2015
Pre-Conference:
Pooled Trusts Intensive

Wednesday, October 14, 2015

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

2015 SPECIAL NEEDS TRUSTS NATIONAL CONFERENCE

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

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

Pre-Conference: Pooled Trust Intensive
Oct. 14, 2015

A program focused on issues for pooled trusts administrators, attorneys and those who work with pooled trustees.

8:40-9:30 a.m.
The Annual Update of Pooled Trusts and Public Benefits
This not to be missed session will update the audience on the changes of how public benefits programs have affected pooled trust administration through the court decisions and agency policies, including the SSI trust review process.
Neal A. Winston

9:30-10:20 a.m.
SSA Review of SNTs
This session will provide a brief overview of Special Needs Trust based as indicated in literature available online and will provide a summary of the steps taken by a Representative to submit a trust for review and a decision, along with the method of response.
Shemeaka Woodard, Operations Supervisor, SSI Unit

10:30-11:30 a.m.
An Update from HUD
Uche Oluku, Invited

11:30 a.m.-12:15 p.m.
ABLE Accounts and More: What Pooled Trust Administrators Need to Know
This session will provide an update on the implementation of ABLE, mention other legislative activities concerning Pooled SNTs and discuss how PSNTs have a role with these alternatives.
Stephen W. Dale

1:00-1:50 p.m.
Breakout Session 1

- **Too Old for a Pooled SNT? – Think Again! Funding Pooled Trust Subaccounts for Beneficiaries Age 65 and Older – 2015 Update**
  Some states are not allowing beneficiaries to prove fair market value and thus may be out of compliance with federal law. This session will cover the 50 state survey of pooled trusts, offer strategies for proving fair market value and suggest successful arguments (so far) for those states not allowing subaccounts for beneficiaries 65 and older.
  Megan Brand, Laurie Hanson
- **Setting Expectations and Communicating with Special Needs Beneficiaries**
  This session will provide an overview of spectrum disorders, discuss how to set guidelines and expectations and review positive behavioral supports.
  Dr. Kathy Piechura-Coure, Stetson University, Professor of Education & Research Faculty, Nina B. Hollis Institute of Educational Reform

1:55-2:45 p.m.
Breakout Session 2

- **The Power of the Petition: A Trustee's Role in Protective Proceedings**
  This session will identify the instances when a guardian may be necessary for a beneficiary, and the issues faced by the trustee when determining whether to petition for the appointment.
  Megan Brand
- **Software Accounting Systems and PSNTs**
  A panel discussion on different software used and available to Pooled Trust Organizations.
  Barb Helm, Steven E. Hitchcock and Kerry Tedford-Coles

3:00-3:50 p.m.
Breakout Session 3

- **The Risks, Decisions and Processes for PSNTs: How PSNT Administrators Need to Educate Their Directors**
  This session will cover the distinct risks and duties of pooled special needs trusts and their trustees, and how that compares with the duties of conventional trustees.
  Ron M. Landsman
- **The ABLE Act: From Federal Regulations to your State legislature**
  This session will cover the ABLE Act's history in Congress, the behind scenes negotiations that led to its passage, an overview of the proposed IRS rule to establish ABLE programs and an update on State legislative actions to pass ABLE authorizing legislation.
  John Ariale

3:55-4:45 p.m.
Paying for Purchases: The Method Does Matter
Every pooled trust administrator has to make decisions on expenditures and paying for them. There are various ways to pay for expenditures, and careful consideration needs to be given to which way works best for an individual beneficiary. This session will review the various methods of paying for purchases and discuss the pros and cons of each.
Stephen W. Dale

2015 Special Needs Trusts National Conference

Pre-Conference: Pooled Trusts Intensive

To obtain additional copies, contact:

Office of Conferences and Events

1401 61st Street South
Gulfport, FL 33707
(727) 562-7312
Fax (727) 345-1838

Email: conferences@law.stetson.edu
Visit our Web site: www.law.stetson.edu/conferences

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

SPONSORS

2015 SPECIAL NEEDS TRUSTS NATIONAL CONFERENCE

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

Stetson University College of Law expresses its appreciation to our sponsors for their support of the 2015 Special Needs Trusts National Conference

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

Conference Sponsor

TRUSTED EMPLOYEE ADMINISTRATION & MANAGEMENT

We appreciate your support of the
2015 Special Needs Trusts National Conference

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

TRUSTED EMPLOYEE ADMINISTRATION & MANAGEMENT

Any fiduciary who pays someone to work with a beneficiary not only takes on **administrative burdens**, but must also recognize the added risk of **employment liability**.

As the employer of record, **TEAM provides a single, seamless solution** to both of these challenges by eliminating the hassles of employee administration and protecting the trust from employment-related risk.

With our suite of comprehensive services…

…You'll never again have to worry about:

Payroll Processing • W-2 • W-9 • I-9 • Tax Withholding and Filing • State and Federal Unemployment Tax • Garnishments • Wage Reporting for Court Audits • Minimum Wage • Overtime • Mandatory Sick Leave • Background Checks • Employment Verification • Auditing Timecards • Record Keeping • Hiring • Terminations • Employee Issues • ACA Compliant Employee Health Plan • Workers' Compensation Claims • Child and Eldercare Abuse • Discrimination and Harassment Liability • Wrongful Termination • Compliance with Ever-Changing Employment Law • Employee Theft and Crime • Hired and Non-Owned Auto Claims • Unpaid Wages • Cyber Security

---

Over 100 prominent bank and fiduciary clients • Thousands of employees nationwide
Average customer satisfaction rating of 9.6/10

Stop by our booth or contact us at **877.767.8728** to learn more about our service

Wireless Sponsor

SOUTHEASTERN TRUST COMPANY

We appreciate support of the 2015 Special Needs Trusts National Conference

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

NYSARC Inc. TRUST SERVICES

(518)860-1258 / www.nysarctrustservices.org

Thursday Lunch & Conference Bag Sponsor

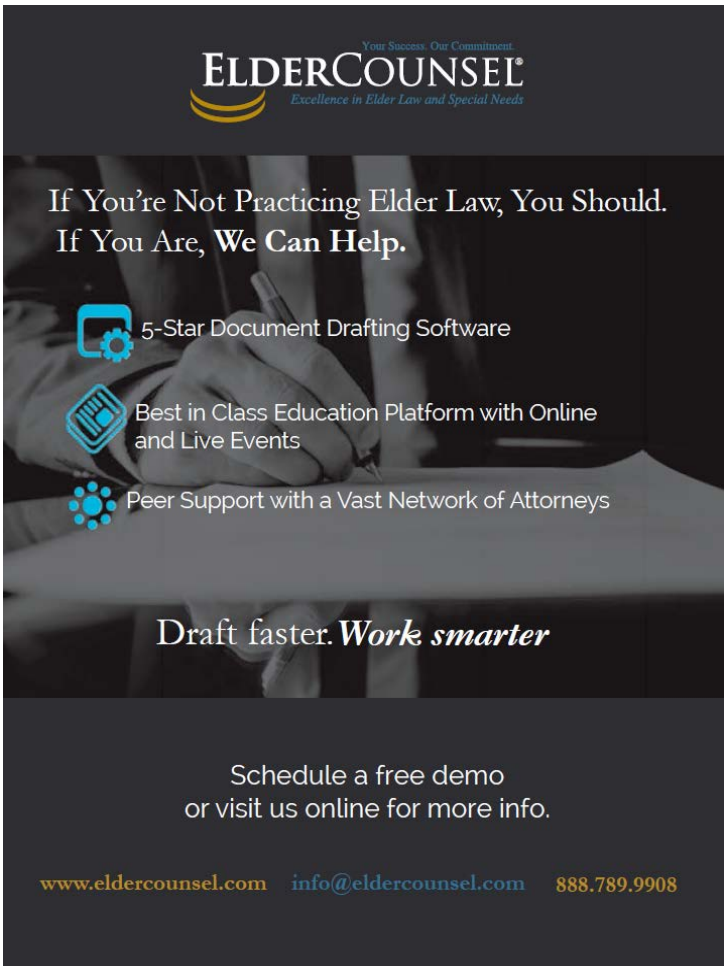
We appreciate your support of the 2015 Special Needs Trusts National Conference

Your Success. Our Commitment.

ELDERCOUNSEL®

Excellence in Elder Law and Special Needs

Registration Sponsor



We appreciate your support of the
2015 Special Needs Trusts National Conference

MetLife Center for Special Needs Planning℠

Name Badge Sponsor

We appreciate your support of the
2015 Special Needs Trusts National Conference

Special needs Alliance

Special needs require special attorneys.

Thursday Morning Break Sponsor

We appreciate the your support of the 2015 Special Needs Trusts National Conference

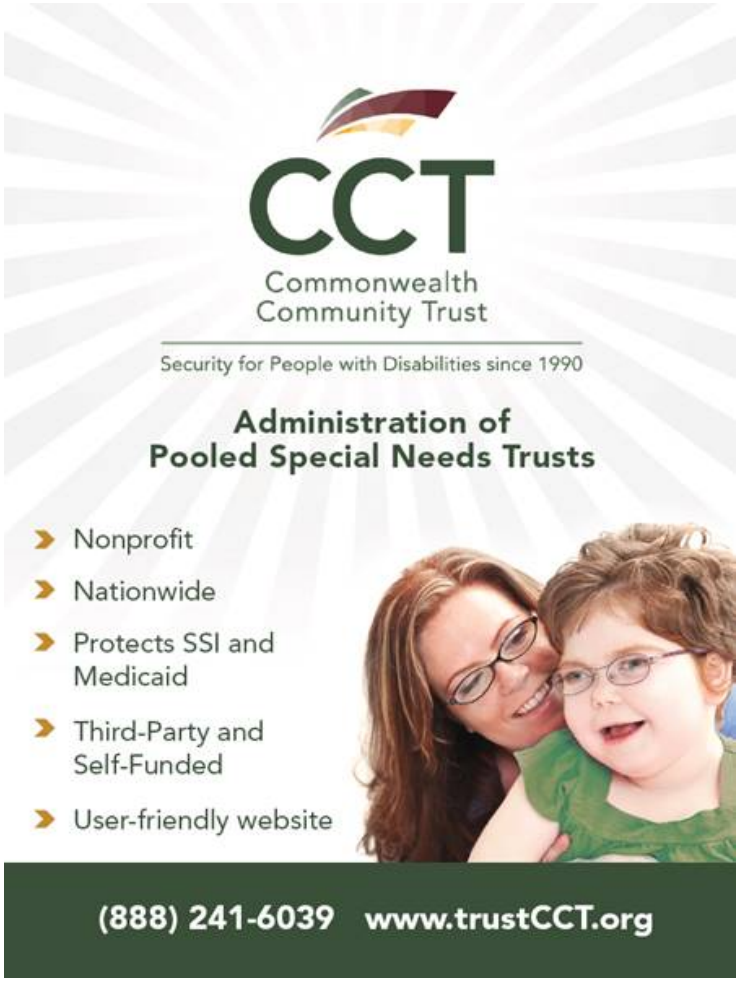
STEWART
HOME & SCHOOL
ESTABLISHED 1893

Thursday Afternoon Break Sponsor

We appreciate your support of the 2015 Special Needs Trusts National Conference

CCT
Commonwealth
Community Trust
Security for People with Disabilities since 1990
www.trustCCT.org 888-241-6039

Friday Morning Break Sponsor



We appreciate your support of the 2015 Special Needs Trusts National Conference

Thursday Night Reception Sponsor

A Special Thanks to

RENAISSANCE®
VINOY® RESORT & GOLF CLUB
ST PETERSBURG

***for* being our Host Hotel**

We appreciate your support of the
2015 Special Needs Trusts National Conference

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

EXHIBITORS

2015 SPECIAL NEEDS TRUSTS NATIONAL CONFERENCE

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

Stetson University College of Law expresses its appreciation to our exhibitors for their support of the 2015 Special Needs Trusts National Conference

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

We appreciate our exhibitors for their continuous support of Stetson Law & the Special Needs Trusts National Conference

CareFamily
Easy, Affordable Senior Care
Senior Resource Direct

www.familycare.com

THE CENTERS

www.centersweb.com

COLVENT GROUP

www.colventgroup.com

EQUITY TRUST COMPANY®

www.trustetc.com

Definiti
HEALTHCARE MANAGEMENT

www.definiti.net

FAMILY NETWORK ON DISABILITIES
SPECIAL NEEDS TRUST ADMINISTRATION

www.fndusa.org

VANTAGE
FINANCIAL GROUP

www.vanfin.com

Guardian TRUST

www.guardianpooledtrust.org

HWA INTERNATIONAL, INC.
Trust Accounting Software Since 1977

www.HWAinternational.com

InterActive Legal

www.interactivelegal.com

KRAUSE
FINANCIAL SERVICES

www.medicaidannuity.com

MEDIVEST
MSP Compliance Solutions

www.Medivest.com

MEMBERS® Trust Company | Trust & Investment Services for Credit Union Members

www.memberstrust.com

MSS
mobility support systems
Mobility Made Easy!

*http://www.*mobilitysupportsystems.*com*

NATIONAL CARE ADVISORS

www.nationalcareadvisors.com

NELF
National Elder Law Foundation

www.nelf.org

OPTIONS FOR COLLEGE SUCCESS

www.optionsforcollegesuccess.org

True Link

www.truelinkfinancial.com

WELLS FARGO

www.wellsfargoprivatebank.com

PRE-CONFERENCE:
Pooled Trust Intensive

Wednesday, October 14, 2015
8:40 A.M. – 9:30 A.M.

The Annual Update of Pooled Trusts and Public Benefits

Presenter:
Neal A. Winston
Attorney at Law
Winston Law Group, LLC
Somerville, MA

- Materials

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

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

THE ANNUAL SURVEY AND COMMENTARY OF POOLED TRUSTS AND PUBLIC BENEFITS

Prepared for:
Pre-Conference: Pooled Trustees

2015 Special Needs Trusts: The National Conference
October 14, 2015
The Vinoy, St. Petersburg, Florida

Protecting the financial future of those with disabilities

Presented by:
Neal A. Winston, Esq.
Winston Law Group, LLC
440 Broadway Somerville, MA 02145
www.winstonlg.com ~ nw@winstonlg.com
Tel. (617) 841-4000 Fax. (617) 629-7500

The Annual Survey and Commentary of Pooled Trusts and Public Benefits

By Neal A. Winston[1]

The annual update for pooled trusts in 2015 is still related almost entirely to treatment of pooled trusts by the Medicaid and SSI programs, and this year mostly for SSI. There is also a notable case involving the countability of in-kind trust distributions for HUD and state funded subsidized housing payments.

Following 2 years of meetings with advocates regarding inconsistent evaluation of special needs trusts, the SSA rolled out a training program for its employees leading to a review of all pooled and individual special needs trusts involving SSI recipients. This has led to many adverse redeterminations of trusts that were previously allowed, including pooled trusts.

For Medicaid issues involving pooled trusts, the state Medicaid agencies are still the principal players. While pooled trusts are accepted in all states, the major undecided issues from state to state involve penalties for age 65 and over funding of a pooled trust and retention policies of the pooled trust for funds upon the death of the Medicaid recipient.

This annual update is intended as a basic presentation for pooled trust administrators. While tied together by law and court decisions, the SSI and Medicaid programs operate relatively independently of each other, particularly involving interpretation of non-categorical eligibility and operations policy.

[1] Acknowledgments to Keirsa Johnson, Winston Law Group, LLC, for research and editing, Atty. Laurie Hanson for update on pooled trust transfers, Atty. Angela Conellos for update on pooled trust retention, and Atty. Mary O'Byrne and other members of the Special Needs Alliance for comments and updates on issues of importance to pooled trust advocates and administrators

SUPPLEMENTAL SECURITY INCOME

SSA Centralized Review of Special Needs Trusts

The program was rolled out on April 23, 2014, and described in detail in an emergency transmittal issued by the agency.[2] The program procedure has subsequently been formalized in a major revision of the POMS issued August 7, 2015[3]. A copy of the POMS is attached as Addendum A (15 pages). The program is officially called the Regional Centralization of SSI Trust Reviews. Since many of the 2015 SSA problems with pooled trusts involve the added scrutiny created by the review process, I am restating the review procedure originally described last year in the transmittal.

- The field office technician that initially conducts the initial or redetermination of an individual's eligibility involving a pooled trust should first determine if the master trust has already been reviewed in the region. If a precedent exists that the trust is allowable with certain terms, it should be included in the joinder agreement in order for the trust to be excluded as a resource.

- The technician then forwards the trust to a trained individual either in a local or regional office called a Regional Trust Reviewer Team (RTRT) member to determine if the initial determination by the technician was correct. If the pooled trust was created outside of the region, then it will be forwarded to a RTRT member in that region for review.

- New pooled trusts are reviewed by the head reviewer in each region, who is called the Regional Trust Lead (RTL). Usually, it is a person working in the regional office. The RTLs also handle reevaluation of RTRT decisions, requests for guidance from the Central Office in Baltimore, development of regional trust precedents, coordination with other regions, and general oversight of the regional trust review process.

[2] EM-14026, https://secure.ssa.gov/apps10/reference.nsf/links/04232014010832PM

[3] POMS SI 01120.202 August 7, 2015

- Early in the development process, a training and guide booklet called "The Fact Guide for National Trust Training" was created. A copy is attached as Addendum B (31 pages). The SSA has characterized the booklet as only a reference guide that cannot be relied upon as the source of official policy, even though it is known to be widely used by the reviewers. The guide is currently being reviewed for revision by the SSI policy group in Baltimore, and comments have been requested from advocates.

- While pooled and individual trusts share many similar requirements, there are specific comments in the guide that point out key differences between a pooled trust and an individual special needs trust:

    - There is no age restriction to establish a trust within a pooled trust.
    - A legally competent, disabled adult has the legal authority to establish the trust account under a pooled trust with his/her own funds in addition to a parent, grandparent, legal guardian, or court.
    - Pooled trust may retain amounts remaining in the beneficiary's account upon his or her death before payback to the state Medicaid agency(s)[4].

The newly reissued trust POMS SI 01120.202 (attached as Addendum A) includes trust review procedures and clarifies a number of problem issues generally involving the procedural aspects of special needs trust review under the new review system. While it did not make any significant changes to SSA policy, it does provide examples in section F. of countability of trust resources that provide a guide for asset transfers that would be of general interest to administrators.

The review procedure does not provide for a beneficiary, pooled trust administrator, attorney, or other member of the public to directly communicate with the RTRT or RTL regarding issues that may cause the trust to be countable during a review. The advocates were initially assured by the SSA that if a pooled trust is found to be defective or otherwise countable to a recipient, the specific reason would be communicated to the recipient and/or trust administrator. However, no

[4] Lack of a policy opinion about a maximum amount for retention is a notable exclusion in the directive as compared to state Medicaid agency policies

SSA representative would be allowed to inform the trust administrator how to fix a defective trust.

Lack of notice specificity as to the cause of countability and the perception of overly fussy and extended reviews has become the greatest complaint of the pooled trust review procedure. Individuals and administrators are often not specifically told why the transfer or trust is defective or countable, leaving it up to the individual recipient, advocate, or administrator to figure out the problem and fix it.

WisPACT

A particularly notable example is the ongoing and unfinished dialogue that Wisconsin WisPACT trust administrators have had with the SSA Region 5 office for more than a year over multiple terms in its master trusts and joinder agreements. Areas of review and discussion have included perceived sole benefit violations, early terminations, definition of individual sub-accounts, 90 day amendment periods, and pay back terms. In turn, the SSA reviewers of individual cases made a number of inconsistent determinations involving countability of individual recipient's transfers into the trusts that required pooled trust administrator intervention with the regional office.

Montana Self Sufficiency Trust (MSST)

In effect, the review procedure has brought added scrutiny to pooled trust terms that were previously considered as allowable by the SSA. Under the heading of the famous cliché, "be careful what you ask for, because you might get it…", a number of pooled trusts that have only recently been reviewed since their initial review at time of creation have been found to contain terms that are clearly or at least arguably in violation of long-standing SSA policy and have needed to be amended. In one notable example, a self settled transfer into a pooled trust established by the Montana state legislature in 1995[5] was determined to be countable to an SSI

[5] Montana Self Sufficiency Trust (MSST), MCA Sections 53-18-101 through 105

individual under review following two decades of allowance of self settled transfers. A frustrating part of the resolution was that it took a congressional inquiry to the SSA to obtain the analysis from the SSA Region 8 office that the pooled trust had not been properly created at the onset because it allegedly was revocable by the recipient, and thus did not meet the d4C requirements of OBRA '93.

Regional Chief Counsel Precedents

In order to create guidance and establish precedent, the Regional Chief Counsels can publish opinions in the POMS called Regional Chief Counsel Precedents. The section in which trust guidance opinions are grouped is POMS PS 01825. While publication is voluntary and thus sporadic on behalf of the regional Chief Counsels, there have been a few in the past 18 months related to pooled trusts [6].

Advocacy In Reporting Problems

Pooled trust administrators are encouraged to contact an advocates coalition[7] in order to report these problems to the SSA central office for quality control review and correction. Part of the training and review process requires the SSA to self- evaluate its accuracy and effectiveness for quality control purposes.

---

[6] PS 01825.004 Arizona, PS 15-114 Opinion: Secure Futures Pooled Special Needs Trust, formerly the Jewish Family and Children's Services of Southern Arizona Pooled Trust, for SSI recipients D~ and J~, April 22, 2015; PS 01825.007 Colorado, PS 15-120 Treatment of Amendments to the Arc of the Pikes Peak Region Pooled Income Trust (PL 15-24), May 7, 2015; PS 01825.028 Missouri, PS 14-092 Review of Revised Terms and Conditions of Missouri Family Trust DBA Midwest Special Needs Trust (MSNT) (Juanita), April 14, 2014; POMS PS 01825.029 Montana PS 15-024 Treatment of the Life Enrichment Pooled Trust – Montana, North Dakota, South Dakota, Utah, and Wyoming, November 4, 2014

[7] Advocates have formed a coalition comprised of representatives from multiple advocate disability related organizations, including ARC, Consortium of Citizens with Disabilities, NAELA, Special Needs Alliance, and Academy of Special Needs Planners, as well as representatives of several pooled trusts. Contact Atty. Mary O'Byrne at mobyrne@frankelderlaw.com, 410-337-8900, or Neal Winston at nw@winstonlg.com, 617-841-4000. Contact Atty. Stephen Dale, steve@dalelawfirm.com, 925-826-5585, who with other pooled trust advocates and administrators have created a pooled trust advocacy and listserv communication group

POMS SI 01120.201.2. For The Benefit Of/On Behalf Of/For The Sole Benefit Of An Individual

In May 2012, the SSA issued a new POMS that significantly limited prior pooled trust policy involving the reimbursement or payment of travel expenses of family members of beneficiaries by the pooled trust. If a pooled trust was found to have noncompliant terms with the new POMS, then at each individual beneficiary's SSI redetermination, the transfer to the trust would become a countable and a disqualifying resource as long as the remaining principal exceeded the $2,000 individual resource limit. The SSA considered the existence of the term in a pooled trust to render the trust countable, regardless of whether or not the trust administrator had made a distribution that violated the clarified policy.

