectations. Every professional trustee and pretty much every business person understands that one cannot spend assets and

still benefit from the investment income those assets would have produced. All real estate agents and most homeowners understand that spending, say, $25,000 to improve a $125,000 house will not raise its value to $150,000 (that is, home improvements will not yield an increase in value of even the expense, much less turn a paper profit). Do not assume that trust beneficiaries – or their families – understand the same things.

Conclusion

All of that leads to the inevitable conclusion that a special needs trust should not purchase a residence, right? Wrong.

Notwithstanding all the difficulties, all the increased administrative costs, all the game-playing and badgering and begging (both of and by trustees), purchase of a residence is often one of the most important benefits to be had from a special needs trust. But the trustee should appreciate that it is sometimes very challenging to make the arrangement work.

There's No Place Like Home:
an update on housing issues

Robert B. Fleming
Fleming & Curti, PLC
Tucson, Arizona

FLEMING & CURTI PLC

Different Trusts, Different Problems

- First-party special needs trusts
  - Payback
  - Management problems
- Pooled trusts
  - First-party: retained shares
  - Special management problems
- Third-party trusts
  - SSI recipients (ISM – more in a minute)
  - Medicaid recipients

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In-Kind Support and Maintenance

- Significance of concept:
  - Supplemental Security Income rules
  - No significance for SSDI, DAC, Medicare
  - Some significance for direct Medicaid eligibility
- ISM effect:
  - "Presumed Maximum Value" (PMV) Rule and 1/3 Reduction Rule
  - 1/3 reduction from maximum SSI (w/o state supplements) plus $20
  - In other words: maximum SSI benefit reduced to $468 (for 2016)

What Constitutes ISM?

- Mortgage (including insurance if required by lender)
- Real property taxes
- Rent
- Heating fuel
- Gas
- Electricity
- Water
- Sewer
- Garbage removal

ISM Workarounds

- POMS § SI 00835.370: rent-free use of home held in trust not ISM
- Can the trust pay for cable, internet, telephone, cell service, car repairs, gasoline, transportation, etc – freeing SSI payments for payment of housing expenses?
- Can the trust group its ISM payments into one annual disqualification?

Special Problems

- Joint or fractional ownership
  - Joint tenancy – with a trust?
  - Life estates
- Beneficiary is a minor, with parent living in house
- Court supervises trust
  - Uninformed judges and lawyers
  - Micromanagement and prudent administration
- Affordable Care Act
- Long-time Medicaid beneficiaries

How to Title the Residence

- To the trustee (as fiduciary)
- To the beneficiary individually
  - Outright or jointly, at time of trust funding
  - Outright, by trustee
  - Lien on property
    - Property purchased by trust
    - Previously-owned family property with improvements
- Purchase in joint names

Effect of Titling Choices

- Accounting
- Effect on benefits
- Ability to pay for upkeep, taxes, etc.
- “Sole benefit” rule/requirement and its effects

What Could Go Wrong

- Family failures:
  - Rent
  - Utilities, taxes, other ISM items
  - Upkeep and home management
- Property loss of value, esp. with joint ownership interests
- Cost of renovations
- Home suitability
- Corporate trustees and real property ownership

Property Management Plan

- Written agreement with beneficiary and/or family
  - Rent arrangements **and effect of non-payment**
  - Taxes, water, gas – other ISM items
  - Insurance (frequently trust obligation)
  - Repairs, improvements, accomodations
- Managing family expectations
- Periodic reviews of suitability, compliance, alternatives

Some other interesting stuff

- January, 2014 *Voice* article: Special Needs Trusts and Home Ownership: a Trustee's Concerns
- May, 2011 *Voice* article: Buying a House for a Special Needs Beneficiary: Proceed with Care!
- May, 2012 *Voice* follow-up: Buying a House – More Questions
- SSA's POMS provision on home ownership by a special needs trust: SI 01120.200F
- SSA's POMS provision on ABLE Act accounts: SI 01130.740
- Fleming & Curti, PLC's newsletter: http://issues.flemingandcurti.com/

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STETSON LAW

2016 Fundamentals of Special Needs Trusts Webinar

Friday, April 29, 2016
2:10 P.M. – 3:10 P.M.

Surviving the SSA Review Process

Presenter:
René H. Reixach Jr.
Attorney at Law, Woods Oviatt Gilman LLP
Rochester, NY

- Materials
- PowerPoint

Stetson University College of Law presents:
2016 Fundamentals of Special Needs Trusts Webinar
April 29, 2016
Stetson University College of Law
Gulfport, Florida

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

SURVIVING THE SSA REVIEW PROCESS

Stetson University College of Law
2016 Fundamentals of
Special Needs Trusts Webinar
April 29, 2016

René H. Reixach
Woods Oviatt Gilman LLP
700 Crossroads Building
Rochester, NY 14614
Tel: (585) 987-2858
rreixach@woodsoviatt.com

I have almost gotten to the point where I simply will not prepare a special needs trust for someone who is or will be eligible for Supplemental Security Income (SSI) because increasingly once I have completed my work and the trust has been established, the Social Security Administration (SSA) will determine that the individual no longer qualifies for SSI because of the trust.

This results in frantic calls for help from the client, who is upset that the work I did has resulted not in protecting their benefits but in causing the benefits to be lost. If the trust has substantial assets the problem hopefully can be straightened out, but on a routine hourly rate basis the fee for doing that could easily be more than the fee for setting up the trust in the first place, particularly if an Administrative Law Judge ("ALJ") hearing is required (and the fee undoubtedly will be reduced by the SSA to add insult to injury).

The problem of such adverse decisions by the SSA has for many years been made even worse by the very vague notices it issues concerning allegedly defective trusts. In a recent case the decision on reconsideration simply stated "it was determined that the trust is a countable resource. It does not meet the special needs exception rules." What is one supposed to make of such a notice? Is the problem that the trust was established by a parent or by a court, but the SSA considers it to have been established by the beneficiary, *e.g. Draper v. Colvin*, 779 F.3d 556

(8^{th} Cir. 2015) [trust defective because parents were allegedly acting on behalf of beneficiary under power of attorney]? The solution seems to be to have the parent "seed" the trust with a small payment from the parent, frequently $10.00, at least a day before funding it with the beneficiary's funds, and to make sure that the power of attorney authorizes the parent to fund the trust from the beneficiary's resources, but not to "establish" it in the first place.

Another problem of some currency concerns early termination clauses in an SNT. SSI policy in section SI 01120.199 of the SSA Program Operations Manual System (the "POMS") requires that such a clause provide that any remaining balance in the trust will first be used to reimburse Medicaid rather than be paid to other beneficiaries. What if the trust contains no early termination clause? In one case I had the SSA sent a notice that a trust had to be amended to so provide. The only problem was that the trust had no early termination clause to amend! It was easier to switch than fight, so we amended the trust to add an early termination clause with the required Medicaid payback language. While we were at it we amended it to correct what I believe the SSA actually meant was wrong with the trust, namely that it named the State (singular) for the Medicaid payback provision rather than the States (plural). But see below for the merits of that issue (or lack thereof).

If a trust has been in effect, and SSI has been paid, but subsequently the SSA determines that the trust is defective, the beneficiary is supposed to be given 90 days to get the trust amended. POMS § SI 01120.199.A.2. Sometimes that happens, sometimes it doesn't. One reason may be that the requirement for the 90-day grace period is set forth in the section concerning early termination provisions, but it applies to all the criteria for the trust to be excepted from being counted as a resource under not only that section but also under the other substantive requirements in §§ SI 01120.200 through SI 01120.203. So you may get a notice terminating SSI because of an allegedly defective trust which should provide for a 90-day period to correct it but does not.