At the intervention of the then SSA Commissioner, the May 2012 POMS change was withdrawn. Following the advocates' meetings and ongoing communications with the SSA, the agency reviewed its trust distribution travel policy involving family members, and eventually issued the following clarified POMS on May 15, 2013:

> "**b. Exceptions to the sole benefit rule for third party payments**
> Consider the following disbursements or distributions to be for the sole benefit of the trust beneficiary:
> • Payments to a third party that result in the receipt of goods or services by the trust beneficiary;
> • Payment of third party travel expenses which are necessary in order for the trust beneficiary to obtain medical treatment; and
> • Payment of third party travel expenses to visit a trust beneficiary who resides in an institution, nursing home, or other long-term care facility (e.g., group homes and assisted living facilities) or other supported living arrangement in which a non-family member or entity is being paid to provide or oversee the individual's living arrangement. The travel must be for the purpose of ensuring the safety and/or medical well-being of the individual.

> NOTE: If you have questions about whether a disbursement is permissible, please request assistance from your regional office."[8]

Many advocates feel that the travel payment and reimbursement policy for relatives and other third parties is still too restrictive, and have submitted proposed changes for the travel policy to the SSA for review. In particular, it has been requested that the POMS be clarified to specifically allow travel expenses for a third party to accompany the trust beneficiary that are necessary due to the beneficiary's medical condition, disability, or [minor] age. It remains under review by the agency.

90 Day Amendment Rules

At the time that the travel and other policy issues for allowable terms in a pooled trust were being "clarified" through review of pooled trusts under existing SSA policy, it developed a new policy of allowing a pooled trust 90 days to amend its prior nonconforming terms. The 90 day rule that allows the pooled (and individual) trust to be amended trust without causing a retroactive overpayment or having the trust asset become a countable resource for travel is as follows:

> "**d. Trusts that previously met the requirements to be excepted under section 1917(d)(4)(A) or (C) of the Act**
>
> If a trust previously determined to be exempt from resource counting under section 1917(d)(4)(A) or (C) contains a third party travel expense provision(s) that must be amended in order to conform with the third party travel expense provisions in SI 01120.201F.2.b., it must be amended within 90 days. That 90-day period begins on the day the recipient or representative payee is informed that the trust contains a third party travel expense

[8] POMS SI 01120.201F.2.a.

> provision(s) that must be amended in order to continue qualifying for the exception under Section 1917(d)(4)(A) or Section 1917(d)(4)(C).
>
> Do not count a previously exempted trust as a resource during the 90-day amendment period. If the trust still fails to meet the requirements of this section after the expiration of the 90-day amendment period, begin counting the trust as a resource under normal resource counting rules.
>
> NOTE: Each previously excepted trust is permitted only one 90-day amendment period to conform with the third party travel expense provisions in SI 01120.201F.2.b. in this section." [9]

90 day amendment rules only exist for trust terms involving SSA policies including null and void clauses in trust documents, management of pooled trusts by a nonprofit association, and early termination provisions[10], as well as for family travel reimbursement. The SSA reasoning is that the agency is clarifying or changing specific previous policies that previously allowed these terms or practices to exist without causing countability or disqualification. A number of current redeterminations also involve trusts in which other categories of trust terms were allowed under previous determinations, but are not exempted for amendments under these classifications and cause immediate countability and suspension or termination of benefits for the recipient beneficiary.

These adverse redeterminations may be due to error by the original SSA reviewer or by a current SSA reinterpretation of an allowable term. It is notable that the standardization of the SSA review process has created a thorough review of all trusts and uniformity of reviewing through internal training and communications that did not previously exist. The current reviewers have identified a number of problematic trust terms and trust creation issues that were not known to previous reviewers. Other than the four categories in which the 90 day amendment rules apply,

[9] POMS SI 01120.201.F.d.

[10] POMS SI 01120.225.A.2; POMS SI 01120.199.A.2, POMS SI 01120.227.A.2.

these redeterminations create the hardship of immediate current and retroactive ineligibility and retroactive overpayments.

When advocates have suggested that the 90 day amendment rule should be expanded to apply to all redeterminations involving terms or trust creation practices that are not allowed by current SSA interpretations of policy outside of the four excepted categories, the SSA has responded that appeal and overpayment procedures exist to handle all of these adverse redeterminations. In effect, aside from the loss of essential support for an indefinite period of time that the recipients face for something totally outside of their own control, they also are without any direct remedy to correct it because it lies solely in the actions of the trustees and trust administrators.

Once benefits are suspended or terminated, it can take months for the field office to work through the multistep procedure of reinstating benefits even if the defective trust or joinder agreement is immediately amended by the administrator or trustee. In addition, the recipient must then work through the procedure of requesting a waiver of overpayment for something for which the recipient was entirely without fault. There is also a very significant workload burden on the SSA for each suspension or termination and reinstatement and processing of the overpayment waiver. Pooled trusts can involve hundreds of recipients. Since there is lack of any specific policy regarding the issuance of waivers involving trust amendments, the waivers have been inconsistent in remedying these without fault procedures.

SSA Trends Involving Pooled Trusts

The SSA countability of trusts and disqualification of individual recipients for eligibility due to clarification of previously allowable trust terms, such as for family travel reimbursement, is part of a broader and relatively recent trend over the past five years. Formerly, a pooled trust would be approved or disapproved based on its terms as conforming with the specific requirements of OBRA ’93. Sole benefit distribution rules have always existed, but the remedy upon review would be to treat the improper distribution as countable income, or as a transfer of a resource for less than value that would create a transfer penalty. The new trend expands this principle to distributions that might occur by making the entire trust countable as a resource. The family

travel reimbursement term is the most notable example. It has also been applied by the SSA to require permanent countability of an individual trust for improper administration of the trust even after the improper administration ends.[11]

To avoid interpretive problems that can arise, the general consensus by the pooled trust advocates has been to recommend that pooled trust administrators proactively review their trusts and remove specific terms that might cause an adverse SSA or Medicaid determination. Particular areas of SSA scrutiny include family travel reimbursement and early termination or transfer because the trust is not considered as being for the "sole benefit" of the beneficiary. Many practitioners consider these trust term examples as extraneous and troublesome anyway when it comes to agency review. As long as a distribution is not specifically prohibited by the trust document or state law or regulation, then it would be up to the trustee's discretion to make that particular distribution for any particular recipient, and agency objections would then be limited to reviewing distributions on a case-by-case basis for each beneficiary rather than providing a blanket disqualification of a pooled trust.

After the offending terms are removed, what would happen if the Trustee then went ahead and made family travel distributions that were contrary to the POMS? The POMS addresses this eventuality as follows:

> When all or a portion of a trust, established with the individual's or spouse's resources, is a *non-countable* (clarification added) resource to the individual, if payment is made from the portion of the trust that is a resource to the individual to, or for the benefit of, another, then such a payment is a transfer of resources.[12]

[11] Elias v. Colvin, 2015 WL 4529877 (M.D. Pa. July 27, 2015). Recipient had direct access to her d4A trust assets when the family trustee became ill and unable to manage the trust. A few years later, another family member became trustee and properly managed the trust thereafter. The SSA determined that the trust became a permanently countable asset beginning with the recipient's access and did not end when the temporary access ended. The federal District Court upheld the countability of the trust during the access period, but remanded for review and redetermination for countability thereafter.

[12] POMS SI 01120.201.E.1.b.

Therefore, since a recipient's share of a pooled trust is considered a non-countable resource, certain family member travel distributions would be considered a transfer of resources and would trigger the resource transfer penalty, but would not render the trust itself as a countable resource to the recipient. This penalty would also apply to transfers of the recipient's share of trust income.

What can we expect from the SSA in the future? Between 2009 and 2014, there was a general conservative movement in policy decisions involving the "sole benefit" interpretation. There was even some discussion of attempting to define "sole benefit" in the form of a regulation. That discussion seems to have ended. At present, the trend appears to have stabilized in a period of relatively neutral policy interpretation.

Pooled trust administrators are encouraged to contact an advocates coalition [13] in order to report these problems to the SSA central office for quality control review and correction. Part of the training and review process requires the SSA to self evaluate its accuracy and effectiveness for quality control purposes.

MEDICAID

Although the Medicaid requirements for pooled trusts are generally controlled by federal law under 42 U.S.C. 1396p(d)(4)(C) and HCFA 64 through the Baltimore Medicaid policy Central Office section of the Center for Medicare and Medicaid Services (CMS), the state legislatures and Medicaid agencies have been the moving forces involved in interpretations of OBRA '93 as it relates to (d)(4) trusts and Medicaid eligibility.

[13] See footnote 7

While discussed in the *Lewis*[14] case as an undecided federal law question, it still appears to be a state option as to whether or not an individual age 65 or over can fund a pooled trust without a transfer penalty for long term care Medicaid eligibility. The federal statute is written in such a way that while it clearly states that funds transferred into a pooled trust by an individual age 65 or over are not ever countable as a resource against Medicaid eligibility, it is less clear that the transfer into the trust will not create a period of ineligibility. There is also wide variability among the states as to the amount that may be retained by the pooled trust upon the death of the beneficiary, even though that question was clearly resolved in *Lewis* in favor of an unlimited amount of the total, at least for the 3rd Circuit.

Age 65 and Over Transfers Into a Pooled Trust

Minnesota attorney Laurie Hanson again reports this year that there are not any significant changes in her informal survey tally from 2014, although a number of states are in flux due to lawsuits, conditions, or unknown or inconsistent application. She reports that twenty states and DC (AK, AL, CA, CT, DE, FL, IA, ID, IN, KS, KY, MA, MD, MT, OH, OK, RI, TN, WI, and WV) do not have penalties for post-64 transfers. Twenty two states (AZ, GA, HI, LA,ME, MS, NC, ND, NH, NJ, NM, NV, OR, PA, SC, SD, TX, UT, VA,VT, WA, and WY) have penalties for transfers. The other eight states (AR, CO, IL, MI, MN, MO, NE, and NY) may or may not have penalties for transfers depending on certain factors or the state policy is unknown. The report is attached as Addendum C (10 pages).

Last year, Megan Brand, Executive Director of the Colorado Fund for People with Disabilities, reported that that the Colorado Department of Health Care Policy and Financing (DHCPF) had been challenging all pooled trust age 65 and over transfers as disqualifying due to transfer for less than value. Since late 2012, the agency had effectively reversed its prior policy of allowing individuals transferring funds into a pooled trust to overcome the presumption that the transfer was made for less than fair market value. Beneficiaries had previously been allowed to

[14] *Zachary D. Lewis v. Gary Alexander*, 2012 U.S. App. LEXIS 12546 (3d Cir. 2012), US Supreme Court certiorari denied

overcome the presumption by presenting actuarial formula spending plans. Remedial legislation was filed with the state legislature, but it did not progress.

In February, 2014, the Colorado Office of the Attorney General determined that individuals age 65 or older would be permitted to rebut the presumption that a transfer into a pooled trust was made without fair consideration, and convincing and objective evidence could be used to rebut the presumption. However, it left unresolved whether the Medicaid agency could accept an actuarial formula spending plan as convincing and objective evidence for the purpose of rebutting the presumption.

Since last year, the advocates have appealed to hearings several eligibility denials involving age 65 and over transfers that used actuarial formula spending plans. The administrative law judges ruled in favor of the beneficiaries on a couple of the appeals, but the state Medicaid agency then overruled the hearing decisions. The state agency based its objection on the argument that an actuarial formula spending plan was just too speculative. One of the cases is now in state District Court awaiting adjudication.

Retention in Pooled Trust Upon Death of Beneficiary

Federal law is blank on the percentage or amount of a beneficiary's account that may be kept by the pooled trust upon the death of the beneficiary. The states are very variable as to what is allowed to be retained. *Lewis* and other federal and state cases note that 100% retention is allowed by federal law. Wisconsin attorney Angela Canellos has generously allowed her chart of status and reported states on retention and pooled trusts to be attached to this outline as Addendum D (2 pages).

SUBSIDIZED HOUSING

While not unique to pooled trusts, trust distributions may have a significant effect on the amount of the subsidy for individuals with section 8 vouchers and those receiving other state or local

subsidized housing aid. "Regular" distributions of principal from a special needs trust count as income for purposes of subsidy amount determination. Whereas if the individual had kept the funds in a personal bank account rather than transferring the funds to a special needs trust, use of the funds would not count. However, keeping the funds in a personal bank account would then have cost the individual SSI and Medicaid eligibility.

A notable and successful challenge to this type of income counting through trust distributions was made in the Santa Monica, California case *Sheila Finley v. City of Santa Monica.*[15] Sheila Finley notified the housing authority that she was going to receive two settlements from a former employer that would go into an irrevocable special needs trust. She required the special needs trust to maintain eligibility for other benefits. The housing authority used its usual formula, and counted all regular distributions of principal from the trust as income, thus significantly increasing the portion of the rent that she would pay, even though she had no direct access or use of those funds.

If she had kept the funds in her own bank account with total access and use, she would have lost eligibility for the other programs, but her subsidized rent would have only been marginally increased by the small amount of interest the account would have generated.
The entire case outcome turns on the definition of "income" as defined by the housing program. The court concluded that by using a plain reading of the regulations, distributions of principal on behalf of the individual should not be counted as income for purposes of establishing the subsidy amount.

Subsequent challenges to this form of income counting for subsidized housing reimbursement using trust distributions have generally not been successful. Likewise, a United States District Court decided in favor of the Brookline [Massachusetts] Housing Authority in a case involving an individual who transferred her lawsuit settlement funds into an individual supplemental needs trust in order to maintain eligibility for SSI and Medicaid.[16]

---

[15] *Sheila Finley v. City of Santa Monica*, Civ. No. BS127077, 2011 WL 7116184 (Cal.Super.Ct. May 25, 2011)

[16] DeCambre v. Brookline Housing Authority, et al, 2015 WL 1333319 (March 25, 2015)

Kimberly DeCambre's situation was similar to Sheila Finley. She received an injury settlement over a two-year period, and on each occasion, deposited the funds into a d4A individual special needs trust in order to maintain eligibility for her Supplemental Security Income benefits. The housing authority determined that many of the subsequent in-kind distributions for goods and services were "regular" and not otherwise exempted, and therefore countable as income when calculating her rate of subsidy. She claimed under a variety of federal statutes that this method of calculation was improper because if she had merely left the settlement in her own name rather than transferring it to the trust, then only the interest income would have counted rather than each regular distribution. She also claimed certain of the distributions should be considered as exempt distributions for medical purposes.

The federal court upheld the method that the housing authority used to calculate the distributions of regular income, but remanded the case back to the housing authority to determine with greater clarity and care those amounts that should be exempted as non-countable medical distributions. The court noted the key issue that trust administrators face in attempting to properly determine countable trust distributions: "The court problem lies in the lack of clarity in HUD provisions governing SNT beneficiaries for section 8 benefits, and this issue should be addressed by HUD or Congress. [Nevertheless] …Reviewing the decision of the BHA as to the initial income calculation and subsequent denial of reasonable accommodation requests, i. e. its treatment of DeCambre's SNT as a trust, rather than as a lump-sum settlement, is reasonable under the existing regulatory scheme." This decision is attached as Addendum E (17 pages) and is currently under appeal to the United States First Circuit Court of Appeals.

CONCLUSION

The Social Security Administration positively reacted to the criticism of advocates regarding the agency's need to create a more uniform and accurate trust evaluation procedure by creating a comprehensive training and review procedure for agency personnel for special needs trusts. The results following the first 18 months after implementation have left a mixed opinion with pooled

trust administrators and advocates. While these reviews may have dredged up trust problems that may not have been picked up in earlier reviews due to improved and uniform training, some advocates feel that the reviewers are focusing on minutia that create unreasonable burdens for compliance. The dialogue between the SSA and advocates is continuing with the expectation that as issues arise, they will be adequately reviewed by the agency with care and attention given to resolution.

The past year has again been notable for the general lack of federal and state Medicaid agency attention to pooled trusts. This lack may be related to agency attention focused on implementation of the Affordable Care Act and state health care initiatives, and perhaps by the effect of the *Lewis* decision in pushing back aggressive state actions in attempting to regulate pooled trusts in areas other than age 65 and over transfers. Nevertheless, individual state Medicaid agency initiatives and court cases will probably still create the news for the coming year rather than anything coming from the federal Medicaid agency.

Addendum A – 15 pages

Social Security
Official Social Security Website

POMS Recent Change

Effective Dates: 08/10/2015 - Present

Identification Number:	**SI 01120 TN 50**
Intended Audience:	See Transmittal Sheet
Originating Office:	ORDP OISP
Title:	**Identifying Resources**
Type:	POMS Transmittals
Program:	**Title XVI (SSI)**
Link To Reference:	

PROGRAM OPERATIONS MANUAL SYSTEM
Part 05 - Supplemental Security Income
Chapter 011 - Resources
Subchapter 20 - Identifying Resources
Transmittal No. 50, 08/2015

Audience

FO/TSC: CR, CR TXVI, DRT, FR, OA, OS, RR, SR, TA, TE, TSC-SR

Originating Component

OISP

Effective Date

Upon Receipt

Background

This transmittal provides instructions on how to develop and document the resource status of trusts for SSI purposes. It also introduces the "Regional Centralization of SSI Trust Reviews" review process developed by the Atlanta, Philadelphia, and Seattle regions. The trust review process intends to improve the accuracy and consistency of resource determinations for trusts by having the Regional Trust Review Team (RTRT) review all trust resource determinations for not previously evaluated trusts or amended trusts before adjudication of any initial claim or posteligibility event. This transmittal incorporates the trust review process, previously released in EM-14026, which became effective April 28, 2014.

Summary of Changes

SI 01120.202 Development and Documentation of Trusts Established on or After 01/01/00

We updated subsection headings, revised passive voice statements, and revised cross reference format throughout the instructions to meet the Program Operations Manual System transmittal guidelines.

Subsection B.6. - Added instructions for field office technicians, trust reviewers, and regional trust leads related to the trust review process.

Subsection C - Added instructions in a step-action format for field office technicians, trust reviewers, and regional

trust leads related to the trust review process.

SI 01120.202 Development and Documentation of Trusts Established on or After 01/01/00

A. Procedure For Trust Development

1. General development for written trusts

a. Review the trust document

Obtain a copy of the trust document and related documents and, if possible, review the trust to determine whether the:

- Trust was established before, on or after 01/01/00;
- Assets were transferred into the trust before, on or after 01/01/00;
- Trust contains assets of third parties;
- Individual is grantor, trustee, or trust beneficiary;
- Trust is revocable or irrevocable;
- Trust provides for payments to the individual or on the individual's behalf;
- Trust generates income (earnings), and if so, whether the individual has the right to any of the income;
- Trust contains a spendthrift clause that prohibits anticipation of any trust payments; and
- Trust is receiving payments from another source.

b. Which instructions apply when determining the resource status and income treatment of a trust

Depending on the trust's date of establishment and whose funds the trust principal contains, follow these instructions to determine the resource status and income treatment of the trust:

If the trust was established...	And contains...	Then follow instructions in:
On or after 01/01/00	Any assets of the individual	SI 01120.199, SI 01120.201 through SI 01120.204, SI 01120.225 and SI 01120.227
	Only assets of third parties	SI 01120.200
Before 01/01/00	Assets of the individual transferred before 01/01/00	SI 01120.200
	Any assets of the individual all transferred on or after 01/01/00	SI 01120.199, SI 01120.201 through SI 01120.204, SI 01120.225, and SI 01120.227
	Only assets of third parties	SI 01120.200

NOTE: If the trust beneficiary adds his or her own assets to an existing third party trust on or after 01/01/00, redevelop the trust under the instructions in SI 01120.199, SI 01120.201 through SI 01120.204, SI 01120.225 and SI 01120.227.

c. Consult regional instructions

Consult any regional instructions that pertain to trusts to see if there are any State or Tribal laws to consider on such issues as revocability or irrevocability and grantor trusts. You may also consult the title XVI Regional Chief Counsel (RCC) Precedents. For RCC precedents on trusts, see PS 01825.000.

d. Referring a trust to Regional Office (RO)

If there are unresolved issues that prevent you from determining the resource status of the trust, or there are issues that you believe need a legal opinion, follow your regional instructions or consult with your RO program staff via vHelp. If necessary, the RO staff will seek guidance from the central office (CO) or the Regional Chief Counsel (RCC). Do **not** contact or refer materials to the RCC directly.

NOTE: When referring a trust to the RO, make sure to include all documentation and an SSA-5002 (Report of Contact), if necessary, identifying the claimant, recipient, or deemor, source of funds or assets, relevant relationships of others named in the trust, and a brief summary of the unresolved issue(s).

2. General development for oral trusts

a. State recognizes as binding

If the State in question recognizes oral trusts as binding (see regional instructions):

- Record all relevant information about the trust;
- Obtain from all parties (alleged grantor, trustee, trust beneficiary) signed statements describing the arrangement; and
- Unless regional instructions specify otherwise, refer the case to your RO staff. The RO will refer the case, through the Assistant Regional Commissioner for Management and Operations Support (ARC, MOS), to the Regional Chief Counsel.

NOTE: The special needs trust and pooled trust exceptions do not apply in the case of an oral trust since these exceptions require written evidence as part of the trust document. For more information on the special needs trust and pooled trust exceptions, see SI 01120.203A and SI 01120.203B.

b. State does not recognize as binding

If the State does not recognize oral trusts as binding (see regional instructions), see if an agency relationship exists. Develop under regular resource-counting rules or transfer of resources rules, as applicable. For transactions involving agents, see SI 01120.020.

3. Determining whether a trust is revocable or irrevocable

Determine whether a trust is revocable or irrevocable based on the terms of the trust and State law considerations (State grantor trust rules). For revocability of grantor trusts, see SI 01120.200D.3.

4. Determining if a trust is a resource

When determining whether a trust is a resource, apply the policies in regional instructions and SI 01120.201C and

SI 01120.201D.

Once you establish revocability or irrevocability of a trust:

- If the individual used his or her assets to establish a revocable trust on or after 01/01/00, count the trust corpus as a resource **unless one of the exceptions in SI 01120.203B applies.**
- If the individual used his or her assets to establish an irrevocable trust on or after 01/01/00, and if the trust can make payments to or for the benefit of the individual or the individual's spouse under any circumstance, count the portion of the trust attributable to the individual's assets from which the trust can make payment to or for the benefit of the individual or spouse as a resource **unless one of the exceptions in SI 01120.203B or SI 01120.203C applies**.
- If the individual used his or her assets to establish an irrevocable trust on or after 01/01/00, and if the trust cannot make payments to or for the benefit of the individual or the individual's spouse under any circumstance, develop the establishment of the trust for a potential transfer of resources penalty using instructions in SI 01150.100.

NOTE: If you determine that the trust is a resource, you must determine if an exception or waiver in SI 01120.203 applies.

5. Developing legal instruments and devices similar to a trust

a. Which arrangements to develop

Obtain any written documentation and review the arrangement to determine if it meets the requirements in SI 01120.201G.

If so, determine whether the arrangement is a countable resource under regular SSI resource counting rules. If the resource is:

- countable, develop the arrangement under the other applicable resource rules.
- not countable, develop the arrangement following the procedures for developing trusts.

NOTE: Review only arrangements established with an individual's assets on or after 01/01/00. Do **not** develop legal instruments and devices similar to a trust established with an individual's assets prior to 01/01/00 under instructions in SI 01120.200. However, transfers to such an arrangement may be subject to the transfer of resources provisions. For transfer of resources, see SI 01150.100.

b. Referral to the RO

If you are unsure of whether the arrangement is one that you should develop as a legal instrument or device similar to a trust, refer the matter to the RO via the vHelp system. If necessary, the RO staff will seek guidance from the central office (CO) or the RCC. As we resolve cases over time, we develop precedents that make resolution of these issues easier.

6. Trust review process

Field office (FO) technicians evaluate all trusts **that need a resource determination** (such as a new or amended trust) in all initial claims (IC) and posteligibility (PE) events to determine the resource status of the trusts. For PE events, it is not necessary to reevaluate trusts that have a resource determination, unless there is:

- an amendment to the trust, or
- a clarification in policy that affects the resource determination. For resource status changes in PE events, see SI 01120.200J.7.

To ensure accurate and consistent trust resource determinations:

- FO technicians submit their trust resource determinations and any related documentation to the Regional Trusts Reviewer Team (RTRT) for review using the Supplemental Security Income Trust Monitoring System (SSITMS) website.
- The RTRT reviews all trust determinations and provides a decision and any feedback to the FO technicians via the SSITMS website.

FO technicians and RTRT members can use this SSITMS (http://oasweb.ba.ssa.gov/ssitm/) link to access the website. For instructions on using the SSITMS website, visit the user guide located under the Help link on the SSITMS website.

The following steps describe the trust review process for the FO technicians and RTRT members.

a. FO technician actions

For all IC and PE cases where a claimant, recipient, or deemor alleges ownership of a trust that needs a resource determination, determine whether the trust is a countable resource. To make the trust resource determination, follow the appropriate trust policies in SI 01120.199 through SI 01120.204, SI 01120.225, and SI 01120.227. Additionally, for pooled trusts:

- Determine if a precedent on the pooled trust exists. Use the SSITMS "Help" link to access the SharePoint site that houses the precedent library.
- Review the precedent, if one exists. Trust precedents contain information to help you with the evaluation of the pooled trust.

After making a trust resource determination:

- Document the determination along with any references and rationale used in the decision-making process.
  a. For MSSICS cases, use the Report of Contact (DROC) screen.
  b. For non-MSSICS cases, use a Report of Contact form (SSA-5002) and fax it into the electronic folder (EF) or Non-Disability Repository for Evidentiary Document (NDRED).
- Fax the initial trust resource determination, trust document, and any pertinent information into the appropriate EF.

Then follow these trust review process steps:

1. **Submitting trust determinations for RTRT review**
   - Access the SSITMS website and select the Add New tab. Add the claimant or recipient's name, representative payee's name (if any), social security number, and all other relevant trust information.
   - Select the appropriate type of trust in SSITMS (third party trust, special needs trust, etc.).
   - Submit the trust resource determination for RTRT review.
2. **Reviewing the RTRT responses**

   SSITMS sends an email notification after the trust reviewer (TR) or regional trust lead (RTL) reviews the trust and makes a decision. To view the RTRT's response:

   a. Access SSITMS and select the case from the Summary page listing or use the link in the email to access the case, and
   b. Click on the "Details/Update" tab.

      The Results field will show that the RTRT member either agreed or disagreed with the trust resource

determination. When the FO technician is ready to process the case, change the trust status to "FO Effectuated" using the edit function.

NOTE: Select "FO Effectuated" only after completing all case development. Changing the Trust Status to "FO Effectuated" **locks** the case in SSITMS. Only the Remarks field will be accessible for additional comments.

3. **Reevaluations of trust determinations**

   To request a reevaluation of a trust resource determination, access SSITMS and:

   a. Change the Trust Status to "Referred to RTL" using the Edit function.

   b. Provide rationale, a summary of supporting documentation, and appropriate references in SSITMS Remarks and select "Submit."

   The RTL will select the case for review and determine if the central office (CO) or the Office of General Counsel (OGC) needs to review the case. The RTL will respond to the request via the SSITMS website, and SSITMS sends an email notification when the RTL completes the reevaluation process.

4. **Appeal requests of trust determinations**

   When the claimant or recipient appeals the trust resource determination, the RTL must review the FO's reconsideration decision. To request a review of the trust reconsideration determination, access SSITMS and:

   - select "Recon Pending" from the Recon Trust Status dropdown using the Edit function, and
   - provide pertinent information about the reason for the appeal in FO remarks and select "Submit."

   NOTE: Do not enter RO Recon Trust Determination in SSITMS FO remarks. SSITMS will send an email notification when the RTL completes the Recon review

5. **RTRT returns cases for FO further development**

   When the RTRT requires additional information from the FO, they will return the case for further development. SSITMS will send an email notification about the further development requested to the FO mailbox. To view the RTRT's request, access SSITMS and:

   - select the case from the Summary page listings or use the link in the email to access the case, and
   - Click on the Details/Update tab.

   View the request for additional information in the Remarks field. After completing the development requested, update the Trust Status to "FO Development Completed" using the edit button and submit.

b. Trust Reviewers (TR) actions

Trust reviewers (TR) review the FO technician's trust resource determination along with any pertinent documentation in the Modernized Supplemental Security Income Claims System (MSSICS) and the Claims File Records Management System (CFRMS). When TRs receive a trust resource determination for review in SSITMS, TRs select the case with "Pending" trust status from the SSITMS summary listing, and:

- Review the trust and associated information.
- Provide feedback in the Remarks field in SSITMS.
- Change the trust status to "Review Completed" after making a decision on the trust resource determination.
- Indicate "agree" or "disagree" with the FO technician's trust resource determination in Results.
- Submit the response to the FO.

Additionally, TRs refer:

- Trusts back to the FO when the case needs further development.
- Refer trusts established outside their region to the RTL. The RTL will refer the trust to the appropriate region.
- Refer pooled trusts to the RTL for review and inclusion in the precedent file.

c. Regional Trust Lead (RTL) actions

Regional trust Leads (RTL) review trust resource determinations for all pooled trusts, reevaluations, and appeals. When needed, RTLs request guidance from CO or OGC, and refer trusts to other regions for their input or decision. RTLs also refer trusts back to the FO when the case needs further development. Additionally, RTLs monitor the SSITMS website and add pooled trust precedents to the SSITMS SharePoint Repository for Precedents.

Follow these steps for the trust review process:

1. **Reviewing pooled trust resource determinations**

   Select the case from SSITMS summary listing page or by using the link in the email notification, and:

   - Click the Details/Update tab.
   - Review information provided by the FO technician.
   - Determine if consultation with CO or OGC is necessary.
   - Provide the review results in the Remarks field.
   - Update Trust Status to "Completed by RTL".
   - Indicate "agree" or "disagree" with the FO's determination in Results and click "Submit."

     NOTE: Add a precedent to the SSITMS SharePoint Repository for Precedents for all pooled trusts that do not have a precedent in file. Use the SSITMS "Help" link to access the precedent library in the SharePoint site.

2. **Email notifications for reevaluation requests**

   RTLs will receive an email notification whenever a trust resource determination needs reevaluation. To view the reevaluation request, access the case from the SSITMS Summary page listing.

3. **Reevaluate trust resource determinations**

   To reevaluate the trust resource determination, follow steps listed in SI 01120.200A.6.c.1 in this section. The technician who submitted the case and the technician's FO mailbox will receive an automated email notification when the RTL makes a decision. The subject line will show "Response to Trust for Reevaluation."

4. **Appeal requests**

   SSITMS sends the RTL an email notification when he or she needs to review an FO determination on a trust reconsideration. To view appeal requests, access the case from the SSITMS Summary page listing or from the link in the email notification. To review the reconsideration determination, follow steps listed in SI 01120.202A.6.c.1 in this section. To address the appeal request, follow steps listed in SI 01120.202A.6.c.1 in this section.

   The technician who submitted the case and the technician's FO mailbox will receive an automated email notification when the RTL makes a decision. The subject line will show "Response to SSI Trust Recon for Review."

B. Summary For Trust Development

1. Trust development

The following is a summary of trust development presented in a step-action format (For full development instructions, see SI 01120.202A):

STEP	ACTION
1	Obtain and review a copy of the trust and all related documents.
2	Does the trust contain **any** assets of the individual? • If **no**, follow instructions in SI 01120.200. **STOP.** **NOTE:** If the individual adds any of his or her assets to a third party trust on or after 01/01/00, redevelop the trust per SI 01120.201 through SI 01120.204. • If **yes**, go to **Step 3**.
3	Determine the date the individual transferred his or her assets to the trust. To know which instruction to follow, see SI 01120.201C.1 and SI 01120.202A.1.b. • If the individual transferred any of his or her assets prior to 01/01/00, follow instructions in SI 01120.200. **STOP.** • If the individual transferred all of his or her assets in the trust on or after 01/01/00, go to **Step 4**.
4	Consult national and regional instructions to determine if the trust is revocable or irrevocable (for determining revocability of the trust, see SI 01120.202A.3): • If you are unable to make a determination, consult with your RO programs staff. • If the trust is revocable, go to **Step 5**. • If the trust is irrevocable, go to **Step 6** (SI 01120.201D.2).
5	The trust is a resource unless an exception applies. To see if an exception applies, go to SI 01120.203A. For treatment of revocable trusts, see SI 01120.201D.1.
6	For the policy on irrevocable trusts see SI 01120.201D.2. Does the trust also contain assets of a third party? • If **yes**, determine the amounts in the trust attributable to the individual and the third party. Develop resource treatment of the portion attributable to the third party under SI 01120.200. Go to **Step 7** for the portion of the trust attributable to the individual. • If **no**, go to **Step 7**.
7	Are there **any** circumstances that would allow payment from the trust to or for the benefit of the individual? • If **no**, the trust is not a resource, refer to SI 01150.100 to see if a transfer penalty is applicable. • If **yes**, the trust is a resource in the amount that the trust can pay out from the portion attributable to the individual unless an exception applies; go to SI 01120.203 to see if an exception applies.

2. FO actions during the trust review process

The following is a summary of the FO actions during the trust review process presented in a step-action format (For full development instructions, see SI 01120.202A.6.a in this section.):

Step	Action
1	Determine whether the trust is a countable resource. To help you evaluate the trust, follow steps in SI 01120.202B.1 in this section. Go to **step 2.**
2	Submit your trust resource determination to the RTRT for review using the SSITMS website. Follow instructions in SI 01120.202A.6.a, in this section. Go to **step 3.**
3	When the SSITMS sends the automated notification that the RTRT completed his or her review of the trust, access SSITMS to review the results. Go to **step 4**
4	Do you agree with the RTRT's review of the trust? • If yes, change the trust status in SSITMS to "FO effectuated" at the point when you are ready to adjudicate the IC or close the PE event. Do not change the status until all issues within the IC or PE event are resolved. **STOP.** • If not, request a reevaluation of the trust. For information on how to request a reevaluation, see SI 01120.202A.6.a.3. **NOTE**: You have to wait for the reevaluation's results to adjudicate your claim event.

3. RTRT actions during the trust review process

The following is a summary in a step-action format indicating the RTRT's actions in the trust review process (For full development instructions, see SI 01120.202A.6.b in this section.):

STEP	ACTION
1	Access SSITMS to select the case with "pending" trust status. Go to **step 2.**
2	Is the trust a pooled trust or Indian Gaming Regulatory Act (IGRA) trust? • If yes, refer to RTL for review. STOP. • If not, go to **step 3.**
3	Review the FO's trust resource determination. Use information documented in MSSICS and CFRMS to help with your review of the trust. Go to **step 4.**
4	Determine whether you agree or disagree with the FO's determination and provide feedback in the remarks section of SSITMS. Go to **step 5.**
5	Select "Edit" to change the trust status to "Review Completed" and indicate in

STEP	ACTION
	"Results" whether you agree or disagree with the FO technician's trust resource determination. Go to **step 6.**
6	Submit your response. **STOP.**

4. RTL actions during the trust review process

The following is a summary in a step-action format indicating the RTL actions in the trust review process. For full development, see SI 01120.202A.6.c in this section.

STEP	ACTION
1	Access SSITMS to select the case from the SSITMS listing or from the link in the email notification. Go to **step 2.**
2	Is this a reevaluation request? • If yes, go to **step 3.** • If no, go to **step 6.**
3	Review the FO and TR determinations and the remarks section to see the reason for the disagreement. Go to **step 4.**
4	Determine if CO or OGC consultation is necessary to resolve the disagreement. Contact CO or OGC if necessary and go to step 5 once you are ready to make a decision. If CO or OGC input is not necessary, go to step 5.
5	Make a decision on the reevaluation and submit your response via SSITMS. **STOP.**
6	Is the trust established outside your region? • If yes, refer the trust to the appropriate region for input. • If not, go to **step 7.**
7	Review the FO's trust resource determination for the IGRA trust or pooled trust. **NOTE:** If the trust determination is for an IGRA trust or new- pooled trust, add a new precedent to SharePoint. Contact OGC or CO if you need input while evaluating the trust. Go to **step 8.**
8	Determine whether you agree or disagree with the FO's determination and provide feedback in the remarks section of SSITMS. Go to **step 9**
9	Select Edit to change status to "Review Completed" and indicate in "Results" whether you agree or disagree with the FO technician's trust resource determination.

STEP	ACTION
	Go to **step 10**
10	Submit your response. **STOP.**

C. Procedure For Documenting Trusts

1. Documenting trusts in MSSICS

Document the existence of a trust in MSSICS by answering **Yes** on the Resource Selection (RMEN) page to the **Trusts** question. A **Yes** answer will bring the **Trust (RTRS) page** into the path.

- Complete the applicable trust questions on the Trust page.
- If an exception applies, enter the value of the trust in **excluded amount** and select the exclusion type, e.g., meets special needs trust requirements or undue hardship, from the **exclusion reason** drop down menu.
- Record all information used in determining whether the trust is a resource and whether it generates income in the Trust page in MSSICS. For more information on what information to record, see MSOM INTRANETSSI 013.005. Record your conclusion in the **FILE DOCUMENTATION NOTES** section or on the **DROC** screen. Then annotate evidence on the **EVID** screen.

2. Documenting trust on paper forms

Document the existence of a trust on the appropriate resources question on the form or in remarks.
Record all information used in determining whether the trust is a resource and whether it generates income. Record your conclusions on an SSA-5002 or SSA-553 (Special Determination). Document evidence on the **EVID** screen (see GN 00301.286) even on non-MSSICS cases.

3. Documentation requirements in all cases

Include in the file:

- A copy of the trust document, if any;
- Copies of any signed documents between organizations making payments to the individual and the individual legally entitled to such payments, if the payments have been assigned, either revocably or irrevocably, to the trust or trustee;
- Source of assets funding the trust and
- Records of any payments or disbursements from the trust, as necessary; and
- Any other pertinent documents.

D. Procedure For Coding Trusts

1. Coding Medicaid trusts on paper

Code a **Q** and the date of establishment of the trust in the Third party Liability (PT) field of the Supplemental Security Record (SSR) if the trust qualifies as a Medicaid Trust.

2. Coding Medicaid trusts in MSSICS

As of the issuance of these instructions, MSSICS does not automatically post the Q code to the PT field of the SSR; do a manual entry per SI 01120.202D. For more information on the third party insurance field, see SM 01005.350.

3. Coding the CG field

Code **RE06** or **RE07**, as applicable in the CG (case characteristics) field to indicate a revocable or irrevocable trust, respectively. (For a list of CG code entries see SM 01301.820.)

E. Procedure For Medicaid Determination

1. When not to make Medicaid eligibility determination

If the individual resides in a section 1634 State (in which SSA makes Medicaid determinations on behalf of the State), do not attempt to make a Medicaid eligibility determination since the Medicaid determination regarding the trust may differ from the SSI eligibility determination. (For a discussion of Section 1634 States see SI 01715.010A.3.)

2. Prepare manual notice

Post-eligibility discovery of a trust in a section 1634 State will not result in a correct automated notice paragraph. Suppress any automated notice and prepare a manual notice using Medicaid Paragraph 1147 in NL 00804.110.
NOTE: If the individual is blind or visually impaired, see instructions on the special blind or visually impaired notice options in NL 01001.010.

3. Send trust information to State

a. 1634 States

Copy the trust information and send it to the same address used for assignment of rights (AOR) and third party liability (TPL) information. See regional instructions or contact your RO staff for the correct address.

b. 209(b) and SSI criteria States

In States where SSA does not have an agreement to make the Medicaid eligibility determination:

- copy the trust information and see regional instructions SI NY01150.110, SI DEN01150.110, and SI BOS01150.110; or
- contact your RO staff for the correct address to send the information. For a discussion of section 209(b) and SSI criteria States see SI 01715.010A.1. and SI 01715.010A.2.

F. Examples Of Trust Evaluations

1. Example when the trust principal is a resource

a. Situation

The 20-year-old SSI claimant is the beneficiary of an irrevocable trust. The court established the trust in 02/2014 with the proceeds of the settlement of a lawsuit. The claimant lives with her parents, who support her fully. Her

parents filed a medical malpractice suit on her behalf against her doctor. The doctor's insurance company settled the lawsuit before it went to trial for $400,000. The court approved the settlement agreement, whereby, the insurance company placed the money in trust for the claimant, naming her parents as trustees. The trust permits payments for the claimant's special needs other than support and maintenance. The trust does not provide for reimbursement of Medicaid expenditures to the State on behalf of the claimant.

b. Analysis

The trust was established with assets of the claimant. Although she never received them directly, the settlement proceeds meet the definition of assets in SI 01120.201B.2. Her parents, acting on her behalf, approved the establishment of the trust. The court directed the proceeds to establish the trust after 01/01/00. Although the trust was legally irrevocable under State law, the trust permitted disbursement of all the funds in the trust for the benefit of the claimant. Therefore, the trust is a resource in its full amount, $400,000. The claimant is ineligible due to excess resources.

2. Example when Individual's assets form only part of the trust

See example of when the individual's assets form only a part of the trust in SI 01120.201C.2.c.

3. Example when part of the individual's assets in the trust are countable

a. Situation

Bill Murray is an SSI recipient. His wife, who is not eligible, won $150,000 in the State lottery, of which she received $85,000. She used the money to establish the Murray Family Irrevocable Trust. The trust stipulates that she can only use $40,000 for their daughter's college education. She can use the remainder of the money for a number of purposes at the discretion of the trustee, including supplemental needs for Bill and income payments to his wife.

b. Analysis

Since Mrs. Murray established the trust with her assets and she can only pay $45,000 to or for the benefit of, Mr. Murray, we will count $45,000 as a resource. We consider the remaining $40,000 in the trust a transfer of resources that we must evaluate under SI 01150.100.

4. Example when the trust principal is not a resource

a. Trust established by a third party

- **Situation**

  Woody King is a disabled young adult. In 08/2014, his parents established an irrevocable special-needs trust on his behalf with $100,000 of their own funds. Prior to attaining age 18, he was ineligible because of the income and resources of his parents through deeming. Now that he has attained age 18, he is reapplying for SSI.

- **Analysis**

  Mr. King's resources do not include the trust established by his parents since he was not the grantor of the trust and it is irrevocable. As long as his other income and resources are within the limits, he is eligible for SSI. However, since the trust is not a resource, payments from the trust, to or for the trust beneficiary, may be income.

  NOTE: A third party trust can be revocable and not count as a resource as long as the trust beneficiary does not have the legal authority to revoke the trust or direct the use of the trust assets.

b. Trust self-established but no payment can be made to or for the benefit of the individual

- **Situation**

  Arnie Becker is permanently disabled due to an injury he suffered in an automobile accident. Mr. Becker received a $3.5 million dollar insurance settlement that went into two irrevocable trusts. The first trust is a discretionary trust providing $2.5 million for the education and welfare of his children. The second trust is a charitable trust containing $1 million. The trustee must distribute annually the earnings on the trust in the form of scholarships for students at a nearby college.

- **Analysis**

  Although Mr. Becker's trusts constitute a very large amount of money, none of it goes to him or to provide for his or his spouse's needs. SSA does not count the trusts as resources for SSI purposes. However, the establishment of the trusts is a transfer of resources under SI 01150.100. Mr. Becker will likely be ineligible for SSI for at least 36 months.

5. Trust includes excluded resources

a. Example of a burial trust

- **Situation**

  Mattie Walker, an SSI recipient, wishes to plan her funeral through a prepaid agreement. In the State where she lives, recipients of public assistance, including SSI, must place the funds for their prepaid agreement into a funeral trust. Ms. Walker enters into a contract for a casket and vault valued at $5,000, and the funeral services she wants are valued at $1,500. She places the full amount in a revocable trust. As required by State law, the trust shows Ms. Walker as the grantor and the funeral home as the trust beneficiary.

- **Analysis**

  The revocable funeral trust is a resource under SSI burial trust policy in SI 01120.201H.2. This is the case because Ms. Walker is the grantor of the trust and the trust is revocable. The purpose of the trust is irrelevant for purposes of trust policy (SI 01120.201C.2.d).

  However, since the trust is an otherwise countable resource, the SSI burial exclusions apply to the funds. We exclude the vault and the casket as burial spaces. We exclude the $1,500 for funeral services under the $1,500 burial funds exclusion. Therefore, we can exclude the total value of the trust. If the amount of funds for funeral services exceeds $1,500 (other than interest or appreciation), we could exclude up to $1,500, and the remaining amount would be countable.

  For the burial space exclusion see SI 01130.400 and for the burial fund exclusion see SI 01130.409 through SI 01130.425.