A recent example of the failure of the SSA to follow its own rules for the 90-day grace period to correct a defective SNT is set forth in *Orr v. Colvin*, 2016 U.S. Dist. LEXIS 42786 (E.D. Cal. Mar. 30, 2016). There the SSA determined that an SNT was defective, including on reconsideration, but at the next step in the appeal process an ALJ determined that the trust satisfied the SSI requirements. It further provided that within 60 days after that decision the SSA Appeals Council could decide on its own motion to review the decision. More than five months later the Appeals Council determined to reopen the case because the ALJ decision was incorrect. The SSI recipient submitted a letter arguing that the trust met the SSI exception rule and alternatively requested a 90-day grace period to have a court amend the trust if it did not meet the exception. The Appeals Council ignored the request for the 90-day grace period. In its decision the court ordered a remand to provide the beneficiary an opportunity to amend the trust. The court was apparently frustrated by the actions of SSA, stating that the Appeals Council had deprived the beneficiary of the opportunity to amend his trust, "an opportunity that is authorized by the SSA's own internal policy manual which the Commissioner urges the court to apply in this case." *Id.* at *19.

One way to correct an allegedly defective trust is to petition the court with jurisdiction over trusts in your state to amend it. You might consider, however, whether this could be done with less expense and delay by having all the interested parties, including the Medicaid agency (which is an interested party by virtue of the Medicaid payback requirement), consent. Many states have statutes permitting irrevocable trusts to be amended with such consent, *e.g.*, N. Y. Estates, Powers & Trusts Law § 7-1.9, though there can be problems if not all the interested parties have capacity. In New York, if there are living potential minor beneficiaries under a *per* *stirpes* remainder provision they are considered interested parties, but because they are minors they cannot consent and you have to go to court.

At least on the issue of a trust having been established by a court, the SSA seems finally to have come to its senses, recognizing that 42 U.S.C. § 1396p(d)(4)(A) [section 1917(d)(4)(A) of the Social Security Act; SSA always cites to sections of the Act rather than the U.S. Code] plainly authorizes a special needs trust to be established by a "parent, grandparent, legal guardian or a court," so even if the court is acting at the behest of the SSI applicant/beneficiary, the trust has still been validly established by "a court." SSA Admin Message AM-15032, May 28, 2015.

If the alleged defect is not one of those, what might it be? The notice my client received on reconsideration clearly violates the due process requirement for adequate notice setting forth the reason for a decision terminating public benefits like SSI, *see Goldberg v. Kelly*, 397 U.S. 254 (1970). The answer is that the trust in question, which had been prepared a number of years ago, simply tracked the language of the statute and provided that on the death of the beneficiary "the State will receive all amounts remaining in the trust" up to the amount of Medicaid paid on behalf of the beneficiary. The SSA subsequently interpreted that requirement to mean that a trust was defective if it tracked the statutory language and provided for reimbursement to "the State" [singular] because the trust had to provide reimbursement to the "States" [plural] [see the reference to the "State(s)" in Admin Message AM-15032.

Yes, that was the alleged defect in this trust. Fortunately I had been down this road before and guessed correctly that this was the problem. Fortunately also, I had the name and contact information for someone in the SSA regional office in New York City whom I could contact to verify this. A previous contact there had been willing to interpret the reference to the State in the singular as meaning the States (plural) in old trusts established before the SSI policy on this became clear, but she had retired. So, we petitioned the Surrogate's Court to amend the trust to conform to the SSI policy, and sent off the court order to the Social Security office and, guess what, nothing happened. Months went by, and it was only after I wrote the regional office that they decided to reinstate my client's benefits, retroactive to the date of the court order.

That did not totally solve the problem, however, because the SSA had determined that the client had been overpaid benefits for several years because all that while her resources exceeded the $2,000 SSI resource limit because the principal of the trust had to be counted as a resource since the trust was allegedly defective. So, having lost that issue on reconsideration, we proceeded to request an administrative law judge (ALJ) hearing, the next step in the multi-step and lengthy SSA appeal process. It has now been ten months since we requested the hearing, and it has not been scheduled, which is typical of the delays in the ALJ hearing process. Meanwhile the SSA keeps sending threats to recoup the alleged overpayment from future benefits, etc.

If you have to go through the appeal process, the first step is to request a reconsideration; only after you lose that do you need to request an ALJ hearing. Be sure that the SSI applicant/recipient has designated you as his or her representative on an SSA-1696-U4 form (available on the Social Security website, ssa.gov), or else the SSA will not communicate with you.

If an SSI recipient's benefits are being terminated, reconsideration is a very important step. Usually you would ask for an "informal conference" at which you get to explain to someone why the decision was incorrect as opposed to just mailing it in and hoping for the best. If the beneficiary requests a reconsideration within ten days of receipt of the notice discontinuing his or her benefits (which is presumed to be five days after the date of the notice), the benefits can be reinstated pending the reconsideration decision. 20 C.F.R. § 416.1136(b). This is required as a matter of due process under *Goldberg*, but if the reconsideration decision is unfavorable the continuation of benefits stops, subject only to retroactive reinstatement on a further appeal to an ALJ, the Social Security Appeals Council or federal court.

SSA being SSA, however, that reinstatement pending reconsideration may not happen. At that point you can contact the office of the member of the House of Representatives in whose district the client lives, or one of the U.S. Senators from the State. They all have staff whose job is to try to resolve constituent problems with SSA & SSA in turn has staff whose job is to respond to those inquiries.

The ultimate answer to the problem of the State/States, singular/plural, issue, I believe, is found in the Dictionary Act of 1871, 1 U.S.C. § 1 (and its counterpart in New York law, which also might apply since the trust was established under New York law and says that New York law governs it, but given that we are dealing with the SSA, it probably will only feel that federal law applies. How, you might ask, could a statute enacted over one hundred years prior to the enactment of the SSI program have anything to do with this issue? Well, the Dictionary Act has been relied on quite recently by the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, ___ U.S. ___. 134 S.Ct. 2751, 189 L.Ed. 2d 675 (2014), to interpret the meaning of another statute.

What the Dictionary Act says relevant to this issue is that in any federal statute the singular includes the plural and the plural includes the singular. So it would seem that a trust tracking the language of the statute using the word "State" should be construed to mean "States." Even the SSA on occasion slips and uses the singular "State" instead of "States," in its recently issued "Fact Guide for National Trust Training" as we point out in the memorandum of law on the ALJ appeal. If that is good enough for SSA training it ought to suffice for my poor client!

The one piece of good news amidst all this SSI pettifoggery is that the SSA is finally recognizing that notices like the one they sent my client do not pass muster. The SSA just issued an Emergency Message, EM-16012, setting forth guidelines on issuing manual notices for individuals determined ineligible because of excess resources that include a countable trust. This is a step in the right direction, but whether the format to be used satisfies the requirements of due process is questionable since the format is written in what one might call "SSI speak" rather than English (or any other language the beneficiary might understand).

Rather than describing the problem in the trust that is the subject of the Dictionary Act appeal as "the trust only provides for reimbursement of Medicaid to an individual state rather than to any state that provided Medicaid to the beneficiary" or something like that, the notice will only state that section __ of the trust "does not comply with Program Operations Manual System (POMS) SI 01120.201B.1.h" and include a reference to finding the POMS on line. That is better than simply stating that it "does not meet the special needs exception rules," but it is woefully inadequate under the due process standards of *Goldberg*. An advocate might be able to figure this out on the internet, but many SSI recipients will not be able to do so on their own.

Social Security Administration
Supplemental Security Income
Notice of Reconsideration

SOCIAL SECURITY
15 LEWIS ST
GENEVA, NY 14456-1700
Date: May 04, 2015
Claim Number: [redacted]
LW

[redacted] FOR
[redacted]
[redacted] RD
[redacted], NY [redacted]

Reconsideration Filed:
February 24, 2015

We had a review completed of the supplemental needs trust and it was determined that the trust is a countable resource. It does not meet the special needs exception rules.