  NOTE: If a trust does not permit the use of the funds in the trust for burial, the burial exclusions are generally not applicable. Upon the individual's death, the individual would no longer be a beneficiary of the trust unless the trust specifically provides otherwise. Therefore, individuals cannot designate $1,500 of an

otherwise countable trust as a burial fund unless the trust permits such a use. If you are unable to make this determination, consult with your RO programs staff.

b. Example of a trusts that includes an excluded resource

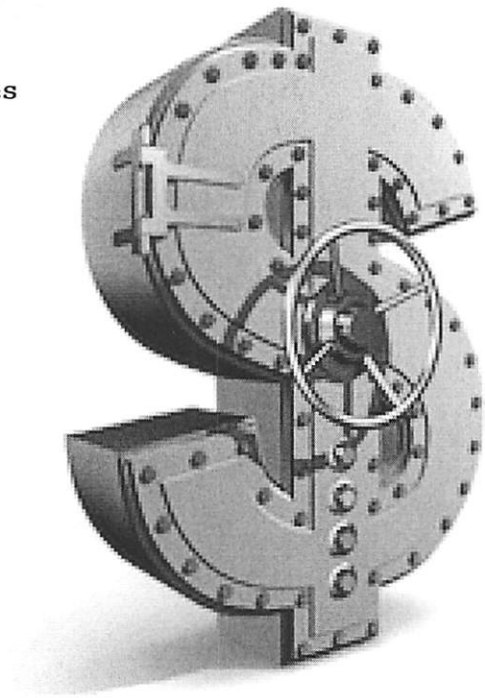
- **Situation**

  Armand Gonzales is a disabled adult SSI recipient. Mr. Gonzales received an award of $250,000 in a lawsuit in 06/2010 and the money went directly into a trust for his benefit. The trust does not meet any of the exceptions to the general SSI trust policy, so the trust would be a countable resource for SSI purposes, and as a result, Mr. Gonzales has excess resources in 07/2010 (the month after the month that the trust is established). The trustee uses all of the money in the trust to purchase a house for Mr. Gonzales (the trust hold the property title), and he moves into the home in 01/2011 when construction is completed. He contacts SSA and informs us of what has happened.

- **Analysis**

  Mr. Gonzales is ineligible due to excess income in 06/2010 and excess resources from 07/2010 to 01/11. When he moves into the house in 01/2011, we consider him to be living in his own home because he has an equitable ownership interest under a trust. The house qualifies for the home exclusion as of 02/2011, and if Mr. Gonzales meets all other SSI eligibility requirements, we can reinstate his benefits. For home as a resource, see SI 01120.200F.1.

Addendum B – 31 pages



Fact Guide for National Trust Training

TABLE OF CONTENTS:

A. KEY PLAYERS INVOLVED IN A TRUST

1. Beneficiary (defined) –

- A beneficiary is an individual who receives a benefit from something; the legal recipient of money or goods.
- For SSI purposes, a trust beneficiary is a named person for whose benefit a trust exists.
- A beneficiary does not hold legal title to trust property, but does have an equitable ownership interest in it.
    - As equitable owner, the beneficiary has certain rights that will be enforced by a court because the trust exists for his/her benefit.
- The beneficiary receives the benefits of the trust, while the trustee holds the title and must perform any and all duties related to the trust's administration.

2. Grantor (defined) –

- The grantor is the person who provides the trust principal to create the trust. The grantor then turns over to administration of the trust to the trustee.

- The grantor must be the owner of, or have legal right to, the property or be otherwise qualified to transfer it.

    - An individual may be a grantor even if an agent or other person legally empowered to act on his/her behalf establishes the trust with funds or property that belong to the individual.

- A grantor may also be referred to as: "settlor," "donor," or "trustor" – and, in the case of a deceased person's will, "testator."

- A trust has multiple grantors if more than one person provides the trust principal.

- In some cases, the grantor is ***also*** the beneficiary of the trust. This is true **if the beneficiary funds the trust using his/her own assets**. These trusts are commonly referred to as "Grantor Trusts" or "Self-Funded Trusts."

3. Trustee (defined) –

- The trustee is the person who holds legal title to, and administers the assets of the trust for the use and benefit of another.

- The trust document will clearly define the role of the trustee, including (but not limited to): duties, responsibilities, permitted activities, and prohibited activities.

- The trustee has no legal right to revoke the trust or use the property for his/her benefit.

    - **EXCEPTION:** If the trustee is serving a dual role as a grantor, their ability to revoke the trust would fall under their role as a GRANTOR.

4. Residual Beneficiary (defined) –

- A residual beneficiary is a person who receives the remainder of the trust's property upon termination of the trust, i.e., when the beneficiary dies.
    - There can be more than one residual beneficiary.
    - Residual beneficiaries are usually identified within the trust document, sometimes specifically by name (e.g., "my daughter, Mary Poppins") or generally speaking in anticipation of a residual beneficiary (e.g., "any future children the beneficiary may have")
- The trust may detail how the residual beneficiaries can receive the trust property following the death of the beneficiary. (e.g., the trustee must establish a new trust for each residual beneficiary, the trustee must make specific disbursements for specific purposes such as educational costs, the trustee must issue a lump sum, etc.)
- A residual beneficiary may also be referred to as a "remainderman" within the trust document. The two terms are synonymous.

HELPFUL HINTS

- Your key players (the grantor, the beneficiary, and the trustee) are typically identified in the beginning of the trust document within the first few paragraphs. If they are not, continue reading each article of the trust until you are able to define the roles of each key individual. The person filing for benefits (for himself/herself or others) should be able to confirm the parties involved.

POTENTIAL PITFALLS

- Look for situations where the **grantor** is also named the **trustee**. Just as the grantor can serve a dual role as the beneficiary, the grantor can also serve a dual role as trustee.
- Later in this package, we will discuss the distinction between the grantor who funds the trust, and the individual **who takes the action** to establish the trust. Sometimes, a trust will call the agent establishing the trust the "grantor" or the "settlor." However, please be aware that the ***true*** grantor of a trust is the person that actually provides the funding for the trust.
- For SSI purposes, we are focused on the **BENEFICIARY's powers** within the trust when making a trust determination. Technicians may sometimes confuse the powers of the *trustee* with the powers of the beneficiary. The trust will specifically state what the trustee can/cannot do. However, it is not always as clear what the beneficiary can/cannot do. **Make sure to read the trust CAREFULLY and identify passages that clearly identify the BENEFICIARY'S role and what the BENEFICIARY can/cannot do.** There is no particular section in a trust that contains this information.

B. TRUST POLICY

1. Self-funded trusts established before 01/01/00 (SI 01120.200)

- For SSI purposes, trusts established before 1/1/00 that contain the assets of the beneficiary, if any of the assets were transferred to the trust before 1/1/00, may be a resource if:
    - The beneficiary (claimant, recipient, or deemor) has legal authority to revoke or terminate the trust and then use the funds to meet his/her food or shelter needs, or
    - The beneficiary can direct the use of the trust principal for his/her support and maintenance under the terms of the trust.

POTENTIAL PITFALL

- If the trust was established prior to 1/1/00 **but no assets were transferred to the trust prior to 1/1/00**, the policy in **SI 01120.201** applies.

- If the beneficiary does not have the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his/her own support and maintenance, the trust principal is not the beneficiary's resource for SSI purposes.
- If the beneficiary does have the legal authority to revoke or terminate the trust, the trust principal is a resource to the beneficiary.
- The trust must also contain a valid spendthrift clause IF the state of the trust's jurisdiction recognizes spendthrift clauses. Section H of this package describes the spendthrift clause.

2. Third party trusts established before, on, or after 01/01/00 (SI 01120.200)

- A third-party trust is a trust established with the assets of someone other than the beneficiary. For example, a grandparent may use his assets to fund a trust for a grandchild.
- For SSI purposes, a third party trust may be a countable resource if the beneficiary (claimant, recipient, or deemor) can:
    - revoke or terminate the trust, and
    - obtain the assets for him or herself.
- If the trust is irrevocable, or if the trust may be revoked but the **beneficiary** cannot obtain the assets for him or herself, the trust does not count as a resource for SSI purposes.
- The trust must also contain a valid spendthrift clause IF the state of the trust's jurisdiction recognizes spendthrift clauses. Section H of this package describes the spendthrift clause.
- The date the third party trust was created is immaterial when making a resource determination as all third party trusts follow policy and procedure within **SI 01120.200**, regardless of when the trust was created.

POTENTIAL PITFALL

- Be alert for situations where a trust is allegedly established with the assets of a third party, but in reality is created with the beneficiary's property. In such cases, the trust is a grantor trust, not a third party trust.

3. Self-funded trusts established on or after 01/01/00 (SI 01120.201)

- For SSI purposes, a trust established on or after 1/1/00 that contains the assets of the individual (or spouse) is a **countable resource** regardless of:
    - the purpose for which the trust was established;
    - whether the trustees have or exercise any discretion under the trust;
    - any restrictions on when or whether distributions may be made from the trust; or
    - any restrictions on the use of distributions from the trust.

This means that any trust established with the assets of an individual on or after 1/1/00 will be subject to these provisions and may be counted in determining SSI eligibility.

POTENTIAL PITFALLS

- No clause or requirement in the trust, no matter how specifically it applies to SSI or other Federal or State program (i.e., exculpatory clause), precludes a trust from being considered under the rules in this section. **An exculpatory clause is one that attempts to exempt the trust from the applicability of these rules.**
    - *Example:* An exculpatory clause would be one that states, "*Section 1613(e) of the Social Security Act does not apply to this trust.*" **Such a statement has no effect as to whether these rules apply to the trust.**
- Exceptions to this POMS section are: the "special needs trust" exception and the "pooled trust" exception. Section F of this package details both of these exceptions.

C. BASIC TRUST IDENTIFIERS

1. When was the trust established and funded?

- Funding the trust involves transferring legal title from the grantor to the trust.
- A trust can be considered funded **as of the date of the trust's signing**.
- A testamentary trust is a trust established by a will and effective at the time of the testator's death is a trust established by a will and **effective at the time of the testator's death.**
- **For self-funded trusts** (trusts established with the beneficiary's or spouse's assets), it is important to decipher whether the trust was established before, on, or after January 1, 2000. POMS has different rules and regulations for these trusts based on the effective date of the trust.

2. Who is the source of the trust principal, and who took the action to establish the trust?

- Anyone can fund a trust. For SSI purposes, we consider **who** funded the trust and **when** the trust was funded as factors when determining whether the trust is a countable or excluded resource.
- The trust principal can also be referred to as the "corpus" or "body" of the trust. This is the property the trust owns.
- The trust principal includes assets in the initial trust and any trust earnings and additions made to the trust after it is established.
- The grantor named in the trust document who provides/provided the assets funding the trust and the individual whose actions established the trust *may not be the same*. The trust may name the individual (e.g., a parent or legal guardian) who physically took action to establish the trust rather than the individual who provides/provided the trust assets. This distinction is important, especially in developing Medicaid trust exceptions in SI 01120.203.

HELPFUL HINTS

- Funds received by the beneficiary from a settlement are owned by the beneficiary.
- A trust may be established, signed, and dated *without* funds or with only a small amount of funds added to it. These are called "seed trusts" or "dry trusts" prepared in anticipation of future funds. We must still develop these trusts because assets may be added to the trust principal at any time in the future.
- Language in the body of the trust should indicate who is providing the funds to the trust, and a list of items in the trust. For example, *"Said property shall include, but shall not be limited to, the assets listed on Schedule A…".*
- Work with the SSI recipient, representative payee, or the trustee to obtain the trust fund bank account information as well as information on assets such as real property and vehicles.

D. REVOCABLE VS. IRREVOCABLE

1. Revocable (SI 01120.200.B.19)

- A trust is "revocable" if the grantor of a trust has the power or authority to revoke (i.e., reclaim or take back) the assets deposited in the trust.
- **If the individual (a claimant, recipient, or deemor [see SI 01310.127]) is the grantor of the trust, the trust will generally be a resource to that individual if that individual can revoke the trust and reclaim the trust assets.**
- **If a third party is the grantor of the trust, the trust will not be a resource to the beneficiary of the trust merely because the trust is revocable by the grantor.** In a third-party trust situation, you should focus on whether the individual (claimant, recipient, or deemor) can terminate the trust and obtain the assets for him or herself.

POTENTIAL PITFALL

- For third party trusts: Do not assume a "revocable" trust is a countable trust. As a reminder, we look at the **BENEFICIARY's** power within the trust. If the beneficiary can revoke the trust, it is a countable resource. If the beneficiary cannot revoke the trust, but a third party (grantor) CAN revoke the trust, we must continue to evaluate the trust based on the remaining criteria for that particular type of trust.

- **The revocability of a trust is critical in determining whether it is a resource to the SSI recipient.** If the recipient can revoke the trust, he or she can use its assets to pay for support and maintenance, thus making it a resource.

2. Irrevocable

- A trust is "irrevocable" if the grantor of a trust **CANNOT** revoke (i.e., reclaim or take back) the assets deposited in the trust.

POTENTIAL PITFALL

- Most states follow the general principle of trust law that, **if the grantor is the sole beneficiary of a trust**, the trust is revocable, even if the trust document states that it is irrevocable. However, if the trust names a residual (or contingent) beneficiary to receive the benefit of the trust interest after a specific event, usually the death of the primary beneficiary, the trust is irrevocable.
    - The primary beneficiary cannot unilaterally revoke the trust without the permission of the residual beneficiary. The definition of a residual beneficiary varies from State to State.
- It is **VERY IMPORTANT** that you review the Regional POMS to determine if a grantor trust, where the grantor is the sole beneficiary, is truly irrevocable.

E. COMMON TYPES OF TRUSTS

1. Self-Funded Trusts

- A self-funded trust is a trust that contains property that belonged to the beneficiary before the trust was created. In other words, the beneficiary is also the grantor.
- Generally, we consider trusts established on or after 1/1/00 with assets of the individual (or spouse) to be a resource for SSI purposes (SI 01120.201), unless they meet one of the special needs trust or pooled trust exceptions (SI 01120.203).

2. Third-Party Trusts (SI 01120.200)

- A third-party trust is a trust established with the assets of someone other than the beneficiary. For example, a grandparent may establish a third-party trust for a grandchild.
- In order to be considered a third-party trust, the trust must contain the assets of the third party, not the assets of the beneficiary.
- **REMINDER:** Be alert for situations where a trust is allegedly established with the assets of a third party, but in reality is created with the beneficiary's property. In such cases, the trust is a grantor trust, not a third party trust.

3. Testamentary Trusts (SI 01120.200)

- A testamentary trust is a trust established by a will.
- The trust is only effective at the time of the testator's death.
- We treat testamentary trusts similar to third party trusts (SI 01120.200).
- **NOTE:** If an individual receives an inheritance and a trust was **NOT established in the will**, the inheritance funds are not considered to be part of a "testamentary trust." If the individual gains access to the inheritance after the testator's death (i.e., the money changes hands between the deceased's estate and the individual), then this is considered to be the individual's funds.

4. Totten Trusts (SI 01120.200)

- A totten trust or "bank account trust" is a tentative trust in which a grantor makes himself/herself trustee of his or her own funds for the benefit of another.
- Typically, the individual deposits funds in a savings account and indicates, either in the title of the account or by filing a writing with the bank, that he or she is the trustee of the account for another person.
- The trustee can revoke a totten trust at any time.
- Upon the trustee's death, ownership of the funds passes to the beneficiary of the trusts.

- Totten trusts are valid in most jurisdictions. However, some jurisdictions have held them invalid because they are too tentative.
- The grantor, who is also the trustee, of a totten trust retains the authority to revoke it at any time. Therefore, the funds in the account are the grantor's resource.

5. Tribal Trusts (SI 01130.150)

NOTE: Tribal trusts do not follow the regular trust policy and procedure outlined in SI 01120.199 – SI 01120.203.

- Per **SI 01130.150,** when determining the resources of an individual (and spouse, if applicable) who is of Indian descent from a federally recognized Indian tribe, **any interest of the individual (or spouse) in trust are excluded from resources.**

- If an individual Indian alleges an interest in a trust:
  - Obtain for the file a copy of any document(s) that might identify it as such; and/or
  - Verify the allegation with the appropriate Indian agency.

- If verification is by phone, document the file with a Report of Contact. Prepare a determination on the basis of the evidence.

POTENTIAL PITFALL

- You must identify whose assets are used to fund the trust, i.e., the Tribe's assets vs. the tribal member's assets. We consider trusts established with individual tribe member's per capita payments, which are paid directly from the net revenues of any tribal gaming activity, to be self-funded trusts and we follow policy in SI 01120.201 to evaluate their resource status.

TREATMENT OF INCOME DERIVED FROM A TRIBAL TRUST

- As detailed in SI 00830.850, the Omnibus Budget Reconciliation Act of 1993 provides for an exclusion of income derived from those individual interests in Indian trusts for purposes of determining SSI eligibility and payment amount. This income (called individual Indian trust or lease income) generally comes from interests in lands allotted to individual Indians many years ago. The income generated by those interests may be quite small, because many of the original interests in allotted lands have fractionated over time.
- **We can exclude up to $2,000 *per year* in payments derived from individual interests in Indian trust or restricted lands from income.**
  - Such payments include any interest that accrues on funds while they are held by the Bureau of Indian Affairs (BIA) before being distributed or credited to an individual's account.
- This exclusion applies to the income of an ineligible spouse or ineligible parent(s) in the deeming process.

- Does not apply to the income of a sponsor when deeming to an alien or to the income of an essential person.

- For purposes of applying the $2,000 ***annual*** exclusion, for both eligible individuals and deemors, only payments received in months where the individual was/is SSI eligible count toward the $2,000 annual exclusion.
- If tribal trust income exceeds $2,000 per calendar year, determine the month in which the $2,000 annual exclusion is exceeded, and **count the excess income as unearned income** in the months received.
  - FOs may keep track of the excluded income by any effective method.
- Per SI 00830.830E, if there is an allegation or other indication that an individual received tribal trust funds:
  - Verify that the individual is a member of the relevant tribe by contacting the BIA, or tribal authorities, or by using an established precedent;
  - During your contact, develop the identity and amount of the excludable payment/distribution;
  - Document the casefile using a Report of Contact, an income report from a tribal authority, a signed statement from a tribal authority, or a copy of the pertinent local precedent.
  - **You must follow the procedures above regardless of the amount received and regardless of whether you will exclude the funds.**
- SI 00830.850D instructs that you must issue manual notices in all situations where the income derived from interests of individual Indians in trust affects payment amounts.
  - Suppress the systems-generated notice;
  - Include an explanation of the $2,000 annual exclusion of income derived from an individual's Indian's interest in the trust AND a summary of date(s) and amount(s) of such income used in determining the individual's SSI payment amount.

F. EXCEPTIONS TO COUNTING SELF-FUNDED TRUSTS AS RESOURCES

1. Special Needs Trusts (SI 01120.203)

A. REQUIREMENTS OF THE EXCEPTION

We can exclude a special needs trust established on or after January 1, 2000 as a resource if it contains ALL of the following criteria:
(Sections B-F below detail each element of the exception.)

- Trust must contain the assets of an individual under age 65; **and**
- Individual must be disabled; **and**
- Trust must be established for the sole benefit of the individual; **and**
- Trust must be established through actions of a parent, grandparent, legal guardian, or a court; **and**
- Trust must provide for reimbursement to the State(s), upon the individual's death, for medical assistance paid on the individual's behalf.

B. ASSETS OF INDIVIDUAL UNDER AGE 65

- Trust must contain the individual's assets.
- If the trust established before age 65, any exceptions continue to apply to the trust after individual reaches age 65;
- Additions/augmentations to a trust **at/after** age 65 DO NOT meet the exception.
    - Additions or augmentations do not include interest, dividends, or other earnings of the trust that previously met the special needs exemption criteria.

POTENTIAL PITFALLS

- If the trust is funded with a combination of the individual's assets and a third party's assets (e.g., 50% of the assets belong to the individual and 50% of the assets belong to the individual's relative), this section will apply to the portion of the trust principal comprised of the individual's assets. The third party's portion will be evaluated under third party guidelines in SI 01120.200.

C. INDIVIDUAL MUST BE DISBABLED

- Must meet SSA's definition of disability for SSI purposes.

D. SOLE BENEFIT OF THE INDIVIDUAL

- The trust must be established for and used for the benefit of the disabled individual.
- **No one but the individual** can benefit from the trust during the individual's lifetime.

- Trust CAN provide for reasonable compensation for a trustee(s) to manage or handle legal matters regarding the trust.
- Special needs exception **DOES NOT** apply if:
    - The trust provides benefit to any other individuals or entity during the disabled individual's lifetime; or
    - The trust allows for termination of the trust prior to the individual's death and payment of the principal/corpus to an individual or entity (other than the State).

E. WHO CAN ESTABLISH THE TRUST?

1. **Parent or Grandparent**
    - ***For legally competent, disabled adults:*** A parent or grandparent may establish a "seed" trust to allow for the disabled individual to transfer his/her own assets into the trust.
2. **Legal Guardian**
    - A person establishing the trust must have legal authority to act with regard to the assets of the individual.
    - An attempt to establish a trust account by a third party with the assets of an individual WITHOUT the legal right or authority to act with respect to the assets of that individual will generally result in an invalid trust.
3. **Court**
    - Creation of the trust **MUST** be required by a **court order**.
    - **Approval by the court is insufficient.**

POTENTIAL PITFALLS

- A parent may establish a "seed trust" for his/her disabled child in order to transfer the child's funds into the trust account at a later time. Technicians commonly mistake the parent as a third party and consider the trust to be a "third party trust" because the parent was the first to make a deposit. We must be very careful to distinguish between a seeded trust for the beneficiary's funds and a third-party trust that will *not* contain the beneficiary's funds, as POMS provides for different evaluation of the two categories of trusts.
- An appointed representative may petition the court to create a trust for the beneficiary. The court will approve the request and initiate creation of the trust. While it appears that the court "established" the trust, it was the appointed representative acting as an agent of the beneficiary who actually established the trust. In this case, we would consider the beneficiary to have established the trust.
- For SSI purposes, in order to find that the court created the trust, the trust must be the direct result of a **COURT ORDER**.
    - *Example:* A beneficiary wins a lawsuit in the amount of $50,000. 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. We would consider this trust to be established by the court because the beneficiary had no power to create the trust himself/herself.

F. STATE MEDICAID REIMBURSEMENT

- The State(s) **MUST** be listed as the **FIRST** payee and have priority over payment of other debts/administrative expenses.
    - **THESE ARE THE ONLY ALLOWABLE PRIMARY EXPENSES THAT MAY TAKE PRIORITY:**
        - Taxes due from the trust at the time of death;
        - Court/filing fees associated with the trust.
    - **IMPORTANT:** No other payments besides those mentioned above are allowed before State Medicaid reimbursement.
- The trust must repay ALL States that provided the beneficiary with Medicaid coverage;
    - Trust cannot limit reimbursement to one State.
- The trust cannot limit the Medicaid coverage period;
    - For example, the trust cannot stipulate that payback only applies to the period after the establishment of the trust.
- **Labeling the trust as a "Special Needs Trust" or a "Pay-Back Trust" is not sufficient.** A trust must meet all the aforementioned provisions to meet the special needs exception.