If You Disagree With The Decision

If you disagree with this decision, you have the right to request a hearing. A person who has not seen your case before will look at it. That person is an Administrative Law Judge (ALJ). The ALJ will review your case again and look at any new facts you have before deciding your case.

- You have 60 days to ask for a hearing.
- The 60 days start the day after you receive this letter. We assume you got this letter 5 days after the date on it unless you show us that you did not get it within the 5-day period.
- You must have a good reason if you wait more than 60 days to ask for a hearing.
- You have to ask for a hearing in writing. We will ask you to sign a form HA-501-U5, called "Request for Hearing." Contact one of our offices if you want help.

Please read the enclosed pamphlet, "Your Right to an Administrative Law Judge Hearing and Appeals Council Review of Your Social Security Case." It contains more information about the hearing.

How The Hearing Process Works

The ALJ will mail you a letter at least 20 days before the hearing to tell you its date, time and place. The letter will explain the law in your case and tell you what has to be decided. Since the ALJ will review all the facts in your case, it is important that you give us any new facts as soon as you can.

The hearing is your chance to tell the ALJ why you disagree with the decision in your case. You can give the ALJ new evidence and bring people to testify for you. The ALJ also can

See Next Page

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

INTRODUCTION

This is an appeal from a Notice of Reconsideration dated May 4, 2015, which stated that an overpayment of SSI benefits due to alleged excess resources was correct because the appellant's supplemental needs trust was a countable resource. The reason stated for that conclusion was "It does not meet the special needs exception rules."

ISSUE

That reconsideration decision is incorrect; the one issue which can be identified from a review of the trust agreement is that Article XVI of the trust agreement provides for reimbursement to the State for all Medicaid payments made for the beneficiary while SSI policy is that it must provide for reimbursement to all States (plural). This is legally incorrect under both federal law, the Dictionary Act of 1871, 1 U.S.C. § 1, and under New York State law (which the trust agreement provides apply to the trust), N.Y. General Construction Law § 35. Both statutes provide that the singular includes the plural, so the reference to the singular "state" in the trust agreement includes the plural "states" which satisfies the interpretation of the Social Security Administration that repayment of Medicaid benefits must be made to any states (plural) which provided such benefits.

BACKGROND

The genesis of this dispute was a decision by the Geneva, New York field office that the appellant had resources in excess of the $2,000 resource allowance during a number of months over a period of several years, resulting in an overpayment of $12,419.79 . During some of the months for which the field office had determined that there were excess resources, that was correct; but for April-December, 2013 and April-July, 2014 (and going forward since February, 2015) that was incorrect because the funds in question were not in the appellant's personal account but rather were in an account for her supplemental needs trust, and thus were exempt from being counted as resources. The reconsideration decision concluded that even for the months during which the funds were in an account of the supplemental needs trust they still were countable resources because the trust did not comply with SSI rules.

ARGUMENT: The Reference to the State (Singular) Includes the States (Plural) Under Both Federal and New York State Law

The federal law governing supplemental needs trusts, 42 U.S.C. § 1396p(d)(4)(A), Social Security Act § 1917(d)(4)(A), provides that in order for funds in a supplemental needs trust to be exempt from being treated as a countable resource for SSI or Medicaid, the trust agreement must provide that "the State will receive all amounts remaining in the trust upon the death of such individual [the beneficiary] up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title [for Medicaid]." This statute governs how the SSI program evaluates supplemental needs trusts.

As a general rule, 42 U.S.C. §§ 1382(b)(e)(3)(B), Social Security Act § 1613(e)(3)(B), provides that resources in an irrevocable trust are countable under the SSI program if there are any circumstances under which payments may be made from those funds in the trust. There is an exception to this rule, however; 42 U.S.C. § 1382b(e)(5), Social Security Act § 1613(e)(5), provides that "This subsection shall not apply to a trust described in subparagraph (A) or (C) of section 1917(d)(4) [42 U.S.C. § 1396p(d)(4)]".

The Dictionary Act of 1871, 1 U.S.C. § 1, provides that "In determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to several persons, parties or things." Thus the requirement in 42 U.S.C. § 1396p(d)(4)(A), Social Security Act § 1917(d)(4)(A) for repayment of Medicaid to the *State*, and the language of the trust agreement tracking that requirement with reference to repayment to the *State* both include repayment to the States (plural) without the need to spell it out any further.

The trust agreement says in Article XVI "This agreement shall be construed and governed in all respects by the laws of the State of New York." N.Y. General Construction Law § 35 says "Words in the singular number include the plural . . . ." The New York statute governing supplemental needs trusts, N.Y. Social Services Law § 366.2(b)((2)(iii) provides that for a supplemental needs trust there is an exception to the general rule requiring counting as available resources the corpus of discretionary self-settled trusts "if upon the death of such individual the *state* will receive all amounts remaining in the trust up to the total value of all medical assistance paid on behalf of such individual." (emphasis supplied). Thus the reference in Article XVI of the trust agreement to repayment to the State tracks the requirement of the New York Medicaid statute and under the General Construction Law requires repayment to the states (plural) just like the Social Security Administration requires.

The Social Security Administration has recently issued a "Fact Guide for National Trust Training" (copy attached) to assist adjudicators in determining whether supplemental needs trusts meet the requirements exempting the trust assets from being counted as resources by the SSI program. It says in section F.1.F that the trust must provide for repayment to "ALL States that provided the beneficiary with Medicaid coverage; ° Trust cannot limit reimbursement to one State." The example it gives of a trust which violates this policy, however, is quite different than the reference to the "State" in Ms. M[redacted]'s trust; the Fact Guide example of a defective trust provision is one which requires repayment to "the State of Connecticut." Here the trust agreement is not so limited just to the State of New York, where Ms. M[redacted] lives. Ironically, even the Social Security Administration in that Fact Guide says in section F.1.D that the special needs exception does not apply if the trust allows for payment of the principal/corpus to an individual or entity "(other than the *State*). (emphasis supplied). Just like Ms. M[redacted]'s trust agreement, that Fact Guide reference to payment to the "State" means States (plural), but if the Social Security Administration uses the word "State" interchangeably with "States" in this guidance document that should equally be good enough for Ms. M[redacted].

CONCLUSION

The reference to the "State" in the Trust Agreement includes the "States" (plural), under both the Dictionary Act of 1871 and the N.Y. General Construction Law, so it satisfies the requirement of the Social Security Administration that the Trust Agreement provide for repayment of Medicaid not just to one particular State but all States which have provided or will provide Medicaid benefits for Ms. M[redacted].

Respectfully submitted,

René H. Reixach, Esq.
Woods Oviatt Gilman LLP
700 Crossroads Building
2 State Street
Rochester, New York 14614
Tel: (585) 987-2858
Fax: (585) 987-2958
rreixach@woodsoviatt.com

Attorney for C[redacted] M[redacted]

Social Security
Official Social Security Website

Emergency Message

Identification Number:	**EM-16012**
Intended Audience:	All RCs/ARCs/ADs/FOs/TSCs/PSCs/OCO/OCO-CSTs/ODAR
Originating Office:	ORDP OISP
Title:	**Guidelines on issuing manual notices for individuals determined ineligible because of excess resources that include a countable trust**
Type:	EM - Emergency Messages
Program:	**Title XVI (SSI)**
Link To Reference:	See Reference at the end of this EM.

Retention Date : September 02, 2016

A. Purpose

This emergency message (EM) provides additional requirements for issuing a manual notice when notifying an individual of ineligibility due to excess resources that include a countable trust.

B. Background

We are issuing guidance to field office (FO) technicians on providing additional information in manual notices about the reason an individual is determined ineligible due to excess resources that include a countable trust.

Current manual notices sometimes provide incomplete information about ineligibility due to excess resources that include a countable trust. This guidance will help provide a standardized approach to providing information on trust issues, clarify the message sent to individuals, and allow us to provide better public service.

C. Policy for using a manual notice to notify an individual of ineligibility due to excess resources that include a countable trust

POMS SI 01120.204 provides instructions on when a manual notice is required for trusts established with an individual's assets on or after 01/01/00. The POMS requires that FO technicians issue a manual notice whenever an individual:

- is ineligible due to excess resources and those resources include a trust;
- has excess resources, but is eligible for SSI based on an undue hardship waiver; or
- has a change in eligibility or payment status due to trust or undue hardship involvement.

Use the instructions and notice paragraphs in POMS SI 01120.204 to prepare manual notices for trust cases. Prepare these notices using the Document Processing System (DPS).

D. Procedures for drafting manual notices for individuals determined ineligible because of excess resources that include a countable trust

Continue to use the required paragraphs outlined in POMS SI 01120.204, depending upon the specific individual's circumstances. In addition, using free form text, for each reason the trust is countable (that is, why it does not meet the exception or other requirements in POMS), you must cite:

- the applicable section of the trust (or any joinder agreement, if applicable) containing the problematic language or issue;
- the POMS citation that contains the policy requirements on that subject; and
- the following language indicating where the POMS can be found on-line – "You can find the Program Operations Manual System (POMS) on the Social Security website at https://secure.ssa.gov/poms.nsf/Home?readform."

E. Examples of manual notice language

The following examples (1) describe various scenarios where an individual's trust would be a countable resource because it does not comply with all of the requirements for exception and (2) provide sample notice language technicians could include in a manual notice. The examples are not all inclusive.

1. **Situation** - Section VII.A.2. of the trust does not allow Medicaid payback to all States providing medical assistance in the event of the beneficiary's death.

Sample Language - Section VII.A.2. of the trust does not comply with Program Operations Manual System (POMS) SI 01120.203B.1.h.

2. **Situation** - Section 3.a. of the trust violates the sole benefit requirement by allowing for payment of third party travel expenses not permitted by POMS SI 01120.201F.2.

Sample Language - Section 3.a. of the trust does not comply with Program Operations Manual System (POMS) SI 01120.201F.2.

3. **Situation** - Section III.B.2. of the trust does not require that the State(s) receive all amounts remaining in the trust at the time of early termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan.

Sample Language - Section III.B.2. of the trust does not comply with Program Operations Manual System (POMS) SI 01120.199F.1.

4. **Situation** - Under Section 1 of the trust, the parent did not have legal authority to establish the trust with his adult child's assets.

Sample Language - Section 1 of the trust does not comply with Program Operations Manual System (POMS) SI 01120.203B.1.g.

5. **Situation** – Under Section I of the trust, the establishment of the trust occurred after the beneficiary turned 65. Also, Section V.A.2. of the trust does not allow Medicaid payback to all States providing medical assistance in the event of the beneficiary's death.

Sample Language – Section I of the trust does not comply with Program Operations Manual System (POMS) SI 01120.203B.1.b. Section V.A.2. of the trust does not comply with Program Operations Manual System (POMS) SI 01120.201B.1.h.

6. **Where to locate POMS on-line**

   Sample language – You can find the Program Operations Manual System (POMS) on the Social Security website at https://secure.ssa.gov/poms.nsf/Home?readform.

F. **References**

SI 01120.199 Early Termination Provisions and Trusts
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 01120.201 Trusts established with the assets of an individual on or after 1/1/00
SI 01120.202 Development and Documentation of Trusts Established on or After 01/01/00
SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00
SI 01120.204 Notices for Trusts Established on or after 1/1/00
SI 01120.225 Pooled Trusts Management Provisions
SI 01120.227 Null and Void Clauses in Trust Documents

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.

EM-16012 - Guidelines on issuing manual notices for individuals determined ineligible because of excess resources that include a countable trust - 03/02/2016

SURVIVING THE SSA REVIEW PROCESS

Stetson University College of Law
2016 Fundamentals of
Special Needs Trusts Webinar
April 29, 2016

René H. Reixach
Woods Oviatt Gilman LLP
700 Crossroads Building
Rochester, NY 14614
Tel: (585) 987-2858
rreixach@woodsoviatt.com

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- Increasingly once I have completed my work and the trust has been established, the Social Security Administration (SSA) will determine that the individual no longer qualifies for SSI because of the trust.

- If the trust has substantial assets the problem hopefully can be straightened out, but on a routine hourly rate basis the fee for doing that could easily be more than the fee for setting up the trust in the first place, particularly if an Administrative Law Judge ("ALJ") hearing is required (and the fee undoubtedly will be reduced by the SSA).

- The problem of such adverse decisions by the SSA has for many years been made even worse by the very vague notices it issues concerning allegedly defective trusts.

- "It was determined that the trust is a countable resource. It does not meet the special needs exception rules."

- *Draper v. Colvin*, 779 F.3d 556 (8th Cir. 2015) [trust defective because parents were allegedly acting on behalf of beneficiary under power of attorney]

- Have the parent "seed" the trust with a small payment from the parent, frequently $10.00, at least a day before funding it with the beneficiary's funds.

- Make sure that the power of attorney authorizes the parent to fund the trust from the beneficiary's resources, but not to "establish" it in the first place.

- Another problem of some currency concerns early termination clauses in an SNT. SSI policy in section SI 01120.199 of the SSA Program Operations Manual System (the "POMS") requires that such a clause provide that any remaining balance in the trust will first be used to reimburse Medicaid rather than be paid to other beneficiaries.

- If a trust has been in effect, and SSI has been paid, but subsequently the SSA determines that the trust is defective, the beneficiary is supposed to be given 90 days to get the trust amended. POMS § SI 01120.199.A.2.

- The requirement for the 90-day grace period is set forth in the section concerning early termination provisions, but it applies to all the criteria for the trust to be excepted from being counted as a resource under not only that section but also under the other substantive requirements in §§ SI 01120.200 through SI 01120.203.

- A recent example of the failure of the SSA to follow its own rules for the 90-day grace period to correct a defective SNT is set forth in *Orr v. Colvin*, 2016 U.S. Dist. LEXIS 42786 (E.D. Cal. Mar. 30, 2016).

- An ALJ determined that the trust satisfied the SSI requirements.

- More than five months later the Appeals Council determined to reopen the case because the ALJ decision was incorrect.

- The SSI beneficiary requested a 90-day grace period to have a court amend the trust if it did not meet the exception. The Appeals Council ignored the request.

- The court ordered a remand to provide the beneficiary an opportunity to amend the trust.

- One way to correct an allegedly defective trust is to petition the court with jurisdiction over trusts in your state to amend it.

- You might consider, however, whether this could be done with less expense and delay by having all the interested parties, including the Medicaid agency (which is an interested party by virtue of the Medicaid payback requirement), consent.

- At least on the issue of a trust having been established by a court, the SSA seems finally to have come to its senses.

- Even if the court is acting at the behest of the SSI applicant/beneficiary, the trust has still been validly established by "a court." SSA Admin Message AM-15032, May 28, 2015.

- The notice my client received on reconsideration clearly violates the due process requirement for adequate notice setting forth the reason for a decision terminating public benefits like SSI, *see Goldberg v. Kelly*, 397 U.S. 254 (1970).

- The trust in question simply tracked the language of the statute and provided that on the death of the beneficiary "the State will receive all amounts remaining in the trust" up to the amount of Medicaid paid on behalf of the beneficiary.

- The SSA has interpreted that requirement to mean that a trust was defective if it tracked the statutory language and provided for reimbursement to "the State" [singular] because the trust had to provide reimbursement to the "States" [plural] [see the reference to the "State(s)" in Admin Message AM-15032.