POTENTIAL PITFALLS

1. The presence of Medicaid payback language alone does not mean it qualifies under the special needs exception.

    Example: The trust document states the following regarding repayment of expenses upon the death of the beneficiary:

    "Upon the death of the beneficiary, the trustee must first reimburse any living family members who carried any debts on behalf of the beneficiary. This includes any money used to cover the beneficiary's funeral and burial expenses. Also, the trustee must reimburse any and all state Medicaid agencies up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary."

    Because Medicaid was not listed as the first payee, this trust would not qualify for the special needs exception.

2. The Medicaid pay-back provision must cover ALL States in which the beneficiary received assistance.

    Example: Last year, Charlie Brown moved to a residential facility in the State of Rhode Island for better medical care. However, Charlie spent most of his life as a resident of the State of Connecticut. Medicaid has always covered more than 50% of Charlie Brown's medical expenses. The trust document states the following:

    "Upon the death of the beneficiary, the trustee must first reimburse the State of Connecticut up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary. If any trust assets remain after such reimbursement, such remaining assets shall be distributed

to his estate."

Because the trust does not acknowledge repayment to the State of Rhode Island's Medicaid program, this trust does not qualify for the special needs exception. If the clause states, "*The trustee must first reimburse the State of Connecticut* ***or any other state(s) that provided the beneficiary with medical assistance...***" then the exception would apply as the clause does not limit reimbursement to only one State.

G. ADDITIONAL CONSIDERATIONS

- Trusts that meet the special needs trust exception must also meet the SSI resource requirements in SI 01120.200.

2. Pooled Trusts (SI 01120.203)

A. REQUIREMENTS OF THE EXCEPTION

We can exclude a pooled trust established on or after January 1, 2000 as a resource if it contains ALL of the following criteria:
(Sections B-G below detail each element of the exception.)

- Trust must contain the assets of a disabled individual; **and**
- Trust must be established and maintained by a non-profit association; **and**
- Trust must have separate accounts maintained for each beneficiary, but the assets are pooled for investing and management purposes; **and**
- Trust must have individual trust accounts established for the sole benefit of the disabled individuals;
- Trust must have accounts established through actions of the individual, parent, grandparent, legal guardian, or a court; **and**
- Trust must require that, upon the individual's death, any amounts remaining in the individual's account that are not retained by the trust be reimbursed to the State(s) for medical assistance paid on the individual's behalf.

B. INDIVIDUAL MUST BE DISABLED

- Must meet SSA's definition of disability for SSI purposes.

C. NON-PROFIT ASSOCIATION

- The pooled trust must be established through the actions of a nonprofit association. For purposes of the pooled trust exception, a nonprofit association is an organization established and certified under a State nonprofit statute.

D. SEPARATE ACCOUNT WITHIN THE TRUST

- A separate account within the trust must be maintained for each beneficiary of the pooled trust, but for purposes of investment and management of funds, the trust may pool the funds in the individual account.
- The master pooled trust MUST be able to provide an individual accounting for the individual's separate account.

E. ESTABLISHED FOR THE SOLE BENEFIT OF THE INDIVIDUAL

- Under the pooled trust exception, the individual trust account must be established for the sole benefit of the disabled individual.
- Other than the payments described in SI 01120.201F.2.b. and SI 01120.201F.2.c., this exception does not apply if the trust account:
  - Provides a benefit to any other individual or entity during the disabled individual's lifetime, or
  - Allows for termination of the trust account prior to the individual's death and payment of the corpus to an individual or entity (other than the State).

F. WHO CAN ESTABLISH THE SEPARATE ACCOUNT WITHIN THE TRUST?

- **Legally competent, disabled adult**
  - A legally competent, disabled adult who is establishing or adding to a trust account with his/her own funds has the legal authority to act on his/her own behalf.
- **Parent or Grandparent**
  - A parent or grandparent may establish a "seed" trust to allow for the disabled individual to transfer his/her own assets into the trust.
- **Legal Guardian**
  - A person establishing the trust must have legal authority to act with regard to the assets of the individual.
  - An attempt to establish a trust account by a third party with the assets of an individual WITHOUT the legal right or authority to act with respect to the assets of that individual will generally result in an invalid trust.
- **Court**
  - Creation of the trust **MUST** be required by a **court order**.
  - **Approval by the court is insufficient.**

G. STATE MEDICAID REIMBURSEMENT

- The State(s) **MUST** be listed as the **FIRST** payee and have priority over payment of other debts/administrative expenses;
  - **THESE ARE THE ONLY ALLOWABLE PRIMARY EXPENSES THAT MAY TAKE PRIORITY:**
    - Taxes due from the trust at the time of death;
    - Court/filing fees associated with the trust.

    - **IMPORTANT:** No other payments besides those mentioned above are allowed before State Medicaid reimbursement.
- The trust must repay ALL States that provided the beneficiary with Medicaid coverage;
    - Trust cannot limit reimbursement to one State.
- The trust cannot limit the Medicaid coverage period;
    - For example, the trust cannot stipulate that payback only applies to the period after the establishment of the trust.
- **Labeling the trust as a "Special Needs Trust" or a "Pay-Back Trust" is not sufficient.** A trust must meet all the aforementioned provisions to meet the pooled trust exception.

H. ADDITIONAL CONSIDERATIONS

- Trusts that meet the pooled trust exception must also meet the SSI resource requirements in SI 01120.200.

HELPFUL HINTS

Key Differences Between a Pooled Trust and a Special Needs Trust:

- **No age restriction** to establish a trust within a pooled trust;
- A legally competent, disabled adult **has the legal authority** to establish a trust account under a pooled trust with his/her own funds (in addition to a parent, grandparent, legal guardian, or court.)
- Pooled trusts may retain amounts remaining in the beneficiary's account upon his or her death.

G. HELPFUL REFERENCE TOOLS TO DETERMINE IF THE TRUST IS A COUNTABLE OR EXCLUDED RESOURCE

1. Chicago Trust Decision Tree

- After you have identified the key pieces of the trust and applied them to the trust policy in POMS, you may use the **Chicago Trust Decision Tree** that is approved for national use.
    - When answering questions contained in the Trust Decision Tree, **do not guess** if you are not sure. Making an uneducated guess within the decision tree may lead you to an incorrect conclusion. Instead, click on the "*Need More Information*" option for guidance.

2. POMS Reference Chart: Summary of Trust Development (SI 01120.202)

STEP	ACTION
1	Obtain and review a copy of the trust and all related documents. **(Refer to Section K of this document for additional reminders.)**
2	Does the trust contain **any** assets of the individual? • If **no**, follow instructions in SI 01120.200. (**NOTE**: If any assets of the individual are added to the trust at a later point in time, the trust must be redeveloped SI 01120.201-SI 01120.204.) STOP. • If **yes**, go to **Step 3**.
3	Determine the date the individual's assets were transferred to the trust (See SI 01120.201C.1. and SI 01120.202A.1.b.). • If any of the individual's assets were transferred prior to 1/1/00, follow instructions in SI 01120.200. STOP. • If all of the individual's assets in the trust were transferred on or after 1/1/00, go to **Step 4**.
4	Consult national and regional instructions to determine if the trust is revocable or irrevocable (see SI 01120.202A.3.). • If you are unable to make a determination, consult with your RO programs staff. • If the trust is revocable, go to **Step 5**. • If the trust is irrevocable, go to **Step 6** (SI 01120.201D.2.).
5	The trust is a resource unless an exception applies. Go to SI 01120.203A to see if an exception applies. (Also see SI 01120.201D.1. for treatment of revocable trusts.)

6	(See SI 01120.201D.2. for the policy on irrevocable trusts.) Does the trust also contain assets of a third party? • If **yes**, determine the amounts in the trust attributable to the individual and the third party. Develop resource treatment of the portion attributable to the third party under SI 01120.200. Go to **Step 7** for the portion of the trust attributable to the assets of the individual. • If **no**, go to **Step 7**.
7	Are there **any** circumstances under which payment from the trust could be made to or for the benefit of the individual? • If **no**, the trust is not a resource. Refer to SI 01150.100 ff. to see if a transfer penalty may be applicable. • If **yes**, the trust is a resource in the amount that could be paid from the portion attributable to the individual unless an exception applies. Go to SI 01120.203 to see if an exception applies.

3. POMS Reference Chart: Procedure for Developing Special Needs Trust/Medicaid Trust Exceptions to Resource Counting (SI 01120.203D.1)

STEP	ACTION
1	Does the trust contain the assets of an individual who was under age 65 when the trust was established? (SI 01120.203B.1.b. in this section). • If **yes**, go to **Step 2**. • If **no**, go to **Step 8**.
2	Does the trust contain the assets of a disabled individual? (SI 011203B.1.d.) • If **yes**, go to **Step 3**. • If **no**, go to **Step 8**.
3	Is the disabled individual the sole beneficiary of the trust? (SI 01120.203B.1.e.) • If **yes**, go to **Step 4.** • If **no**, go to **Step 8.**
4	Did a parent, grandparent, legal guardian or a court establish the trust? (SI 01120.203B.1.f. in this section). • If **yes**, go to **Step 5**. • If **no**, go to **Step 8.**
5	Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in SI 01120.203B.1.h. in this section? • If **yes**, go to **Step 6**. • If **no**, go to **Step 8**.
6	The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in SI 01120.203B.1.c. in this section. Go to **Step 7** for treatment of assets placed in trust prior to age 65. Go to **Step 8** for treatment of assets placed in trust after attaining age 65.
7	Evaluate the trust under SI 01120.200D.1.a. to determine if it is a countable resource.
8	The trust (or portion thereof) does not meet the requirements for the special needs trust exception. Determine whether the pooled trust exception in SI 01120.203B.2. applies.

4. POMS Reference Chart: Pooled Trust Development (SI 01120.203D.2)

STEP	ACTION
1	Does the trust account contain the assets of a disabled individual? (See SI 01120.203B.2.b. in this section) . • If **yes**, go to **Step 2**. • If **no**, go to **Step 8**.
2	Was the pooled trust established and maintained by a nonprofit association? (See SI 01120.203B.2.a., SI 01120.203B.2.c. and development instructions in SI 01120.203F in this section). • If **yes**, go to **Step 3**. • If **no**, go to **Step 8**.
3	Does the trust pool the funds, yet maintain an individual account for each beneficiary, and can it provide an individual accounting? (SI 01120.203B.2.d. in this section). • If **yes**, go to **Step 4**. • If **no**, go to **Step 8**.
4	Is the disabled individual the sole beneficiary of the trust account? (SI 01120.203B.2.e. in this section). • If **yes**, go to **Step 5**. • If **no**, go to **Step 8**.
5	Did the individual, parent(s), grandparent(s), legal guardian(s) or a court establish the trust account? (SI 01120.203B.2.a. and SI 01120.203B.2.f. in this section). • If **yes**, go to **Step 6**. • If **no**, go to **Step 8**.
6	Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death from funds not retained by the trust as required in SI 01120.203B.2.g. in this section? • If **yes**, go to **Step 7**. • If **no**, go to **Step 8**.
7	The trust meets the Medicaid pooled trust exception, however, the trust still should be evaluated under SI 01120.200D.1.a. to determine if it is a countable resource.
8	The trust does not meet the requirements for the Medicaid pooled trust exception.

	Determine if the undue hardship waiver applies under SI 01120.203E in this section.

H. ADDITIONAL TRUST CONSIDERATIONS

1. Early Termination Provision in Special Needs Trusts and Pooled Trusts (SI 01120.199)

- An early termination provision or clause would allow a trust to terminate before the death of the beneficiary. Such provisions or clauses may provide for termination of the trust when, for example, the beneficiary is no longer disabled or otherwise becomes ineligible for SSI and Medicaid, or when the trust fund no longer contains enough assets to justify its continued administration.

- A trust that was previously determined to be exempt from resource counting under Section 1917(d)(4)(A) or Section 1917(d)(4)(C) of the Act shall continue to be excepted from resource counting, provided the trust is amended to conform with the requirements of this section within 90 days. That 90-day period begins on the day the recipient or representative payee is informed that the trust contains provisions that must be amended to continue to qualify for the exception under Section 1917(d)(4)(A) or Section 1917(d)(4)(C).

- Do not count a previously excepted trust as a resource during the 90-day amendment period. If the trust still fails to meet the requirements of this section after expiration of the 90-day amendment period, begin counting the trust as a resource under normal resource counting rules.

NOTE: We permit each previously excepted trust only one 90-day amendment period.

Criteria for determining whether an early termination clause is acceptable

- For the purpose of SSI eligibility, a trust that contains an early termination provision or clause may not be excepted from the resource counting rules in Section 1613(e) of the Act unless it satisfies the requirements in Section 1917(d)(4)(A) or (C) of the Act. Additionally, a trust must also satisfy the resource counting rules found at SI 01120.200D and SI 01110.100B to not be a countable resource. To meet those requirements, all of the following criteria must be met:

    - Upon early termination (i.e., termination prior to the death of the beneficiary), the State(s), as primary assignee, must receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s); **and**

    - Other than payment for those expenses listed in SI 01120.199F.3. in this section and SI 01120.201F.2.c., no entity other than the trust beneficiary may benefit from the early termination (i.e., after reimbursement to the State(s), **all** remaining funds are disbursed to the trust beneficiary); **and**

    - The early termination clause gives the power to terminate to someone other than the trust beneficiary.

2. Spendthrift Clause (SI 01120.200B.16)

- A **spendthrift clause (or spendthrift trust)** prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principal. **This means that the beneficiary's creditors must wait until money is paid from the trust *to the beneficiary* before they can attempt to claim money from the trust to satisfy debts.**

- It also means that the beneficiary cannot, for example, sell or assign to a third party for a lump sum his/her right to receive monthly payments. In other words, a valid spendthrift clause would make the value of the beneficiary's right to receive payments not countable as a resource.

- However, spendthrift clauses are not recognized in all States. Additionally, States that recognize spendthrift trusts generally do not allow a grantor to establish a spendthrift trust for his/her own benefit, i.e., as a beneficiary.
    - Thus, using the example from above, in those States where spendthrift clauses are not recognized (whether at all or because the trust is a grantor trust), the value of the beneficiary's right to receive monthly payments should be counted as a resource because it may be sold for a lump sum.
    - Consult your Regional POMS for additional guidance on State-specific issues.

- **If the beneficiary CAN sell his/her beneficial interest in the trust, that interest is a RESOURCE.**

3. Null and Void Clauses (SI 01120.227)

- State law determines the necessary elements of a legally valid trust. Commonly, trust documents contain "null and void" or "savings" clauses (hereafter "null and void"). These null and void clauses operate to cure defects in a trust and preserve the remaining provisions. They prevent the trust from being determined invalid by removing the offending sections from consideration.

- For SSI resource counting purposes, a null and void clause does **not** cure an otherwise defective trust instrument. Null and void clauses cannot overcome missing or conflicting trust provisions. Consider all of the provisions set forth in the trust document to determine whether the trust is a countable resource.

- To be excepted from resource counting under the provisions of Section 1917(d)(4)(A) or (C) of the Act, the trust must meet all of the criteria set forth in SI 01120.199 through SI 01120.203 and SI 01120.225, without regard to the presence of a null and void clause. Trust provisions that fail to meet any of the required criteria must be amended or removed for the trust to be excepted from resource counting.

- A trust that does not purport to the meet the criteria in section 1917(d)(4)(A) or (C) of the Act and that is formed after 01/01/00 must be considered under the criteria in SI 01120.201, without regard to the presence of a null and void clause. Trust provisions that fail to meet the criteria in SI 01120.201 must be amended or removed, or the trust is counted as a resource.

4. Exceptions Regarding Transfers to a Trust (SI 01150.121)

- The period of ineligibility for transferring a resource at less than fair market value **does not apply** to an individual in the following situations:
    - The portion of the trust attributable to the transferred resources is a **COUNTABLE** resource;
    - Resource was transferred into a trust established **for the sole benefit of a blind/disabled child or adult under age 65**, including any trust meeting a "Medicaid trust exception."
- The period of ineligibility **WILL apply** if:
    - The trust is **not** countable as a resource, money or property transferred by the individual into the trust is a transfer of resources that is subject to the period of ineligibility *unless* one of the exceptions mentioned above applies.
    - A disbursement is made from a trust that is counted as a resource (or would be counted as a resource but for the undue hardship provision applicable to trusts), and the disbursement is not made to the individual or for his/her benefit, then the disbursement is considered a transfer of resources for less than fair market value. Such a transfer of resources is subject to the period of ineligibility. The date of the disbursement is considered the date of the transfer.
    - The individual takes action so that **no disbursement can be made from a trust that is counted as a resource** to the individual for any reason, this action causes the trust to no longer be counted as a resource. Therefore, such an action is considered a transfer of resources for less than fair market value. Such a transfer of resources is subject to the period of ineligibility. The date of the action restricting disbursements is considered the date of the transfer.

5. Role of State Laws & Regulations

- It is **VERY IMPORTANT** that you consult any supplemental Regional POMS references to determine if there are additional State laws and regulations that may play a factor in their resource determination.
    - For example, a grantor trust that may be a countable trust in the State of Oklahoma may actually be an excludable trust in the State of New Hampshire.
- When deciding which State laws and regulations to apply, **the laws of the jurisdiction with the most significant relationship to the trust should govern.**
    - Specifically, we consider:
        - The State of the domicile of the grantor at the time of the creation of the trust;
        - The State of the domicile of the beneficiaries;
        - The State where the trust instrument was executed and delivered; and
        - The State where the trust assets were then located.
    - **IMPORTANT:** If you are unsure which jurisdiction applies to your trust, refer the trust through your region's Trust Review process. Your region's CPS will then refer the trust to your region's Office of General Counsel for a legal opinion.

I. DISBURSEMENTS

The SSI recipient or his/her representative payee is required to report the existence of a trust to the local SSA office. You will need the executed/signed document for review, along with any trust disbursements covering the period being developed/reviewed.

In addition to the trust document/will, the recipient must provide any account statements or disbursement reports. They need to show:

- The individual who received the payment (to whom it was made to),
- Date of the payment,
- Amount of the payment, and
- Purpose of the payment.

If the trust is an excluded resource, we must still evaluate any distributions made from the trust to determine whether they are income for SSI purposes. Further, we verify with the trustee periodically and may ask for a record of all disbursements in a specific period.

1. Trust is an excluded resource

If the trust is an excluded resource (meets the special needs trust or pooled trust exception or is discretionary for pre-2000 trusts or third party funded trusts/wills), the trust distributions may or may not be income for SSI purposes. The general income rules apply. Specifically:

- **Cash** paid directly from the trust to the individual **is unearned income**.
    - Gift cards and gift certificates are generally considered cash equivalents.
- **Food or shelter** received as a result of disbursements from a trust by a trustee to a third party is income in the form of **in-kind support and maintenance (ISM)** and is valued under the presumed maximum value (PMV) rule.
    - Remember that for SSI purposes, "shelter items" are:
        - Rent
        - Mortgage
        - Property taxes
        - Heating fuel
        - Gas
        - Electricity
        - Water
        - Sewerage
        - Garbage collection service

- Property taxes (or other household expenses), and outside in-kind support and maintenance are capped at the PMV. If an expense is for durations longer than a month:
  - Divide the total tax payment by the number of months in the payment cycle, and then divide by the number of household members.
    - *Example*:
      The beneficiary's house is assessed with a property tax of $2,000 twice a year:
      $2,000 divided by 6 months = $333.33 per month.
      If there are two household members (including the trust beneficiary), then this is:
      $333.33 divided by 2 household members = $166.67 per month per household member.
      If only the trust beneficiary lived in the home, we would use the lesser of the PMV or the actual expense amount:
      PMV for 2014 = $260.33, which is lesser than the $333.33. In this example, we would charge the PMV.

- Disbursements from the trust that are **NOT** cash to the individual or are third party payments that **do not** result in the receipt of ISM are **not** income.
  - Examples include (but are not limited to):
    - Educational expenses
    - Therapy
    - Medical services not covered by Medicaid
    - Phone Bills
    - Recreation
    - Entertainment

HELPFUL HINTS

- A trustee might make payments that we do not consider income, and that do not affect the SSI payment, such as: the *direct* purchase of household cleaning items, paper products, and other non-food items (no cash); *direct* payment for repairs or upkeep (lawn cutting, etc.); or *direct* payment of: phone and cable bills, prescription and nonprescription items, car insurance, or car repairs/maintenance, etc.

If the trust purchases durable items, e.g., a car or house, either the beneficiary or the trust must be the owner (a car title may show the trust as a lien holder).

- If the trust fails to name the beneficiary or trust as owner, this might constitute a transfer of resources that could affect eligibility for SSI, or result in a loss of the Medicaid exception.
- For the home, the beneficiary is considered to be living in his/her own home based on having an "equitable ownership" and cannot "rent."

For trusts that meet the special needs trust or pooled trust exceptions, review the account records and trust document (as applicable) to decide whether it is for the sole benefit of the trust beneficiary.

- Effective February 4, 2013, trustees may now reimburse third parties for items purchased for a trust beneficiary (including items purchased with the third-party's credit card). As a result, any impact on the SSI recipient depends on the item(s) originally purchased.
    - For example, purchase of personal items such as clothing, a computer, etc. would have no impact. However, if **food** or **shelter** items are purchased, we charge these purchases as ISM which is capped at the PMV using the date it is received by the claimant or recipient.

2. Trust is a countable resource

- Disbursements made to or for the benefit of the individual are considered to be **conversion of a resource.**
    - Any trust earnings, such as interest, would be considered income to the individual
- Disbursements NOT made to or for the benefit of the individual are considered to be a **transfer of resources** as of the date of the payment.

HELPFUL HINTS

- **It is very important that the electronic folder contain account records that show disbursements for the beneficiary** (which may need to be annotated to show to whom paid and purpose if not recorded on the actual account records).
    - Certain account statements may be extremely lengthy, as they may show other investment activity associated with the account.
    - If you find that a document is too large or contains too much information not material to the SSI claim, isolate the portion of the document related to disbursements. We suggest you annotate the file to show that the entire statement has been reviewed (identify the financial institution name, account number, and time period of the statement), but retain only the disbursement segments that are material to the SSI claim.

J. ROLE OF THE PUBLIC / ATTORNEYS

SSA does not have a process to review trust documents (or any other resource-related evidence) outside of the normal claims development process. Therefore, SSA neither approves nor disapproves trusts (as some State agencies do), changes of trustee or appropriate expenditures, etc. for any party outside of the SSA.

When you discuss SSI trust policy with a member of the public, consider (as applicable) the following points in your discussion:

- Explain how trusts affect SSI eligibility and payment amount, in general terms.
- Do not advise a claimant, recipient, representative payee, or legal guardian on how to invest funds or whether to hold property in a trust.
- Remember that you cannot provide the kind of financial guidance that attorneys, accountants, and financial advisors provide. Do not attempt to provide legal advice.
- Never recommend to an individual that he or she set up a trust or suggest that you think a trust would be beneficial to him/her. Be aware that by not knowing all of the legal implications of such an action, you could endanger the individual's eligibility for other programs or benefits (e.g., Medicaid).
- Be aware that a trust that allows eligibility for SSI might not allow eligibility for Medicaid. Therefore, suggest that the individual check with his/her State Medicaid office.
- Examine the trust document or a draft of the proposed trust provisions, as necessary.
    - You may need to explain to the public how SSI policies apply to the trust or identify the area within a trust that precludes it from meeting SSA's guidelines.
- Remember that an individual's ability to access and use the trust principal depends on the terms of the trust document and on State law. Since State laws in this area may be complex, discuss the individual's documents with your Regional Office if you are unable to make a determination.

HELPFUL HINTS

- **IMPORTANT!!** Do not advocate specific changes to a trust if you find that an element of the trust does not meet SSA's criteria. We cannot advise an individual on how to make a trust excludable for SSI purposes. Simply point out the discrepancy between the trust language and the particular policy reference.
- SSA cannot provide specific advice or facilitate family decisions regarding the individual's financial "safety net." There are organizations and attorneys that are familiar with the necessary financial planning for disabled individuals and government entitlement programs. The individual or family member needs to reach out to these types of contacts for such assistance.

K. REMINDER ITEMS & DOCUMENTATION

1. REMINDER ITEMS

Prior to reviewing any trust, you should have the following readily available to you:

- POMS references SI 01120.199; SI 01120.200; SI 01120.201; SI 01120.202; SI 01120.203; SI 01120.225; SI 01120.227. Also, any applicable Regional POMS related to trusts.
- Development charts contained within Section G of this package and/or the Chicago Trust Decision Tree.
- A signed and dated copy of the trust, along with any amendments to the trust.
- The source of the trust funds.
- A copy of the financial account ledgers/statements detailing the trust's assets.
- Information about any disbursements from the trust, including: the date of disbursements, amount of disbursements, to whom paid, and the purpose of the disbursements.
- *For trusts established by the **court**:* A copy of the court order.
- *For trusts established by a **legal guardian**:* Obtain the guardianship papers.
- *For **pooled trusts**:* Obtain a copy of the master trust and the joinder agreement.
- *For **testamentary trusts**:* Obtain proof of the decedent's death and obtain a copy of the last will & testament.
    - It is acceptable to use Numident to prove the decedent's death.

2. DOCUMENTATION

- Refer to SI 01120.200J to document **third-party** and **self-funded trusts created prior to 1/1/2000**.
- Refer to SI 01120.202C to document **self-funded trusts created on or after 1/1/2000**.
- You must fax ALL trust documentation into eView for initial claims or NDRed for post-entitlement issues.
- **MSSICS:** Technicians may now enter trust information using the new trust collection screen in the MSSICS Modernized resource path. In the past, trusts were lumped into the "Other Resources" category on the ROTH screen. Now, trusts have their own section within MSSICS for more accurate tracking and documentation.

Drafted on 12/16/2013

Contributions from:

John M. Donovan, Boston Region
Mandy Stokes, Philadelphia Region
Patricia Jean McInnis, Atlanta Region
Ann McGruder, Atlanta Region
John H. Williams, Chicago Region
Stacy Rounds, Chicago Region
Breyan Foltz, Seattle Region

POOLED TRUSTS-SURVEY OF 50 STATES - updated August 16, 2015

A WORK IN PROGRESS – please email updates to Laurie Hanson, lhanson@mnelderlaw.com

Red /A= Allows Transfers without penalty; Black/NP= Penalizes Blue = D - depends; Green; still do not know

AK/4	A			I am told by various sources in the legal community that Alaska now allows people over 65 to participate in d4c pooled trusts. Patti Saunders The Arc of Anchorage		
AL/4	A			Allowed in Alabama per Katherine Barr		
AR/9	D	Medicaid	Arkansas Dept. of Human Services	I assume that they would penalize a transfer by an individual over 65 into a pooled trust. These are not common (there is no functioning pooled trust in Arkansas) but based on my experience, they think everything that refers to a special needs trust has to meet the (d)(4)(A) requirements. There are no regulations other than one that quotes the statute.	Harvey February 24, 2012	
AZ/10	P	Arizona Long Term Care System (ALTCS) for Medicaid for long-term care		Yes, we do penalize transfers for over-64 beneficiaries -- have since the first days of regulations on d4 trusts (which was probably 1994), though we haven't had any actual pooled trusts to make it make a difference until about 2000-2002 or so Robert Flemming		
CA/6	Y	MediCal	Dept. of Health Care Services	Not this week but yes other weeks	Letter from Agency	

POOLED TRUSTS-SURVEY OF 50 STATES - updated August 16, 2015

A WORK IN PROGRESS – please email updates to Laurie Hanson, lhanson@mnelderlaw.com

CO/9	D			Colorado is penalizing people over 65 when they establish SNT's but if a spending plan is submitted, proving that the trust could reasonably be spent down in their actuarial lifetime, they are winning on appeal. Megan		
CT/8	A			Yes with a spending plan proving Fair Market Value for Community Medicaid waivers. Starting to allow in an NF		No payback
DC	A			Allowed and no penalty per Ron Landsman		
DE/1	A	Medicaid/ The Medical Assistance Program of Delaware	Department of Health and Social Services of the State of Delaware	Yes. Transfers after 64 are allowed in Delaware (Mary Culley)	Letter from Department Attorney General (legal counsel)	
FL/3	A		Agency for Health Care Admin/Dept. of Children and Families	Transfer after age 64 is ok		
GA/4	P	Medicaid for Aged Blind Disabled	Georgia Department of Community Health	Transfers post 64 NOT allowed	Economic Support Services Manual ("ESSM") § 2337-2	
HI/4	P	Medquest	Medquest Division, Department	"Not Really" - But I admit I have not tried. We do not have a local pooled trust and most of my clients don't really like the idea of sending their	See Haw. Admin. Rule 17-1725.1-26(11) showing	

			of Human Services	money out of state. The transfers are not specifically prohibited by statute, but they are also not specifically excluded from the transfer penalty Scott Suzuki	funds in the pooled trust established for an under 65 beneficiary are exempt assets; see Haw. Admin. Rule 17-1725.1-56 governs those transfers that DO NOT cause a penalty period (an over 64 bene transferring to pooled trust is NOT included on this list).	
IA/5	A			Allows		
ID/9	A			Per Dennis Vorheas		
IL/10	D	Medicaid or AABD	Department of Human Services and Department of Healthcare and Family Services	Per Brian re recent legislation.	But if you are over 64 a public guardian can set one up for you.	Pooled trust retains all; no payback
IN/5	A			No penalty per Shane Service and Melissa Justice		50% retained 50% papyback
KS/5	A	Kansas Medicaid	Kansas Health	Note from Barb Helm that Kansas is allowing it but it is a moving target!	Kansas Economic and Employment	Pooled trust retains 25% then

POOLED TRUSTS-SURVEY OF 50 STATES - updated August 16, 2015

A WORK IN PROGRESS – please email updates to Laurie Hanson, lhanson@mnelderlaw.com

			Policy Authority		Support Manual, Section 5621.2	balance to payback
KY/7	A	Kentucky Medicaid	Cabinet for Health and Family Services ("CHFS" or "the Cabinet")	The Kentucky Pooled SNT accepts gifts post 64; the Cabinet has indicated it will take the position such transfers violate DRA 05. Jeffrey Yussman		
LA/4	P	Louisiana Medicaid	Department of Health and Hospitals	Penalized (Joseph Gilsoul)	MEM I-1720	
MA/ 3	A	MassHealth	Division of Medical Assistance	Yes Patricia Freedman	13 Code of Mass REg 520.019(D)	No payback
MD/1	A	Medicaid	Department of Health and Mental Hygiene	Yes. Allowed over 64		
ME/6	P	Main Department of Health and Human Services		For Maine, persons over 65 can transfer money to the pooled trust but such transfers are penalized. Up until about 2 years ago, the MaineCare rules were silent and we were able to transfer to a pooled trust over 65 without penalty. The rules were modified after the CMS letters to impose a penalty period. Patricia A. Nelson-Reade		

POOLED TRUSTS-SURVEY OF 50 STATES - updated August 16, 2015

A WORK IN PROGRESS – please email updates to Laurie Hanson, lhanson@mnelderlaw.com

MI/1	D			Michigan – yes per Mary T. Schmitt Smith; Michigan is not a sure thing per Amy Tripp on Feb. 16, 2011 **No…February 24, 2012- in litigation**		
MN/5	D	Medical Assistance	Department of Human Services	Minnesota applies the transfer rules to the transfer by a person over the age of 64 into a pooled trust but has been reversed by three district courts. Working on appeals now	Minn. Stat. 256B.0595;	Pooled trust may keep 10%; balance to pay back Medicaid
MO/4				Mixed – for nursing home residents, Missouri imposes a transfer penalty and also for some long term caser services.		If trust funds have been used on the beneficiary, pooled trust can keep 25% before payback; if not used, pooled trust must make 100% available for payback.
MS/5	P	Division of Medicaid	Division of Medicaid	Penalizes transfers per Richard Courtney		Full paybackreS b
MT	A			Laurie, Montana DPHHS now allows the transfers without penalty, by informal agreement confirmed via email, although the manual has not been changed yet.	Nancy Gibson email January 31, 2013	
NC/2	P	Division of Medical Assistance	Department of Human Services	Penalty for transfers into pooled trust for people over the age of 65.		Nonprofit can keep only 50% of remaining assets
ND/4	P	Medical Assistance	ND Department	No. Considered a transfer		

			of Human Services in Bismarck			
Nebraska	D					
NH/ 9	P	Medicaid	New Hampshire Department of Health and Human Services	Does not allow per Ann Butenhof		
NJ/1	P	Medicaid	Division of Medical Assistance and Health Services (DMAHS)	People over the age of 64 can fund a pooled trust/but it is penalized		
NM	P	Medical Assistance	Department of Human Services	Penalty.		No Payback
NV/7	P	Nevada State Welfare Division	Nevada State Welfare Division	Not allowed MAABD Program Manual section 250 1 Sep 08		
NY	D	Medical Assistance	Department of Health Run through Local Department of Social Services	Medicaid recipients who are over 65 and participating in a community based Medicaid program are allowed to transfer funds to a d4C in New York, but transfer penalty will apply if the individual is receiving (or eventually receives) Medicaid funded skilled nursing facility services. Ed		

POOLED TRUSTS-SURVEY OF 50 STATES - updated August 16, 2015

A WORK IN PROGRESS – please email updates to Laurie Hanson, lhanson@mnelderlaw.com

OH/5	A	Medicaid	Department of Medicaifd	Ohio Allows transfers into pooled trusts without penalty per Janet Lowder and Elena Lidrbauch	ORC 5163.21(F)(3) OAC 5160:1-3-05.2(C)(3)(c)	Payback is required if individual elects not to leave remainder with pooled trust.
OK/5	A	Medicaid	Department of Human Services	Per Barb Helm March 1, 2012		
OR/6	P			"If a client is age 65 or older when the trust is funded or a transfer is made to the trust, the transfer may constitute a disqualifying transfer….	OAR 461-140-0210	Holding now; negotiating with sate (Paula Boga)
PA/10	P	Medical Assistance	Department of Public Welfare	Penalizes transfers		
RI/10	A	Medicaid	Executive offices of HHS	No penalty since 2014 Pat Freedman		No Payback
SC/1	P	Medicaid	Department of Human Services	February 24, 2012		
SD	P			Supreme Court Decision		
State/CMS Region		NAME OF MEDICAID PROGRAM	NAME OF STATE AGENCY	DOES YOUR STATE PENALIZE A TRANSFER FOR INDIVIDUALS OVER THE AGE OF 64? SINCE WHEN? COMMENTS?	STATUTORY CITATION OR ADMIN RULE OR "POLICY?"	Payback?
TN/8	A	TennCare	Tennessee Dept. of Human Services	New trial court case requires DHS to allow transf. to pooled trust by 65 & over w/o penalty, but no actual regs yet. Case:		

				Beach v. TN Dept of Human Services, Davidson County Chancery Court #09-2120-III, Sept. 8, 2010. King Self		
TX/4	P	Medicaid	Texas Health and Human Services Commission; Administered by the Texas Dept. of Aging and Disability Services	Transfers over 64 permitted but subject to transfer penalty Renee Lovelace		
UT/6	P	Medicaid	UT Dept. of Health and UT Department of Workforce Services	Section 512-2.3 of the Utah Medicaid Manual	Calvin Curtis	
VA/8	P	Medicaid	Virginia Department of Medical Assistance Services and Virginia Department	In Virginia it is considered a Transfer of Assets Joanne Marcus, MSW Executive Director Commonwealth Community Trust		Pooled trust keeps remainder; no payback

			of Social Services			
VT/3	P	Medicaid.	Vermont Agency of Human Services ("AHS") – Decisions regarding $$ eligibility are made by the Department of Children and Families ("DCF"), Economic Services Division ("ESD") – so: AHS-DCF-ESD – no joke.	Strict construction of Rules say "no" over 65 transfer allowed, but DCF lawyer says "Yes" transfer allowed, but subject to transfer penalty if done w/in 5 years of applying for LTC. Vermont DCF-ESD Medicaid SSI Rule 4245.2.F (eff. 10/7/2005) – the rule actually lumps d(4)(A) and d(4)(C) SNTs together and treats them identically. Jim Caffry		
WA/1	P	Department of Social and Health Services	Medical Assistance Administration	Penalizes		
WI/3	A	Medical Assistance	Department of Family Services	Transfer after age 64 ok		

POOLED TRUSTS-SURVEY OF 50 STATES - updated August 16, 2015

A WORK IN PROGRESS – please email updates to Laurie Hanson, lhanson@mnelderlaw.com

WV/1	A			West Virginia does not have any restrictions. Joanne Marcus, MSW Executive Director Commonwealth Community Trust		Requires payback
WY/5	P			Penalizes		

As of August 16, 2015, according to an informal survey on file with Long, Reher & Hanson, **20 states allow transfers** into pooled trust sub-accounts by individuals over age 64 without penalty: AL, AK, CA, CT, DE, FL, IA IN, ID, KS, KY, MA, MD, MT, OH,OK, RI, TN, WV, WI, AND DC (19 states and DC) allow transfers without penalty. **These 22 states penalize the transfer**: AZ, GA, HI, LA,ME, MS, NC,ND, NH, NJ, NM, NV, OR, PA, SC, SD, TX, UT, VA,VT, WA,WY

These 7 states all have variations or are unknown:

- CO – used to use a spending plan; this is in litigation with a change in policy;
- MN – impose a penalty unless fair market value is shown.
- NY - No transfer penalty for "Community" Medicaid services but Transfer penalty for purposes of "institutional" Medicaid service eligibility.
- IL – penalty unless the public guardian is establishing the trust.
- MI no but litigating fair market value issue.
- AR and NE – unknown
- MO – mixed – imposes a penalty for NF services but not for some 1915 waiver services.

Addendum D – 2 pages

CHART OF STATUS IN REPORTED STATES ON RETENTION IN POOLED TRUSTS

- **Alabama**—After full Medicaid payback (if trust is set up as 1st party, if the account has been open 5 years or less, the retention is only 5%.) The retention is 10% if account has been open more than 5 years. Any amount retained goes into a Charitable Pooled Trust to assist recipients of the pooled trust that are running out of money.
- **Arkansas—**the rules are ambiguous in that they state that the state must be paid from assets not retained in the pool. This language would be similar to the statute which suggests that there can be 100% retention.
- **California—**has a statute in regard to special needs trusts. The section of the statute that relates to retention reads as follows: (E) the State receives, upon the death of the disabled individual or disabled spouse, all funds remaining in the individual's account, up to an amount equal to the total amount of medical assistance paid on behalf of that individual by the Medi-Cal program. The State shall receive this amount only to the extent that funds remain in that individual's account and are not retained by the trust to cover management and investment fees associated with that account.[1]
- **Delaware—**allows 100% retention in the pool with no Medicaid payback.
- **Idaho—**regulations require Medicaid to be reimbursed in full, prior to any retention going to the non-profit agency.
- **Illinois**—Illinois requires 100% payback of expended funds by the Medicaid agency.
- **Kentucky—**allows 100% retention in the pool with no Medicaid payback.
- **Maryland—**has a statute that allows for 100% retention. In fact, the Maryland statute is very broad in requiring the state to conform to federal law, presumably in accordance with comparability.[2]
- **Michigan—**allows 100% retention in the pool with no Medicaid payback.
- **Mississippi—**requires some payback before funds are retained in the pool.
- **New Jersey—**allows 100% retention in the pool with no Medicaid payback.
- **New Mexico—**allows 100% retention by the nonprofit at the death of a self settled trust account beneficiary.
- **New York—**allows 100% retention by the trust with no Medicaid payback.

---

[1]California Statute 22 CCR 50489.9 (a)(E) (2013).
[2]Md. Estates and Trusts Code Ann. § 14.5-1002(c)(1)(i).

- **Ohio—**allows 100% retention by the trust. The main pooled trust in Ohio, the CFMF Pooled Trust, gives the applicant a choice of retention or repayment to Medicaid. This would allow a person who has a large trust and a small payback (and who might pass away in a short period of time) the ability to payback Medicaid and leave the remainder to family.
- **South Carolina—**allows 100% retention.
- **Texas—**requires 100% payback of expended funds by the Medicaid agency.
- **Vermont—**rules and interpretive memos state that Medicaid must be paid back, subject only to "reasonable administrative fees" that may be retained by the non-profit.
- **Virginia—**allows 100% retention.
- **Wisconsin—**allows 100% retention in the pool with no Medicaid payback. The main pooled trust, WisPACT, allows for a choice of retention or payback, the same as Ohio.

Addendum E - 17 pages

DeCAMBRE v. BROOKLINE HOUSING AUTHORITY, Dist. Court, D. Massachusetts

2015 2015 WL 1333319

KIMBERLY DECAMBRE, Plaintiff,
v.
BROOKLINE HOUSING AUTHORITY, MATTHEW BARONAS, JANICE McNIFF and CAROLE BROWN, Defendants.

Civil Action No. 14-13425-WGY.

United States District Court, D. Massachusetts.

March 25, 2015.

MEMORANDUM OF DECISION FINDINGS OF FACT AND RULINGS OF LAW

WILLIAM G. YOUNG, District Judge.

I. INTRODUCTION

In a case involving a beneficiary's special needs trust and federal housing benefits, this Court is faced with determining whether such a trust, designed to prevent beneficiaries from losing their Medicaid and Social Security eligibility, should also protect beneficiaries from losing their income-based federal housing vouchers despite statutory language to the contrary. The issue before the Court turns on the interpretation of HUD regulations for calculating annual income for housing assistance eligibility purposes; specifically, whether income should include disbursements from a special needs trust that was funded by lump-sum settlements from a personal injury lawsuit. The plaintiff before the Court, Kimberly DeCambre ("DeCambre"), a Brookline, Massachusetts resident and participant in the Section 8 Housing Choice Voucher Program ("Section 8"), alleges that the Brookline Housing Authority ("BHA") unlawfully calculated her annual income in violation of the federal regulations pertaining to Section 8, as well as in violation of her substantive due process rights under the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1983, 42 U.S.C. § 3604(c) (the Fair Housing Act), 29 U.S.C. § 701 (the Rehabilitation Act), and 42 U.S.C. § 12131 (the Americans with Disability Act). Her allegations of disability-based discrimination were also raised against three BHA employees: Matthew Baronas (Assistant Executive Director), Janice McNiff (Leased Housing Representative), and Carole Brown (Director of the Leased Housing Department) (collectively with BHA, "Defendants").

DeCambre further requested a preliminary injunction against the BHA to stop it from including certain trust disbursements towards the calculation of her income for Section 8 eligibility. This Court heard oral arguments at a case stated hearing[1] on September 19, 2014, which greatly assisted the Court in assessing the parties' claims. The Court, first, rules that DeCambre does not have a section 1983 claim because the BHA's income determination was not arbitrary and capricious, and further denies DeCambre's motion for a preliminary injunction, with an order that her case be remanded for reconsideration before the BHA. The Court's reasoning is laid out below as required by Federal Rule of Civil Procedure 52(a).

II. FINDINGS OF FACT

A. DeCambre's Disability Status

DeCambre is fifty-nine years old, and presently lives with her adult son in a Brookline, Massachusetts apartment. See First Am. Verified Compl. & Demand Trial Jury ("Compl.") ¶ 11, ECF No. 9; see also Pl.'s Mem. Supp. Mot. Emergency Prelim. Inj. ("Pl.'s Mem."), Ex. G, Aff. Kimberly P. DeCambre ¶ 2, ECF No. 5-7. Since 2005, DeCambre has been a recipient of housing vouchers through her participation in Section 8, which is administered locally by the BHA and directly funded by HUD. As described on its website, Section 8 provides housing vouchers to "low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market." Housing Choice Vouchers Fact Sheet, HUD.gov (Sept. 17, 2014), http://portal.hud.gov/hudportal/HUD?src=/topics/housing_choice_voucher_program_section_8; see also 42 U.S.C. § 1437(f) et seq. These vouchers are administered by local agencies and housing subsidies are paid directly to landlords by the agencies. See 42 U.S.C. § 1437(f) et seq. The amount of the rent subsidy typically is the amount of the gross rent, "minus 30 percent of monthly adjusted income." Id. The BHA, which issues these rent subsidies in vouchers, is a local housing authority pursuant to Massachusetts General Law, chapter 121B, section 3, and a recipient of federal funding for subsidizing rent for its participants through an Annual Contributions Contract with HUD. Compl. ¶ 3.

It is undisputed that DeCambre is disabled as she is currently a recipient of Medicaid and Social Security benefits. Stipulated Factual R.: Case Stated ("Stip. Factual R.") ¶ 8, ECF No. 16. She currently receives Supplemental Security Income ("SSI") in the amount of $835.39 per month from the Social Security Administration, which provides supplemental income for "aged, blind, or disabled individual[s]." 42 U.S.C. §§ 1382c(a)(1), (a)(3); see Pl.'s Mem. 2. She also receives Medicaid administered by MassHealth. Id. at 5. DeCambre's "major disabilities" stem from kidney disease, which her treating physician describes as "recurrent kidney stones, severe hypokalemia (low potassium) requiring high dose daily potassium supplements, which is thought due to medullary sponge disease and/or Gitelman's syndrome." Pl.'s Mem., Ex. C2, Dr. Hsiao Letter, ECF No. 5-1. Her physician also stated that DeCambre suffered from "unusual skin patterns, which is presumed to be primary/secondary erythromelalgia," id., while a second physician noted that DeCambre required "access to heat and central air conditioning to ensure temperature regulation" due to her "numerous medical conditions," Pl.'s Mem., Ex. C2, Dr. Crombie Letter, ECF No. 5-3.