- We petitioned the Surrogate's Court to amend the trust to conform to the SSI policy, and sent off the court order to the Social Security office and, guess what, nothing happened.

- Only after I wrote the regional office did they decide to reinstate my client's benefits, retroactive to the date of the court order.

- The SSA had determined that the client had been overpaid benefits for several years because all that while her resources exceeded the $2,000 SSI resource limit because the principal of the trust had to be counted as a resource since the trust was allegedly defective.

- We proceeded to request an administrative law judge (ALJ) hearing.

- It has now been ten months since we requested the hearing, and it has not been scheduled, which is typical of the delays in the ALJ hearing process.

- Be sure that the SSI applicant/recipient has designated you as his or her representative on an SSA-1696-U4 form (available on the Social Security website, ssa.gov), or else the SSA will not communicate with you.

- If an SSI recipient's benefits are being terminated, reconsideration is a very important step.

- If the beneficiary requests a reconsideration within ten days of receipt of the notice discontinuing his or her benefits (which is presumed to be five days after the date of the notice), the benefits can be reinstated pending the reconsideration decision. 20 C.F.R. § 416.1136(b).

- If the reconsideration decision is unfavorable the continuation of benefits stops, subject only to retroactive reinstatement on a further appeal to an ALJ, the Social Security Appeals Council or federal court.

- SSA being SSA, however, that reinstatement pending reconsideration may not happen. At that point you can contact the office of the member of the House of Representatives in whose district the client lives, or one of the U.S. Senators from the State.

- The Dictionary Act of 1871, 1 U.S.C. § 1.

- The Dictionary Act has been relied on quite recently by the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, ___ U.S. ___,134 S.Ct. 2751, 189 L.Ed. 2d 675 (2014), to interpret the meaning of another statute.

- What the Dictionary Act says relevant to this issue is that in any federal statute the singular includes the plural and the plural includes the singular.

- So it would seem that a trust tracking the language of the statute using the word "State" should be construed to mean "States." Even the SSA on occasion slips and uses the singular "State" instead of "States," in its recently issued "Fact Guide for National Trust Training."

- The SSA is finally recognizing that notices like the one they sent my client do not pass muster.

- Emergency Message, EM-16012, sets forth guidelines on issuing manual notices for individuals determined ineligible because of excess resources that include a countable trust.

- Whether the format to be used satisfies the requirements of due process is questionable.

- The notice will only state that section __ of the trust "does not comply with Program Operations Manual System (POMS) SI 01120.201B.1.h" and include a reference to finding the POMS on line.

- This is woefully inadequate under the due process standards of *Goldberg*.

STETSON LAW

2016 Fundamentals of Special Needs Trusts Webinar

Friday, April 29, 2016
3:10 P.M. – 4:10 P.M.

Having Your Cake and Eating It Too: Protecting the Grantor's Eligibility for Medicaid and SSI Benefits by Funding a Trust for Another Disabled Person

Presenter:
Shirley B. Whitenack
Attorney at Law, Schenck Price Smith &King, LLP
Florham Park, New Jersey

- Materials
- PowerPoint

Stetson University College of Law presents:
2016 Fundamentals of Special Needs Trusts Webinar
April 29, 2016
Stetson University College of Law
Gulfport, Florida

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Having Your Cake and Eating It too: Protecting the Grantor's Eligibility for Medicaid and SSI Benefits by Funding a Trust for Another Disabled Person

By: Shirley B. Whitenack, Esq.

In order to qualify for Medicaid coverage in a nursing home, the applicant must be determined to be eligible both financially and medically. Financial eligibility is determined through an income test and a resource test. Generally, an institutionalized individual applying for Medicaid cannot have countable resources that exceed the amount set forth in law. In addition, the applicant's monthly gross income must be below the "income cap" ($2,199 in 2016) for those in income cap states or those whose gross monthly income is reduced below the income cap through the establishment and funding of a Qualified Income Trust in states that permit such trusts.

The transfer of assets rule creates periods of Medicaid ineligibility when an applicant has made transfers, that is, gifts, of his or her assets. A Medicaid applicant must document all of his or her financial transactions during the "look-back period," *i.e.* the 60 months immediately prior to the date of application. If the financial records indicate there has been a transfer of assets (including a check or withdrawal for which there is no explanation other than a gift), Medicaid will presume that the assets were transferred to promote eligibility for Medicaid benefits. The value of the transfer will be divided by the statewide nursing home daily rate to obtain the number of months of the ineligibility, or penalty period. 42 U.S.C. § 1396p(c)(1)(A) & (B). There is no limit on the length of the penalty period.

There are, however, exceptions to the transfer penalty for outright transfers to a disabled child, to a trust established solely for the benefit of a disabled child and to a trust for the benefit of another disabled individual under 65 years old. 42 U.S.C. § 1396p(c)(2)(B)(iii) & (iv). Specifically, 42 U.S.C. § 1396p(c)(2)(B)(iii) states that "[a]n individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that … the assets … were transferred to, or to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II). 42 U.S.C. § 1396p(c)(2)(B)(iv) provides that "[a]n individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that … the assets … were transferred to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)]; Thus,.federal law allows grantors who need or will need Medicaid and/or Supplemental Security Income ("SSI") benefits to fund long term care to transfer assets outright to a disabled person or to a trust for the sole benefit of a disabled person without incurring a penalty period for the grantor or jeopardizing the disabled beneficiary's eligibility for Medicaid and SSI.

The statute that exempts transfers to trusts established "solely for the benefit of" certain disabled individuals references trusts established pursuant to 42 U.S.C. § 1396p(d)(4)(A) but does not specify other types of trusts that may be established "solely for the benefit of" such individuals. The State Medicaid Manual, also known as "Transmittal 64," issued by the Centers for Medicare and Medicaid Services ("CMS"), defines "For the Sole Benefit of" as follows:

> A transfer is considered to be for the sole benefit of a spouse, blind or disabled child, or a disabled individual if the transfer is arranged in such a way that no individual or entity except the spouse, blind or disabled child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.
>
> Similarly, a trust is considered to be established for the sole benefit of a spouse, blind or disabled child, or disabled individual if the trust benefits no one but that individual, whether at the time the trust is established or

any time in the future.[1]

State Medicaid Manual, § 3257 B.6.

This section sets forth two ways in which a transfer to a trust can be established for the sole benefit of the disabled child or disabled individual. Either the transfer instrument or trust "must provide for the spending of the funds involved for the benefit of the individual on a basis that is actuarially sound based on the life expectancy of the individual involved," or it must be a trust addressed in § 3259.7 (self-settled special needs trusts and pooled trusts). The actuarially sound distribution standard is not discussed in this section of the State Medicaid Manual but it is addressed in § 3258.9B, which discusses actuarial soundness in the context of annuities. Specifically, that section provides that "[i]f the expected return on the annuity is commensurate with a reasonable estimate of the life expectancy of the beneficiary, the annuity can be deemed actuarially sound." Section 3258.9B instructs the state Medicaid directors to use life expectancy tables included in the State Medicaid Manual. These tables were compiled from information published by the Office of the Actuary of the Social Security Administration. *Id.*

When the disabled child or other disabled individual is receiving government benefits such as Social Security Disability ("SSD") and Medicare that are not means-tested, it may be beneficial to transfer the property outright as such transfers would not adversely affect the disabled child or other disabled person's access to those benefits. The statutory right to do this was challenged by the New Jersey Department of Human Services, Division of Medical Assistance and Health Services and was upheld by the United States District Court for the District of New Jersey in *Sorber v. Velez, et. al*, ***2009 U.S. Dist. LEXIS 98799 (D.N.J. Oct. 23, 2009)***. In *Sorber*, the plaintiff had resources in excess of the limit but transferred a substantial

[1] Transmittal 64 allows reasonable compensation to be paid to a trustee as well as costs associated with investing or managing the property in the trust.

amount of those resources to their blind or disabled children prior to applying for Medicaid benefits. The state argued that only transfers made to an irrevocable trust for the sole benefit of a disabled child are exempt from the transfer penalty rules set forth in 42 U.S.C. § 1396p(c)(1). Plaintiffs brought an action under 42 U.S.C. § 1983 to enjoin the state from imposing a penalty for the outright transfer of assets to a disabled or blind child.