In her complaint, DeCambre further elaborates on her ailments as also including post traumatic stress disorder, fibromyalgia, arthritis, torn labrum in the hips, shoulder and elbow injuries, and a history of depression. See State Ct. R., Ex. A, Verified Compl. & Demand Trial Jury 5, ECF No. 12.

B. Special Needs Trust

DeCambre is the beneficiary of an irrevocable Special Needs Trust ("Trust") under 42 U.S.C. § 1396p(d)(4)(A) and (C), which is defined as a trust "containing the assets of an individual under age 65 who is disabled. . . and which is established for the benefit of such individual by . . . a court." Pl.'s Mem. 2. As an irrevocable trust under section 1396p(d)(4)(C), DeCambre has no control over the Trust corpus, and the Trust itself earns "little or no interest." Id. The Trust was funded entirely from a series of lump-sum settlements from a personal injury and property damage lawsuit, and created by the Suffolk Superior Court for DeCambre in 2010. Id. at 3; see also Defs.' Opp'n Pl.'s Mot. Prelim. Inj. ("Defs.' Mem.") 3, ECF No. 10. The total amount of the settlement is estimated to be $330,000. Stip. Factual R. ¶ 7. DeCambre's counsel in this case, J. Whitfield Larrabee ("Larrabee"), is also the trustee of the Trust. Pl.'s Mem., Ex. C1, Letter to Joseph, ECF No. 5-3. Based on an expenses chart submitted by DeCambre, principal from the Trust has been used to pay for administrative trustee fees; cell phone, cable, and internet bills; veterinary care for cats; dental and medical costs; and travel expenses. See Pl.'s Mem., Ex. F, Kimberly DeCambre Supplemental Needs Trust Payments 12-1-2012 to 11-04-2013 ("Trust Expenses"), ECF No. 5-6.

C. DeCambre's Section 8 Eligibility

DeCambre has been a participant in the Section 8 housing assistance program since 2005, and effective December 1, 2012, her monthly rental payment for her apartment was $312.00. Pl.'s Mem., Ex. A, Notice Rent Adjustment 2012, ECF No. 5-1. The fair market or contract rent totaled $1,595.00 per month, and she received $1,283.00 in housing assistance program payments. Id. On October 28, 2013, the BHA adjusted DeCambre's rent to $435 per month, explaining that certain disbursements from her Trust could not be classified as exempt medical expenses. Stip. Factual R., Ex. 4, Notice Rent Adjustment 2013, ECF No. 16-4. Upon request for the submission of statements from the Trust for their annual re-certification process, Stip. Factual R., Ex. 5, Letter from Lea Luz Rios, ECF No. 16-5, DeCambre submitted various trust-related documents to the BHA on November 12, 2013, Stip. Factual R., Ex. 6, Letter from Larrabee to Dalia Joseph, ECF No. 16-6.

Upon conducting their annual recertification in the fall of 2013, the BHA determined that DeCambre was no longer eligible to receive housing assistance because her income was too high. Defs.' Mem. 3. DeCambre self-reported her gross annual income to include $2,004 from food stamps, $9,748.68 from social security, $200 from her son's earnings, and $445 from ABCD Fuel Assistance, totaling $12,397.68 for 2013. Stipulated Factual R., Ex. 3, Appl. for Continued Occupancy, Sept. 10, 2013, ECF No. 16-3. The BHA, however, based on submitted income tax returns from DeCambre's attorney, found that DeCambre received approximately $200,000 in distributions from the Trust between 2011 and 2013, and that her 2011 income tax return reported an income of $108,322. Defs.' Mem. 4. Further, the

BHA found that the Trust disbursements totaled $31,749.01 in 2012 and totaled $62,828.99 between January and November 2013 — which they determined should have been reported as income for purposes of recertification. Id. The BHA's yearly gross household income limit for a two-person household is $22,600. Section 8 — Housing Choice Vouchers, Brookline Housing Authority (Oct. 31, 2014), http://www.brooklinehousing.org/sect8.html. As a result, DeCambre was notified in a letter dated December 18, 2013, that effective February 1, 2014, she would be responsible for the full amount of her contract rent, totaling $1,560.00, and would no longer be eligible for housing assistance. Pl.'s Mem., Ex. B, Notice Rent Adjustment 2013, ECF No. 5-2. On January 13, 2014, DeCambre's counsel emailed the BHA indicating that she would appeal the rent adjustment decision. Stip. Factual R., Ex. 10, Larrabee Email of Jan. 14, ECF No. 16-10. A meeting was scheduled between the parties for February 7 to review her file. Stip. Factual R., Ex. 11, McNiff Letter of Jan. 24, ECF No. 16-11. Meanwhile, DeCambre failed to pay the total amount of her adjusted rent ($2,200.00 in arrears), and received a notice to quit for non-payment of rent from her landlord in March 2014. Pl.'s Mem., Ex. G, Mar. Notice to Quit, ECF No. 5-7.

D. Request for Reasonable Accommodation and Hearing Officer's Decision

On March 14, 2014, DeCambre submitted a Request for Reasonable Accommodation[2] to the BHA, as well as a request for a hearing. Pl.'s Mem., Ex. C2, Req. Reasonable Accom., ECF No. 5-3; see also Stip. Factual R., Ex. 16, Req. for Hearing, ECF No. 16-16. In it, she requested that "[the BHA] exclude from counting the expenditure of trust money" that was used towards DeCambre's car purchase, her cell phone and landline bills, and veterinary costs for the care of her cats, which she argued should be categorized as medical expenses, and thus be exempt from income calculation. Req. Reasonable Accom. DeCambre argued her car was a medical necessity because she could not be exposed to hot or cold temperatures outdoors, her cell phone and landline were needed in case of an emergency due to her "medically precarious condition," and her cats were necessary as "companion animals for her mental health, mental and physical disabilities." Id.

An informal hearing was held at the BHA on May 27, 2014, with counsel for both sides present. Def.'s Mem. 5. The Assistant Executive Director of the BHA, Matthew Baronas, served as a hearing officer and issued a written decision on June 9, 2014. Id. In his decision, Baronas determined that the BHA had correctly calculated DeCambre's income and rental share, based upon their interpretation of HUD regulations. Stip. Factual R., Ex. 33, Baronas Decision, ECF No. 16-33. Citing to 42 C.F.R. § 5.609, he ruled that, although DeCambre's personal injury settlement is not considered income under HUD regulation, when these assets were placed in an irrevocable trust, the distributions from the trust must then be "considered income unless specifically excluded by regulation." Id. Baronas also determined that the BHA provided a timely hearing in good faith. Id. at 5-6.

DeCambre made a second Reasonable Accommodation Request on July 8, 2014, upon which she was notified by the BHA that she was missing a medical professional certification "attesting to the nexus between Ms. DeCambre's disability and the accommodation she claims to need." Defs.' Mem. 6. Initially, Larrabee signed this certification himself, arguing that no medical professional was needed, Stip. Factual R., Ex. 45, Larrabee Email of July

21, ECF No. 16-45, and submitted a certification from another physician who treated DeCambre for a hip and shoulder injury in May 2010, Stip. Factual R., Ex. 25, Certification of Med. R. John Doherty, Jr. M.D., ECF No. 16-25. Larrabee eventually submitted a certification from DeCambre's primary care physician on August 6, 2014. Stip. Factual R., Ex. 52, Larrabee Email of Aug. 6, ECF No. 16-52. On August 12, 2014, DeCambre received another notice to quit, stating that she was $1,502.00 in arrears. Pl.'s Mem., Ex. G, Aug. Notice to Quit, ECF No. 5-7.

E. Procedural History

DeCambre filed a complaint against the Defendants with the Massachusetts Commission Against Discrimination ("MCAD") on June 19, 2014, Stip. Factual R., Ex. 23, Mass. Comm'n Against Discrimination Charge Discrimination, ECF No. 16-35, and subsequently withdrew the complaint on August 26, 2014 as a result of pursuing her claims in court, Stip. Factual R., Ex. 30, Dismissal & Notification of Rights, ECF No. 16-30. On August 8, 2014, DeCambre filed this lawsuit against the BHA in the Massachusetts Superior Court sitting in and for the County of Norfolk, seeking $1,000,000 for damages, judicial review, and declaratory and injunctive relief arising from the BHA's decision to withhold her Section 8 Housing Assistance Program ("HAP") payments. State Ct. R., Ex. A, Verified Compl. & Demand Trial Jury 1, ECF No. 12. This action was removed to this Court on August 21, 2014. See State Ct. R., Notice of Removal 3, ECF No. 12.

DeCambre filed her motion for preliminary injunction on August 22, 2014. Pl.'s Mot. Prelim. Inj., ECF No. 4. The case stated hearing was heard on September 4, 2014. Elec. Clerk's Notes, ECF No. 11.

F. Claims Raised

Along with the allegations that BHA miscalculated the amount of her Total Tenant Payment and refused to make reasonable accommodations for her disability upon request, in violation of the federal regulations governing Section 8 and her substantive due process rights, DeCambre also asserts breach of lease, interference with quiet use and enjoyment, declaratory and injunctive relief, and a writ of mandamus and judicial review. Def.'s Mem. 7. Both parties' arguments, however, were limited to the motion for preliminary injunction based on just her first two counts: (1) violation of federal civil rights under section 1983, and (2) disability discrimination under Massachusetts General Law chapter 151B as well as the related federal statutes. Id. As a preliminary matter, this Court finds that DeCambre did not adequately prove each element of her breach of lease and interference with quiet use and enjoyment claims, and therefore cannot prevail on these causes of action.

Adjacent to the central dispute over the HUD provisions and regulations, DeCambre claims that the BHA's determination "knowingly and willfully" violated her federal civil rights because it arbitrarily terminated her participation in Section 8 housing in a decision that was "not based on a preponderance of the evidence." Compl. ¶¶ 54-60. Second, she claims that the BHA denied her benefits "by reason of her disability" in violation of the Rehabilitation Act, Title II of the ADA, and the Fair Housing Act. Id. ¶¶ 65-68. Third, she moves for a preliminary injunction to enjoin the BHA from counting her Trust disbursements towards the

calculation of her total tenant rent, and to resume payment of her housing vouchers in the amount of $1,283 per month, retroactive to July 1, 2014. Pl.'s Mot. Prelim. Inj.

III. RULINGS OF LAW

A. Regulatory Interpretation and HUD Guidance

Central to the core issues before the Court is the interpretation of several HUD regulatory provisions regarding the treatment of trust disbursements with regard to calculating annual income. HUD regulation 24 C.F.R. § 5.609 addresses exclusions and inclusions of "annual income" with regard to financial eligibility for Section 8 housing assistance, while 24 C.F.R. § 5.603 provides further definitions of "net family assets" and "total tenant payment," and explicitly excludes lump-sum personal settlement payments from the definition of annual income. The parties' differing applications of these regulations result in their opposing positions.

The salient facts can be summarized as follows: (1) DeCambre received a series of settlements totaling approximately $330,000 from a personal and property injury lawsuit between June 2010 and December 2012, (2) this settlement was deposited into an irrevocable Special Needs Trust created by the Suffolk Superior Court in June 2010, and (3) DeCambre has used principal from the Trust to pay for an automobile, travel expenses, cat veterinary care, and dental and medical fees. See Stip. Factual R. ¶ 7. DeCambre argues that the Trust disbursements used to pay for these items should not be counted towards her annual income, because the source of her funds are from income-exempt lump-sum settlements and, in the alternative, her expenditures should still be income-exempt under a separate exclusion for "temporary, nonrecurring, and sporadic" payments, see 24 CFR § 5.609(c)(9).

1. HUD Regulations on Section 8 Income

Analysis begins by examining the plain meaning of the language of the applicable regulations.[3] Annual adjusted income for Section 8 purposes is defined as "all amounts, monetary or not, which: (1) Go to . . . the family head . . . or (2) Are anticipated to be received from a source outside the family during a 12-month period following admission . . . and (3) Which are not specifically excluded in paragraph (c) of this section." 24 C.F.R. § 5.609(a) (1)-(3).

Specifically excluded from annual income are: "Lump-sum additions to family assets, such as inheritances, insurance payments (including payments under health and accident insurance and worker's compensation), capital gains and settlement for personal or property losses (except as provided in paragraph (b)(5) of this section)." 25 CFR § 5.609(c) (3) (emphasis added). Applied to DeCambre's initial lump-sum settlement, it is indisputable that this amount is excluded from calculation of annual income.

Complicating this analysis, however, is an adjacent provision under section 5.609. Section 5.609(b)(3) provides that annual income can include: "Interest, dividends, and other net

income of any kind. . . . [w]here the family has net family assets in excess of $5,000, annual income shall include the greater of the actual income derived from all net family assets or a percentage of the value of such assets based on the current passbook savings rate, as determined by HUD." 25 CFR § 5.609(b)(3). Net family assets,

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

24 CFR § 5.603(b)(2)(emphasis added). Under a straightforward application of this provision, DeCambre's Trust disbursements would be counted towards her annual income, notwithstanding expenditures falling under separate exclusions such as medical expenses or temporary, nonrecurring spending. As these regulations do not address a situation where an irrevocable trust is funded by lump-sum settlements, this Court turns to other resources to glean guidance on this matter.

2. Finley v. City of Santa Monica

The core issue is whether a settlement loses its identity as a lump-sum settlement once it is placed in an irrevocable trust. One state court has addressed this question. In 2011, a Los Angeles County Superior Court held that distributions from a special needs trust were excluded from Section 8 annual income. Finley v. City of Santa Monica, No. BS127077, 2011 WL 7116184 (Cal. Super. Ct. May 25, 2011); see also Pl.'s Mem., Ex. D, Finley Op., ECF No. 5-4. The court in Finley held that both sections 5.609 and 5.603(b)(2) could be "harmoniously applied to determine that distribution of principal from the [trust] is not income." Id. at 6. This is because under 24 CFR § 5.609(a)(1)-(3), annual income includes both monetary and non-monetary amounts that "go to, or on behalf of, the family head" and "paragraph (c)" income exclusions. Ruling that "[the special needs trust] principal . . . . remain[s] excluded under 5.609(c)," Finley Op. 6, the Finley court concluded that the "distribution of principal from an irrevocable trust, which is not a family asset, is not annual income where the principal was excluded from annual income under section 5.609(c)(3),"[4] id. at 7.

Reading these provisions "harmoniously," however, does not exactly explain how a lump-sum remains a lump-sum, even when poured into an irrevocable trust. Rather, it only suggests that certain income exclusions predominate over other provisions. Here, the Finley court's statutory reading makes sense only if the annual income exclusions under 5.609(c) were deemed to override the net family assets definitions provision under 5.603(2), which includes distributions from an irrevocable trust in the calculation of annual income. To be clear, nothing in the regulations instruct that certain exclusions prevail over income inclusions, nor do they specifically address settlement-funded irrevocable trusts. When determining which regulatory provisions apply to DeCambre's expenditures, the Court cannot arbitrarily impose a reading which would impute greater weight to certain income provisions over others.[5] As a result, this Court does not follow the line of reasoning in Finley (noting that this Court was not bound by this decision to begin with).

Understanding, however, that the Finley court's reasoning addressed an equitable issue as well as a statutory one, the Court acknowledges the underlying problem of losing housing benefits due to use of a special needs trusts — especially when such trusts are established to protect disabled beneficiaries' access to Medicaid and Social Security benefits.[6] As cogently argued before this Court, special needs trust beneficiaries like DeCambre are unfairly disadvantaged in regards to federal housing assistance simply by their choice to place their settlement funds in a special needs trust. Tr. 23:1-15 ("The problem with this situation is . . . not only is the Brookline Housing Authority not treating people, and Ms. DeCambre, equally with other nondisabled people, they're treating her worse . . . . So you can have a trust, but you can't have any benefit from it."). As noted in Finley, DeCambre could have taken her personal injury settlement and placed it under her mattress, Finley Op. 6, from which she could freely have used it for any purpose without reporting her expenditures as Section 8 income.

Still, the BHA's decision to treat DeCambre's expenditures as disbursements from an irrevocable trust, counting it towards income under section 5.603, was a reasonable application of what this Court reads to be clear and unambiguous HUD rules. Revision of agency regulation is not in the district courts' repertoire, and HUD's interpretive rules on income calculation ought be given deference where they are a "reasonable interpretation." See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation . . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."); see also McGann v. United States, No. 98 CIV. 2192 SAS, 1999 WL 173596, at *7 (S.D.N.Y. Mar. 29, 1999) aff'd, 205 F.3d 1323 (2d Cir. 1999) (explaining that the "plaintiff [cannot] challenge an interpretive rule, such as HUD's procedures on calculating the Section 8 subsidy pursuant to 24 C.F.R. §§ 5.609 and 5.617" because "[i]nterpretative rules . . . do not create rights, but merely `clarify an existing statute or regulation.'") (internal citations omitted); see generally Linda D. Jellum, The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law, 44 Loy. U. Chi. L.J. 141 (2012).

DeCambre's expenditures were from her Trust, which happened to be funded by her lump-sum settlement, and HUD income-counting rules reasonably were applied to her Trust disbursements. This is not to say that further guidance and clarification from HUD is not needed; addressing this very specific issue of settlement-funded special needs trusts are, to say the least, critically necessary to address this growing issue in federal housing and disability law.

Understanding the compelling equitable arguments raised by DeCambre, the Court considered HUD advisory letters and handbooks for further guidance.

3. 2007 New England HUD Advisory Letter

The BHA relies on a HUD Advisory Letter from 2007, which was sent to them by Benjamin Palmer, a HUD Portfolio Management Specialist, in April 2012. Defs.' Mem. 12. The Advisory Letter was provided by HUD's Boston Office of Public Housing, and specifically

addressed Special Needs Trust ("SNT") disbursements and income calculations. Defs.' Mem., Ex. D, HUD Advisory Letter, ECF No. 10-4. Citing section 5.603(b)(2), the letter states "the corpus (principal) of an applicant's . . . SNT is not considered an asset," which comports with the plain reading of the provision. Id. at 1. The letter continues, "[d]istributions from the trust will be counted when determining annual income under 24 CFR 5.609," id., unless specifically excluded or included under sections 5.609(c) and 6.611, and that "[t]he ultimate determination of whether each of the above expenditures counts towards annual income or falls within an exclusion or deduction is to be made by the Public Housing Authority," id. at 2.

While the letter provides examples of SNT distributions that are excluded or counted, it does not provide separate guidance as to whether the source of an SNT could potentially exclude its distributions from being counted towards annual income. Id. at 1-2 (providing only that "[a]nnual income does not include items such as . . . [l]ump-sum additions to family assets such as . . . settlement for personal or property losses.").

What can be gleaned from this letter, however, is an explanation for why SNT income is treated differently by HUD as compared to Medicaid: "Unlike Medicaid,[7] HUD is not reimbursed for benefits provided with excess trust corpus at the end of the beneficiary's lifetime; this accounts for some differences in the treatment of SNT income between the HUD and Medicaid regulations." Id. at 2. This is offered to explain why SNT expenditures "that do not fall under an exclusion or deduction are presumed by the regulations to be available for housing expenses and are therefore counted towards annual income." Id. (emphasis added). This seems logical enough — because there is no guarantee of reimbursement from the excess principal upon a beneficiary's death, HUD chose to impose a more stringent income requirement on federal housing voucher participants.[8] The question remains whether this policy justifies the result of denying federal housing assistance to disabled SNT beneficiaries. The Court thinks not, noting that the policy does not directly speak to federal housing programs eligibility requirements nor does it suggest that lump-sum settlements should remain lump-sums regardless of the depository it is in. At most, this policy seems to suggest that housing authorities, who already carry "[t]he ultimate determination of whether each of the above expenditures counts towards annual income or falls within an exclusion or deduction," can choose to count certain non-excluded expenditures towards annual income. Id.

4. HUD Handbook on Net Family Assets

While the Advisory Letter does not provide specific guidance as to settlement-funded special needs trusts, a 2013 HUD Handbook on occupancy requirements confirms that settlement funds placed in irrevocable trusts are not assets. HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs, U.S. Department of Housing and Urban Development ("HUD Handbook") 5-39 (Nov. 3, 2014), http://portal.hud.gov/hudportal/documents/huddoc?id=43503c5HSGH. pdf ("Assets placed in nonrevocable trusts are considered as assets disposed of for less than fair market value except when the assets placed in trust were received through settlements or judgments.") (emphasis added). This clarifies the definition of net family assets under 24 C.F.R. § 5.603(b)(3), which includes "the value of any . . . assets disposed of by an applicant or tenant for less than fair market value (including a disposition in trust . . .) during the two

years preceding the date of application for the program." See also HUD Handbook 5-38 ("Owners must count assets disposed of for less than fair market value during the two years preceding certification or recertification.").

At oral arguments, the BHA raised an argument that a lump-sum is only a lump-sum for the year it was transferred into an irrevocable trust,

but once it's been sitting in a trust for two or three years, it's no longer a lump sum, it's now an amount of money that the plaintiff is actively . . . taking distributions from and it is not a fair characterization to call that money a `lump sum' any longer than the one year period within which that money is first received.

Tr. 9:4-9 (emphasis added). It is unclear whether the BHA was referring to the two-year penalty period for under-market transfer of assets, but this one-year characterization is not supported by the regulations, nor is it supported by the HUD Handbook on asset transfers. The Court cannot accept BHA's theory that a lump-sum is only a lump-sum for the first year, as it simply has no basis in the regulations.

The only conclusion that can be drawn is that the settlement funds which were placed into DeCambre's special needs trust were not assets disposed of for less than fair market value under section 5.603. As a result, section 5.609(b)(3)'s requirement that annual income includes interest generated by net family assets "in excess of $5000" does not apply, insofar as DeCambre's Trust is concerned.

5. Conclusion on Regulatory Interpretation

Upon analysis of the relevant HUD regulations on annual income and net family assets, as well as HUD advisory publications and non-binding case law, the Court is unable to find any regulatory support for DeCambre's argument that her Trust expenditures must be excluded from annual income and that her Trust corpus remained a lump-sum settlement. To the extent the BHA treated DeCambre's expenditures as spending from an irrevocable trust, rather than from a personal settlement fund, the Court holds that their determination was a reasonable one.