The District Court noted that the dispute between the parties centered on the phrase "solely for the benefit of." Observing that 42 U.S.C. § 1396p(c)(2)(B)(iii) is "not a model of legislative draftsmanship," the Court concluded that "it is syntactically implausible to maintain that the "solely for the benefit" language applies to transfers directly to an applicant's child." *Id.* at 4. Accordingly, the Court held that plaintiffs' transfers of assets to their blind or disabled children are exempt from the transfer penalty rules set forth in 42 U.S.C. § 1396p(c)(1). *Id.* at 8.[2]

Similarly, transfers to trusts solely for the benefit of disabled children or other disabled individuals who are receiving non-means tested benefits should not adversely affect eligibility for those benefits even when distributions are made on an actuarially sound basis. Such distributions, however, can adversely affect or jeopardize access to means-tested benefits such as SSI and Medicaid.

The SSI rules are set forth in the Social Security Administration's Program Operations Manual System (POMS), which is the main source of information used by Social Security employees in processing claims for Social Security benefits such as SSI and Social Security Disability ("SSD"). Pursuant to SSI rules, cash paid from the trust to an SSI recipient is unearned income and reduce SSI benefits dollar for dollar. Distributions "from the trust to third parties that result in the trust beneficiary receiving non-cash items other than food or shelter are in-kind

[2] *See also*, Begley and Jeffries, Representing the Elderly Client, Appendix 7D, Letter to Mary O'Byrne from Ginni Hain, Director, Division of Eligibility, Enrollment and Outreach, CMS, dated June 27, 2005 (stating that the "transferor may simply give the funds directly to his or her disabled child").

income if the items would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt.″ POMS SI 01120.200E1.a. Concomitantly, such disbursements made to third parties will not be considered income when received if the resource would not be considered a countable resource in the month following the distribution. So, for example, if the trust purchased a car for the beneficiary, the disbursement would not be considered income because the car is a not a countable resource.

Payments of food or shelter from the trust by the trustee to a third party are income in the form of in-kind support and maintenance (“ISM”) and are valued under the presumed maximum value (PMV) rule. POMS SI 01120.200E1.b. Pursuant to the PMV rule, disbursements that constitute ISM because they are payments of food or shelter will reduce SSI benefits by no more than one-third of the federal benefit level, which is $244.33 in 2016. POMS SI 00835.300. The PMV is rebuttable.

An SSI recipient living in someone else’s home who receives food and shelter and is not paying a pro rata share of those costs will have benefits reduced by one third the federal benefit rate. This reduction is known as the VTR, or the value of the one-third reduction. POMS SI 00835.200.

Disbursements from the trust could be structured as a stream of distributions that would drain the trust assets within the actuarial life expectancy of the beneficiary. One commentator suggests that that the distribution language in the “sole benefit of” trust should be drafted as a two-tier system.[3] The first tier would structure disbursements from the trust in accordance with the amount that equals an actuarially sound distribution and the second tier would consist of discretionary distributions that exceed that amount. The distributions should be made in such a

[3] Robert A. Mason, CELA, Drafting a Sole Benefit Trust for a SSI Beneficiary, NAELA News, Jul/Aug/September 2015, 22-24.

manner that they do not constitute income to the disabled beneficiary under the SSI rules. The commentator suggests that if the distributions do not total the minimum actuarial amount that is not distributed, the trustee can distribute resources that constitute ISM but do not render the beneficiary ineligible for SSI benefits. The trustee could then decide whether to make additional distributions even if they jeopardize SSI benefits. Noting that a $100,000 trust for the sole benefit of a beneficiary with a life expectancy of 20 years would require an actuarially sound distribution of about $5,000 in the first year, the commentator observes that the trustee could make distributions such as payment of educational or medical expenses, purchase of a car or a "very nice gaming system" that would not be considered income under the SSI rules but that could easily exceed $5,000.[4]

The trust can be structured as a "grantor trust," meaning that during the grantor's lifetime the grantor will report any income (deductions and credits) on his or her personal income tax return. At the death of the grantor, the trust would be treated as a "complex trust", meaning that the trust then will be treated as a separate taxable entity and will report its income, deductions and credits on its own income tax returns. While a complex trust, distributions made on behalf the disabled beneficiary will carry-out to her a portion of the trust's distributable net income ("DNI"), for which the trust will receive an income tax deduction and on which the trust beneficiary will pay income tax. Generally, to the extent that distributions from the trust are less than the full amount of DNI, the trust will pay income tax on the undistributed income.

SAMPLE TRUST LANGUAGE FOR ACTUARIALLY SOUND DISTIBUTIONS

Notwithstanding the Trustee's sole and nonreviewable discretion, if this trust is funded during the Grantor's lifetime, the Trustee shall pay over and distribute the principal of this trust

[4] *Id.* at 24.

to or for the benefit of the Disabled Beneficiary on a “basis that is actuarially sound based on the life expectancy of the Disabled Beneficiary.” For purposes of calculating an “actuarially sound” schedule for the distribution of the trust assets, the Trustee must (i) determine the age of the Disabled Beneficiary on the funding date; (ii) determine the actuarial life expectancy of the Disabled Beneficiary pursuant to the “Life Expectancy Table” published in HCFA Section 3258.9(B) of Transmittal No. 64; and (iii) distribute the principal of this trust to the Disabled Beneficiary within the actuarial life expectancy of the Disabled Beneficiary.

(i) In order to ensure that the trust assets are distributed to the Disabled Beneficiary in an actuarially sound manner, the Grantor hereby instructs the Trustee to distribute the trust assets within the actuarial life expectancy of the Disabled Beneficiary minus one year. For example, if the Disabled Beneficiary is fifty (50) years of age and has an actuarial life expectancy of 31.37 years on the funding date, the Trustee must distribute the assets within thirty (30) years, at a rate of one-thirtieth (1/30) per year times the value of the trust assets, as of the initial funding of this trust.

(ii) In the event any trust assets in excess of the estimated installment as determined in article (i) of this subparagraph (b) shall remain on the date of the final annual distribution, the Trustee shall distribute the entire remaining principal of the trust in order to ensure that the entire trust assets will be paid to or on behalf of the Disabled Beneficiary during the actuarial life expectancy of the Disabled Beneficiary.

CASE STUDY NO. 1

Linda Marshall is an 84 years old widow and suffers from advanced Parkinson’s disease. She needs long term care but does not qualify for Medicaid because she has excess resources. She has a 61 year old son, Eric, who was injured in an accident many years ago. As a result of his injuries, he receives SSD and Medicare. Her son is competent and formerly was an executive in a large corporation. Linda also has a 58 year old son, Paul, who receives no government benefits.

DISCUSSION

Linda can transfer her assets outright to Eric without incurring a transfer penalty. Linda can then qualify for Medicaid benefits in a long term care facility. Eric can gift some of those assets to Paul. Since Eric is not receiving means tested public benefits such as SSI and Medicaid, he will not incur a transfer penalty for gifting some of the assets to Paul. Alternatively, Linda can establish a trust solely for the benefit of Eric. As the assets must then be distributed in an actuarially sound manner or be subject to recovery in a trust established pursuant to 42 U.S. C. 1396p(d)(4)(A), assets can be distributed to Eric, who can then distribute them to Paul, without affecting Eric's benefits.

CASE STUDY NO. 2

Joseph Bazooka is 78 years old. He has been diagnosed with Alzheimer's Disease and is concerned that he may need long term care in the near future. He is not married and has one daughter, Janet, who is 48 years old and is developmentally disabled. Janet is developmentally disabled and cannot manage money. She has been adjudicated incapacitated. Joseph is Janet's legal guardian. Janet receives Medicare, Social Security Disability benefits and Medicaid benefits pursuant to a waiver program that pays for the group home. Joseph wants to make sure that there are funds available for Janet after he dies.

DISCUSSION

Joseph can establish and fund a trust for the sole benefit of Janet. The asset transfer will not result in a penalty period when Joseph applies for Medicaid benefits. Depending on Janet's circumstances, the trust can be structured so that the trustee makes actuarially sound payments on behalf of Janet. Although her Medicare and Social Security Disability benefits will not be adversely impacted by actuarially sound distributions, the trustee must take into account the effect that such payments may have on Janet's Medicaid benefits.

CASE STUDY NO. 3

Jethro Clampett is 80 years old. He has been diagnosed with Parkinson's disease. He is not married and he has no children. He has a nephew, Simon, who has been diagnosed with schizoaffective disorder. Simon is 66 years old. He receives SSI and Medicaid benefits. Jethro would like to establish and fund a special needs trust for Simon but he recognizes that he may need Medicaid benefits to pay for his long term care.

DISCUSSION

Unfortunately, the Social Security Administration and the state Medicaid agency will consider a transfer by Jethro into a trust for the sole benefit of Simon to be an uncompensated transfer because Simon is over 65 years old. 42 U.S.C. § 1396p(c)(2)(B)(iv). Jethro can establish a third party special needs trust for the benefit of Simon which contains neither a Medicaid payback provision nor a provision for actuarially sound payments to Simon to be funded upon Jethro's death or he can engage in government benefits planning that would account for a transfer penalty if he chose to fund the trust during his lifetime.

CASE STUDY NO. 4

Rita Jacobs is 61 years old. She has been diagnosed with early onset dementia. She is divorced and has two children, Michael, who is 27 years old and developmentally disabled, and Sophie, who is married and has two children. Michael receives SSI and Medicaid benefits. He lives with Rita. Rita is concerned that she will need long term care and wants to make sure there are funds available for Michael.

DISCUSSION

Rita can establish and fund a trust for the sole benefit of Michael. Her transfer of funds to the trust will be deemed an exempt transfer. The trust can be structured to make actuarially sound payments to Michael but Rita should make sure she chooses a trustee who is or will be well-versed in SSI and Medicaid rules so that such payments do not jeopardize Michael’s SSI and Medicaid benefits.

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- Having Your Cake and Eating It too: Protecting the Grantor's Eligibility for Medicaid and SSI Benefits by Funding a Trust for Another Disabled Person

- Presented by Shirley B. Whitenack, Esq.

Medicaid Eligibility

- Applicant must be determined to be eligible both financially and medically.
- Financial eligibility is determined through income test and resource test.

Medicaid Eligibility

- Applicant cannot have countable assets in excess of amount set forth by law
- Applicant's monthly gross income must be below "income cap" ($2,199 in 2016) or must be reduced below the income cap through establishment and funding of Qualified Income Trust (where permitted by law)

Transfer of Assets Rule

- Uncompensated transfers, or gifts, will result in period of Medicaid ineligibility
- If financial records going back 60 months reflect an uncompensated transfer, Medicaid agency will presume transfer to promote eligibility for Medicaid benefits

Transfer of Assets Rule

- The value of the transfer will be divided by the statewide nursing home daily rate to obtain the number of months of the ineligibility, or penalty period. 42 U.S.C. § 1396p(c)(1)(A) & (B).
- There is no limit on the length of the penalty period.

Exceptions to Transfer Penalty

- Outright transfers to disabled child
  - 42 U.S.C. § 1396p(c)(2)(B)(iii)
- Transfers to trust established solely for benefit of disabled child
  - 42 U.S.C. § 1396p(c)(2)(B)(iii)
- Transfer to trust established solely for benefit of another disabled individual under 65 years old.
  - 42 U.S.C. § 1396p(c)(2)(B)(iv).

42 U.S.C. § 1396p(c)(2)(B)(iii)

"[a]n individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that … the assets … were transferred to, or to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II).

42 U.S.C. § 1396p(c)(2)(B)(iv)

- "[a]n individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that … the assets … were transferred to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)];

- Federal law allows grantors who need or will need Medicaid and/or Supplemental Security Income ("SSI") benefits to fund long term care to transfer assets outright to a disabled person or to a trust for the sole benefit of a disabled person without incurring a penalty period for the grantor or jeopardizing the disabled beneficiary's eligibility for Medicaid and SSI.

State Medicaid Manual, also known as "Transmittal 64

- Defines "for the sole benefit of"
  - "A transfer is considered to be for the sole benefit of a spouse, blind or disabled child, or a disabled individual if the transfer is arranged in such a way that no individual or entity except the spouse, blind or disable child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or any time in the future."

State Medicaid Manual

- "Similarly, a trust is considered to be established for the sole benefit of a spouse, blind or disabled child, or disabled individual if the trust benefits no one but that individual, whether at the time the trust is established or any time in the future."
- State Medicaid Manual, § 3257 B.6

Two ways to establish trust for sole benefit

- Actuarially sound distributions to or on behalf of disabled beneficiary
- Medicaid payback provision

Actuarially Sound Distribution Standard

- Not addressed in § 3259.7
- Is addressed in § 3258.9B, which addresses annuities

Actuarially Sound Distribution Standard

- "[i]f the expected return on the annuity is commensurate with a reasonable estimate of the life expectancy of the beneficiary, the annuity can be deemed actuarially sound." Section 3258.9B

Life Expectancy of Beneficiary

- Section 3258.9B instructs state Medicaid directors to use life expectancy tables included in the State Medicaid Manual. These tables were compiled from information published by the Office of the Actuary of the Social Security Administration.

Sorber v. Velez

- New Jersey Medicaid agency took position that outright transfer to disabled child or disabled individual constituted an uncompensated transfer
- Further argued that only transfers made to an irrevocable trust for the sole benefit of a disabled child are exempt from the transfer penalty rules set forth in 42 U.S.C. § 1396p(c)(1).

Sorber v. Velez

- U.S. District Court, District for New Jersey:
- Held, plaintiffs' outright transfers of assets to their blind or disabled children are exempt from the transfer penalty rules set forth in 42 U.S.C. § 1396p(c)(1).

Outright transfers

Letter to Mary O'Byrne from Ginni Hain, Director, Division of Eligibility, Enrollment and Outreach, CMS, dated June 27, 2005 -- "transferor may simply give the funds directly to his or her disabled child".

Begley and Jeffries, Representing the Elderly Client, Appendix 7D

Social Security POMS

- The SSI rules are set forth in the Social Security Administration's Program Operations Manual System (POMS), which is the main source of information used by Social Security employees in processing claims for Social Security benefits such as SSI and Social Security Disability ("SSD").

SSI Rules

- Cash paid from the trust to an SSI recipient is unearned income and reduce SSI benefits dollar for dollar.
- Distributions "from the trust to third parties that result in the trust beneficiary receiving non-cash items other than food or shelter are in-kind income if the items would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt." POMS SI 01120.200E1.a.

SSI Rules

- Such disbursements made to third parties will not be considered income when received if the resource would not be considered a countable resource in the month following the distribution.

Example: If the trust purchased a car for the beneficiary, the disbursement would not be considered income because the car is a not a countable resource.

PMV Rule

- Payments of food or shelter from the trust by the trustee to a third party are income in the form of in-kind support and maintenance ("ISM") and are valued under the presumed maximum value (PMV) rule. POMS SI 01120.200E1.b
- Disbursements that constitute ISM because they are payments of food or shelter will reduce SSI benefits by no more than one-third of the federal benefit level, which is $244.33 in 2016. POMS SI 00835.300.
- The PMV is rebuttable.

VTR Rule

- An SSI recipient living in someone else's home who receives food and shelter and is not paying a pro rata share of those costs will have benefits reduced by one third the federal benefit rate.
- This reduction is known as the VTR, or the value of the one-third reduction. POMS SI 00835.200.

Actuarially Sound Disbursements

- Disbursements from the trust could be structured as a stream of distributions that would drain the trust assets within the actuarial life expectancy of the beneficiary.

Grantor Trust

- Grantor reports any income (deductions and credits) on his or her personal income tax return.
- At the death of the grantor, the trust would be treated as a "complex trust."
- Complex trust will be treated as a separate taxable entity and will report its income, deductions and credits on its own income tax returns.

Sample Trust Provision for Actuarially Sound Distributions

- Notwithstanding the Trustee's sole and nonreviewable discretion, if this trust is funded during the Grantor's lifetime, the Trustee shall pay over and distribute the principal of this trust to or for the benefit of the Disabled Beneficiary on a "basis that is actuarially sound based on the life expectancy of the Disabled Beneficiary." For purposes of calculating an "actuarially sound" schedule for the distribution of the trust assets, the Trustee must (i) determine the age of the Disabled Beneficiary on the funding date; (ii) determine the actuarial life expectancy of the Disabled Beneficiary pursuant to the "Life Expectancy Table" published in HCFA Section 3258.9(B) of Transmittal No. 64; and (iii) distribute the principal of this trust to the Disabled Beneficiary within the actuarial life expectancy of the Disabled Beneficiary.

- (i) In order to ensure that the trust assets are distributed to the Disabled Beneficiary in an actuarially sound manner, the Grantor hereby instructs the Trustee to distribute the trust assets within the actuarial life expectancy of the Disabled Beneficiary minus one year. For example, if the Disabled Beneficiary is fifty (50) years of age and has an actuarial life expectancy of 31.37 years on the funding date, the Trustee must distribute the assets within thirty (30) years, at a rate of one-thirtieth (1/30) per year times the value of the trust assets, as of the initial funding of this trust.

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- Linda Marshall is an 84 years old widow and suffers from advanced Parkinson's disease. She needs long term care but does not qualify for Medicaid because she has excess resources. She has a 61 year old son, Eric, who was injured in an accident many years ago. As a result of his injuries, he receives SSD and Medicare. Her son is competent and formerly was an executive in a large corporation. Linda also has a 58 year old son, Paul, who receives no government benefits.

Case Study No. 2

- Joseph Bazooka is 78 years old. He has been diagnosed with Alzheimer's Disease and is concerned that he may need long term care in the near future. He is not married and has one daughter, Janet, who is 48 years old and is developmentally disabled. Janet is developmentally disabled and cannot manage money. She has been adjudicated incapacitated. Joseph is Janet's legal guardian. Janet receives Medicare, Social Security Disability benefits and Medicaid benefits pursuant to a waiver program that pays for the group home. Joseph wants to make sure that there are funds available for Janet after he dies.

Case Study No. 3

- Jethro Clampett is 80 years old. He has been diagnosed with Parkinson's disease. He is not married and he has no children. He has a nephew, Simon, who has been diagnosed with schizoaffective disorder. Simon is 66 years old. He receives SSI and Medicaid benefits. Jethro would like to establish and fund a special needs trust for Simon but he recognizes that he may need Medicaid benefits to pay for his long term care.

Case Study No. 4

- Rita Jacobs is 61 years old. She has been diagnosed with early onset dementia. She is divorced and has two children, Michael, who is 27 years old and developmentally disabled, and Sophie, who is married and has two children. Michael receives SSI and Medicaid benefits. He lives with Rita. Rita is concerned that she will need long term care and wants to make sure there are funds available for Michael.

- Thank you for your attention!

STETSON LAW

2016 Fundamentals of Special Needs Trusts Webinar

Friday, April 29, 2016
4:10 P.M. – 4:40 P.M.

The New ABLE POMS

Presenters:
Robert B. Fleming
Attorney at Law, Fleming & Curti PLC
Tucson, Arizona
&
Shirley B. Whitenack
Attorney at Law, Schenck Price Smith &King, LLP
Florham Park, New Jersey

- PowerPoint

Stetson University College of Law presents:
2016 Fundamentals of Special Needs Trusts Webinar
April 29, 2016
Stetson University College of Law
Gulfport, Florida

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Center for Excellence in Elder Law

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ABLE Act and POMS:
New Alphabet, New Language

Shirley Berger Whitenack
Schenck Price Smith & King, LLP
Florham Park, New Jersey

Robert B. Fleming
Fleming & Curti, PLC
Tucson, Arizona

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ABLE Act Review

- Achieving a Better Life Experience Act
  - Adopted in late 2014
  - New §529A in Internal Revenue Code
  - Inspired by (but quite different from) §529 education plans
- Internal Revenue Service proposed regs
- Social Security regulations
- 2015 amendment: no limitation by state of beneficiary
- State actions: Ohio leads, no winner yet

ABLE Concepts

- Key distinction between §§529 and 529A: ABLE Act accounts owned by beneficiary
- Maximum annual contributions (from all sources): $14,000 or current gift tax exemption
- Maximum account size for SSI to ignore account: $100,000
- Maximum lifetime contribution keyed to 529 plan limits for state
- Disability must be before age 26
- Payback

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Social Security's Big Adventure

- Program Operations Manual System (POMS) explained
- In-Kind Support and Maintenance
- POMS § SI 01130.740 adopted March, 2016
  - Subsection (C)(4): "Do not count ABLE account distributions as income"
  - Even better: "Do not count distributions" regardless of whether for housing, non-housing, otherwise ISM

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What Constitutes ISM?

- Mortgage (including insurance if required by lender)
- Real property taxes
- Rent
- Heating fuel
- Gas
- Electricity
- Water
- Sewer
- Garbage removal

Scenario #1

- Third-party SNT owns house, allows SSI recipient to reside there rent-free
- Trust annually pays taxes, catches up utilities and makes $2,000 distribution to beneficiary – resulting in one-month loss of SSI
- New idea: trust could distribute $1,000/month to ABLE Act account, which beneficiary uses to pay taxes, utilities, other “qualified disability expenses”

Scenario #2

- Self-settled SNT owns home for non-SSI Medicaid beneficiary
- Trustee pays a portion of taxes, utilities, etc. – not ISM (no SSI) and non-disqualifying for Medicaid
- New idea: trustee pays a similar amount to ABLE Act account, distributes home to beneficiary (retaining a lien) and allows beneficiary to collect rent from family members, prioritize payments

Scenario #3

- Self-settled SNT for SSI beneficiary owns home. Beneficiary lives there rent-free
- Can trust distribute $1,000/month to ABLE Act account?
  - By definition, distributions from ABLE Act account can only be for qualified disability expenses
  - Can beneficiary manage funds in ABLE Act account? If not, can trustee?

Some other interesting stuff

- SSA's POMS provision on ABLE Act accounts: SI 01130.740
- Schenck Price Smith & King, LLP Client Alert – The ABLE Act: Another Arrow in the Quiver for Certain Individuals with Disabilities
- Fleming & Curti, PLC's newsletter: http://issues.flemingandcurti.com/
- Fleming & Curti on ABLE Act: http://issues.flemingandcurti.com/tag/able-accounts/

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Gulfport, FL 33707
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