B. Due Process Claims

The following matters remain: whether the BHA violated DeCambre's due process rights on the basis of her disability, in their initial eligibility determination and their subsequent reasonable accommodation determination, and whether a preliminary injunction is warranted to enjoin the BHA from counting DeCambre's Trust disbursements towards the calculation of her total tenant rent. This Court determines that the BHA did not violate DeCambre's substantive due process rights on the basis of a disability, and DENIES the motion for preliminary injunction.

1. Substantive Due Process Claim

DeCambre raises a substantive due process claim — which was very sparsely briefed — arguing that the BHA, acting under the color of law, violated the United States Housing Act of 1937, 42 U.S.C. § 1437f et seq., by incorrectly calculating her Total Tenant Payment at $1,560 per month, and forcing her to pay more than thirty percent of her monthly adjusted income in violation of federal regulations under Section 8. Pl.'s Trial Br. 1-2, ECF No. 24. She also alleges that her due process rights were violated on the basis of disability discrimination under the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1983, 42 U.S.C. § 3604(c) (the Fair Housing Act), 29 U.S.C. § 701 (the Rehabilitation Act), and 42 U.S.C. § 12131 (the Americans with Disability Act). Id. at 8-11.

The Supreme Court has held that public housing authorities operating housing programs under federal housing law may be liable under section 1983. See Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 428 (1987) ("In sum, we conclude that nothing in the Housing Act or the Brooke Amendment evidences that Congress intended to preclude petitioners' [section] 1983 claim against respondent."); see also Clark v. Alexander, 85 F.3d 146, 150 (4th Cir. 1996) ("The civil rights cause of action against a state agency implementing a federal program compels federal courts to uphold the letter of federal law while allowing agencies the discretion to perform their function of reasonably administering the federal program.").

Noting that DeCambre fails to name whether she is suing the three named BHA employees in an individual or official capacity, the BHA argued that her section 1983 claims fail under either distinction. Defs.' Supplemental Br. Sept. 19, 2014 Hearing ("Defs.' Suppl. Br.") 2-3, ECF No. 17. First, if the employees were sued in their official capacity, then no personal liability is imposed and the claim is treated as against the BHA. See Hafer v. Melo, 502 U.S. 21, 25 (1991) ("We emphasized that official-capacity suits `generally represent only another way of pleading an action against an entity of which an officer is an agent.'") (internal citations omitted). Second, if DeCambre intended to sue the BHA employees in their individual capacity, then the individual defendants would receive qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Mason v. Massachusetts Dep't of Envtl. Prot., 774 F. Supp. 2d 349, 373 (D. Mass. 2011) (Tauro, J.). For purposes of analysis, this Court assumes the BHA employees were sued in their official capacity.

A substantive due process claim under the Fourteenth Amendment requires that a plaintiff "show a deprivation of life, liberty, or property," Connor B. ex rel. Vigurs v. Patrick, 771 F. Supp. 2d 142, 159-60 (D. Mass. 2011) (Ponsor, J.), aff'd, 774 F.3d 45 (1st Cir. 2014), and "generally confers no affirmative right to governmental aid, even when such aid may be necessary to protect . . . property interests," id. at 160. The First Circuit has also upheld the use of a "shock the conscience" test for substantive due process claims against government actors. Martinez v. Cui, 608 F.3d 54, 65 (1st Cir. 2010).

DeCambre's argument is solely that the BHA, a "state created political body that administers the federal Section 8 program," improperly calculated her income, resulting in her having to pay more than one hundred percent of her income towards rent, in violation of 42 U.S.C. § 1437(o)(2), which limits a Section 8 tenant's rent payment to thirty percent of

their monthly income. Pl.'s Mem. 7-8. No further argument was provided as to whether DeCambre has a constitutionally protected property right to the regulatory rent ceiling. See Gammons v. Mass. Dep't of Hous. & Cmty. Dev., 523 F. Supp. 2d 76, 82 (D. Mass. 2007) (Saris, J.) ("[t]he threshold question is whether the plaintiffs have an enforceable right under section 1983 not to have their Section 8 benefits improperly terminated in violation of HUD regulations."). Simply because DeCambre had been an eligible Section 8 tenant prior to her SNT expenditures does not create a property interest in Section 8 assistance, nor has this Court been able to find any statutory or judicial authority mandating that SNT distributions are excluded from income calculations. Finally, nothing in the factual record outlining DeCambre's interactions with the BHA hints at any conduct that would "shock the conscience." As a result, this Court rules that DeCambre does not have a substantive due process claim against the BHA.

2. Procedural Due Process Claim

DeCambre's allegations that the BHA hearing officer failed "to find any facts or give any reason for denial of DeCambre's request for reasonable accommodation," Compl. ¶ 41, were treated as a de facto procedural due process claim by the BHA, Defs.' Mem. 9. In Goldberg v. Kelly, the Supreme Court laid out the requisite procedural rights recipients of public assistance are entitled to, including "timely and adequate notice detailing the reasons for a proposed termination . . . an effective opportunity to defend by confronting any adverse witnesses and presenting his own arguments and evidence orally," an opportunity to be represented by counsel before a hearing officer, and the decision maker's conclusions, "stat[ing] the reasons for his determination and indicate the evidence he relied on." 397 U.S. 254, 266-71 (1970) (noting, however, that the written decision "need not amount to a full opinion or even formal findings of fact and conclusions of law.").

It is undisputed and evident from the record that DeCambre received both timely notice and hearings throughout the past year. She first received written notice on December 19, 2013, and upon request for a hearing in January 2014, she received one on May 27, 2014, at which DeCambre was represented by counsel and had an opportunity to present argument and evidence. Defs.' Mem. 9.

The hearing officer's written determination on the request for reasonable accommodation was issued on June 9, 2014. Pl.'s Mem., Ex. E, BHA Decision, ECF No. 5-5. First, the BHA determined that DeCambre's Trust expenditures should be considered "income" for rent calculation purposes, because her expenditures did not fall under the seventeen listed income exclusions under section 5.609(c). Id. With regard to section 5.609(c)(3)'s income exclusion for lump-sum additions to family assets from personal or property losses, the BHA argued that although DeCambre's settlement was "originally considered income by HUD regulation," once it was converted to an irrevocable SNT, withdrawals therefrom became considered income and did not fall under any other exclusions. Id. (Section 5.603(b)(2) counts distribution of principal from these trusts towards income). DeCambre takes issue with the hearing officer's "arbitrary" and "whimsical" decision to include certain expenditures towards her annual income, giving "no plausible reason or explanation for the manner in which it seemed to apply some exclusions while disregarding others." Pl.'s Trial Br. 6. While this Court takes issue with the some of the BHA's explanations, the hearing officer's June 9, 2014 written decision provided sufficient explanation of the BHA's decision to deny

DeCambre's appeal of her rent calculation, noting that this writing "need not amount to a full opinion or even formal findings of fact and conclusions of law." Goldberg, 397 U.S. at 271. Before critiquing the hearing officer's decision, the Court holds that DeCambre does not have a procedural due process claim against the BHA.

3. Discrimination Claim

Finally, as to DeCambre's discrimination-based claims against the BHA, this Court is unable to find any evidence as to whether the BHA calculated her Section 8 income in an unlawful or discriminatory manner, based on her status as a disabled person. The Americans With Disabilities Act mandates:

A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

28 CFR § 35.130(b)(8). The Court shares DeCambre's concern that beneficiaries of special needs trust, by definition including a disabled population, may face hurdles in securing Section 8 assistance. But another facet of this argument is that the beneficiaries of all non-revocable trusts, including non-disabled persons, face the same risks as DeCambre (noting that the regulations only address "non-revocable trusts" rather than special needs trusts). As multiple treatises and publications have instructed, SNTs require careful planning and structuring by trustees to avoid losing federal benefits. See, e.g., Bernard A. Krooks, Special Needs Trusts: The Basics, The Benefits, and the Burdens, The American Law Institute, SR013 ALI-ABA 245, 270-271 (2009) (providing potential alternatives to an SNT for beneficiaries seeking to utilize funds a certain way, while maintaining SSI, Medicaid, and public housing assistance). Because special needs trusts are just one type of non-revocable trust, there is less potential concern for disability-based discrimination than there would be if the regulations had singled out special needs trusts.

The core problem lies in the lack of clarity in HUD provisions governing SNT beneficiaries for Section 8 benefits, and this issue should be addressed by HUD or Congress. Reviewing the decision of the BHA as to the initial income calculation and subsequent denial of reasonable accommodation requests, i.e. its treatment of DeCambre's SNT as a trust, rather than as a lump-sum settlement, is reasonable under the existing regulatory scheme. No evidence has been presented to this Court as to whether the BHA's interpretation tends to screen out disabled tenants — in fact, it appears that the BHA provided multiple opportunities for DeCambre to provide medical certification in her attempts to show a "nexus between her disability and the accommodation she claims to need." Defs.' Mem. 10 (noting that DeCambre attempted to use her counsel Larrabee as a medical expert rather than her treating physicians).

Accordingly, this Court holds that the BHA did not act in a discriminatory manner and that DeCambre's discrimination claims against the BHA cannot stand.

C. Exclusions for Temporary or One-Time Expenses and Medical Costs

Before remanding this case to the BHA, the Court raises several issues found in the BHA's application of income exclusions under "temporary, nonrecurring or sporadic income," § 5.609(c)(9), and under "the cost of medical expenses" exclusion, § 5.609(c)(4). In its written decision, the BHA argued that it followed HUD regulations properly excluding medical expenses and attorney's fees paid for by the Trust from its income calculation. BHA Decision 3. The BHA, however, found it unreasonable that DeCambre tried to exclude her vehicle, phone, and cat expenditures from income. Id. They found that DeCambre's telephone and vehicle expenses were "regular," id. at 2, supported by the fact that the Trust made twelve phone/cable/internet payments, nine veterinary payments, four travel payments, and two car purchase payments between December 1, 2012 and November 30, 2013, Defs.' Mem. 13-14. For example, payments of $480 and $675 were paid for her phone and internet bills in January 2013, $1,218.51 was paid in veterinary expenses to the Boston Cat Hospital in February 2013, and $3,875.12 was paid for airfare and hotel for DeCambre and a travel companion in February 2013. Trust Expenses 2-3. Nearly $5,000 more was paid for veterinary care through the spring of 2013, and $775 was paid to Comcast for phone, cable, and internet in April 2013. Id. at 3. An automobile purchase in the amount of $37,601 was paid for in May 2013. Id. at 4.

The Court is compelled to point out that case law includes "television, Internet, [and] travel" expenses as something SNTs should cover. The Third Circuit states:

A supplemental needs trust is a discretionary trust established for the benefit of a person with a severe and chronic or persistent disability and is intended to provide for expenses that assistance programs such as Medicaid do not cover." Sullivan v. County of Suffolk, 174 F. 3d 282, 284 (2d Cir.1999) (internal quotation marks omitted). These expenses—books, television, Internet, travel, and even such necessities as clothing and toiletries—would rarely be considered extravagant.

Lewis v. Alexander, 685 F.3d 325, 333 (3d Cir. 2012) cert. denied, 133 S. Ct. 933 (U.S. 2013) (emphasis added); accord Family Trust of Mass., Inc. v. United States, 722 F. 3d 355, 357 (D.C. Cir. 2013). DeCambre's cable and internet expenses certainly fit within this argument, supporting excluding these payments from annual income, even though they may not be "temporary." Second, DeCambre's travel costs from February 2013 and March 2013 to visit family could also fall within allowable SNT expenditures which would exclude it from annual income.

More problematic are DeCambre's purported medical expenses (excluding her visits to the dentist and treating physicians, which appear to be undisputed medical expenses). DeCambre argues that her car, landline, and veterinary payments should be excluded from calculation of her income under section 5.609(c)(4). Pl.'s Mem., Ex. C10, Certification of Need For Reasonable Accom., ECF No. 5-3 (providing a certification from DeCambre's treating physician, with an unsigned attachment attesting to her medical need for a car, landline, and cat companionship); see also Pl.'s Mem., Ex. C, Larrabee Aff., ECF No. 5-3.

DeCambre purchased a car on May 28, 2013, with $37,601 from her SNT, Trust Expenses 4, but because the title was held by her Trust, she argues that it is an asset of the Trust and not regularly dispersed income. Larrabee Aff. 2. A separate payment appears to have been made for car insurance totaling $3,549. Trust Expenses 4. The HUD Occupancy Handbook provides a chart of deductible medical expenses ("not exhaustive") which includes the cost of transportation, like bus fare or car mileage, to and from medical treatment, but does not list the cost of an actual vehicle. HUD Handbook, Ex. 5-3. The Court also found the IRS' list of medical and dental expense deductions, which only provided for the cost of transportation, like "actual fare for a taxi, bus, train, or ambulance," or for "medical transportation by personal car, the amount of your actual out-of-pocket expenses such as for gas and oil, or the amount of the standard mileage rate for medical expenses, plus the cost of tolls and parking fees." IRS Topic 502-Medical and Dental Expenses, IRS (Dec. 11, 2014), http://irs.gov/taxtopics/tc502.html. DeCambre's automobile purchase likely cannot fall under these medical expenses, which seem to be limited to public transportation and mileage costs, but the fact that title is held by her Trust as an asset should preclude it from being counted towards income. See 24 C.F.R. § 5.603(b)(2) ("In cases where a trust fund has been established and the trust is not revocable by, or under the control of, any member of the family or household, the value of the trust fund will not be considered an asset so long as the fund continues to be held in trust.").

What the HUD and IRS guidelines on deductible medical expenses do not cover are the costs to maintain a telephone line. This expense, however, seems to fall under the acceptable expenditures outlined by the Third Circuit, and could be considered a non-extravagant spending under the same reasoning allowing spending on television and Internet.

More difficult is the issue of DeCambre's cat veterinary expenses, totaling approximately $6,000. Tr. 34-35 ("she had some sick cats and . . . they became ill with cancer. . . . so there were a bunch of expenditures on these sick cats . . . . They were very expensive cats."). The HUD Occupancy Handbook covers the cost of "assistance animal and its upkeep" as a deductible medical expense, HUD Handbook, Ex. 5-3, and HUD defines assistance animals as "animals that are used to assist, support, or provide service to persons with disabilities" including "providing emotional support to persons with disabilities who have a disability-related need for such support," id. at Glossary 4. Noting that there is established HUD and FHA guidance on support animals, covering the right to have a service animal within a dwelling and veterinary costs of an animal, the BHA ought apply this guidance to determine whether DeCambre's cats could be categorized as emotional support animals, allowing their veterinary costs to be counted towards deductible medical expenses in annual income calculation. No such analysis was provided as to veterinary costs in the written decision, and should be provided on remand.

While this Court does not provide "a brand new hearing or evaluate the facts de novo," Gammons, 523 F. Supp. 2d at 85, it is clear that the BHA could perform a more thorough determination of each potentially excludable expense proffered by DeCambre. By returning this matter to the BHA, the Court urges the BHA to use some of the guidance provided above in making their Section 8 income determinations.

D. Motion for Preliminary Injunction

Because the Court upholds the BHA's determination in terminating DeCambre's Section 8 eligibility, a preliminary injunction mandating that the BHA stop including trust expenses towards her income calculation does not follow. Under First Circuit law, a plaintiff seeking a temporary restraining order or preliminary injunction must demonstrate: (1) a substantial likelihood of success on the merits, (2) a significant risk of irreparable harm if the injunction is withheld, (3) a favorable balance of hardships, and (4) a fit between the injunction and the public interest. Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 120 (1st Cir. 2003). "The sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir.2002). Based upon the Court's rulings on DeCambre's discrimination and section 1983 claims, DeCambre does not meet a showing of likelihood of success on the merits of her federal due process and discrimination claims, and therefore the motion is denied.

III. CONCLUSION

Understanding that HUD regulation and existing case law provide deference to the fact findings and conclusions of local housing authorities, this Court affirms the decision of the BHA in their income and rent calculations for DeCambre in regards to her Section 8 housing vouchers. Based upon its reasonable interpretation and application of HUD provisions defining special needs trusts principal in the determination of annual income, it can be concluded that DeCambre's income, as calculated by the BHA, exceeded the outlined limits of Section 8 housing eligibility.

At the same time, this case demonstrates the serious problem that beneficiaries of irrevocable trusts face; in particular, those that seek to pour lump-sum settlement funds into irrevocable trusts. But until the rules and regulations are clarified, public housing authorities should provide clear guidance and instruction for potential tenants with regard to their financial planning and spending. A more thorough and thoughtful analysis is required by public housing authorities when determining Section 8 eligibility, until further guidance is provided by the HUD.

The motion for preliminary injunction is therefore DENIED, and DeCambre's appeal of her Section 8 eligibility is REMANDED to the BHA.

SO ORDERED.

[1] Rather than holding oral arguments on the motion for preliminary injunction, the parties agreed to have a case stated hearing, delivering final arguments on the merits of the case and allowing the Court to make a judgment based on the record. See TLT Const. Corp. v. RI, Inc., 484 F. 3d 130, 135 n.6 (1st Cir. 2007) ("In a case stated, the parties waive trial and present the case to the court on the undisputed facts in the pre-trial record. The court is then entitled to "engage in a certain amount of factfinding, including the drawing of inferences.") (citing United Paperworkers Int'l Union Local 14 v. Int'l Paper Co., 64 F.3d 28, 31 (1st Cir.1995)).

[2] Pursuant to HUD provisions, any person with a disability is afforded the right to request reasonable accommodation from housing providers to change its "rules, policies, practices, or services so that a person with a disability will have an equal opportunity to use and enjoy a dwelling unit or common space." Disability Rights in Housing, U.S. Department of Housing and Urban Development (Oct. 30, 2014), http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_ho using_equal_opp/disabilities/inhousing.

[3] See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) ("The starting point in every case involving construction of a statute is the language itself."); see also Laracuente v. Chase Manhattan Bank, 891 F. 2d 17, 22 (1st Cir. 1989) ("The ordinary meaning of words expresses the underlying legislative purpose of the statute.") (internal citations omitted).

[4] The Finley court explains that this statutory reading comports with HUD's treatment of interest and principal. Finley Op. 6-7 (citing to the HUD Housing Choice Voucher Guidebook, AR 161-200, available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11749.pd f). Under Exhibit 5-2 of the Guidebook, a lump-sum settlement is considered a family asset and interest earned on the settlement is counted as income. Id. at 7. An irrevocable trust, however, is not categorized as an asset, so interest generated by the trust is only counted as income when it is distributed to the beneficiary, under section 5.603(b)(2). Id. As a result, sections 5.609(c) and 5.603(b)(3) "place[] interest distributions from an irrevocable trust on the same level field with distributions from family assets, including settlements. It also means that distribution of principal from an irrevocable trust, which is not a family asset, is not annual income where the principal was excluded from annual income under section 5.609(c)(3)." Id.

[5] Congress has expressly delegated rule-making authority to HUD to establish procedures for income verification. See McGann v. United States, No. 98 CIV. 2192 SAS, 1999 WL 173596, at *6 (S.D.N.Y. Mar. 29, 1999) aff'd, 205 F.3d 1323 (2d Cir. 1999) ("Here, Congress delegated rule-making authority to HUD to establish procedures for income verification in 42 U.S.C. § 1437f(k) (1994) and HUD promulgated regulations to define and verify income in 24 C.F.R. §§ 5.609, 5.617 (1998).").

[6] This Court is not the first to note this special needs trust problem. Multiple legal publications and guidebooks caution trustees and attorneys on structuring special needs trust to protect beneficiaries from losing their federal housing benefits. See generally Thomas D. Begley, Jr. & Andrew H. Hook, Drafting Issues in Self-Settled Special Needs Trusts, Elder Law 2004, 31 ESTPLN 510, 514 ("[d]rafting a special needs trust is a complex undertaking involving a knowledge of public benefit law and many considerations pertaining to the beneficiary. These trusts do not readily lend themselves to forms and must be individually tailored to each situation."); Gregory Wilcox, Esq., Special Needs Trust v. Section 8, California Advocates For Nursing Home Reform (Nov. 1, 2014), http://www.canhr.org/publications/newsletters/NetNews/Feature_Article/NN_2007Q4.htm (noting that "it is becoming increasingly apparent that most SNTs often overlook a major problem . . . . In contrast to [Social Security] and [Medicaid], the Section 8 housing assistance program has no language in its rules that expressly recognizes and protects SNTs.").

[7] Under Medicaid regulations, special needs trusts are defined so 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." 42 U.S.C. § 1396p(d)(4)(A). No such provision exists under the HUD regulations on annual income.

[8] For context, to become eligible for Medicaid, a recipient must meet the asset requirement for Supplemental Security Income. See 42 U.S.C. § 1382(a)(1) (defining income and asset requirements for disabled individuals). DeCambre currently receives both.

Medicaid and Social Security regulations explicitly exclude special needs trusts from being counted towards a beneficiary's resources. See 42 U.S.C. § 1396p(d)(4)(A) ("This subsection shall not apply to . . . [a] trust containing the assets of an individual under age 65 who is disabled . . . and which is established for the benefit of such individual by a . . . court."); see also 42 U.S.C. § 1396p(c)(2)(B)(iv) (preserving eligibility for medical assistance if assets were transferred to a special needs trust). HUD does not have an asset-based (nor disability-based) eligibility requirement for Section 8, but requires that a certain portion of a family's assets be counted towards annual income. See 24 CFR § 5.603(b) (defining net family assets); see also 24 CFR § 5.609(b) (listing what is included in annual income, including the "[interest, dividends, and other net income of any kind from real or personal property.").

PRE-CONFERENCE:

Pooled Trust Intensive

Wednesday, October 14, 2015
9:30 A.M. – 10:20 A.M.

SSA Review of SNTs

Presenter:
Shemeaka Woodard
TXVI Operations Supervisor
SSI Unit

- Materials
- PowerPoint

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

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

Special Needs Trust

Shemeaka Woodard
Operations Supervisor
Social Security Administration

Background

- As of January 1, 2000 the laws on trusts changed. The following information applies to trust established on or after January 1, 2000.
  - Foster Care Independence Act of 1999(P.L. 106-109). Section 205
  - Exceptions in Section 1613(e) of the Act
- What is a trust?
  - A trust is a legal arrangement regulated by State law in which property is held by one party to benefit another. A trust may contain the following:
    - Cash or liquid assets; and
    - Real or Personal Property that could be turned into cash.

How does a Trust affect an SSI Recipient?

- The trust will count as a Resource for a SSI Recipient.
- There are two types of trusts:
  - In the case of a Revocable trust, the whole trust is a resource.
  - In the case of an Irrevocable trust, if there are any circumstances under which payment could be made to benefit a recipient, the portion of the trust from which payment could be made is a resource to the recipient.
    - Assets used to establish a trust include:
      - Income
      - Resources
      - Property or payments in which a recipient is entitled but do not receive.

Changes in Law...

- Certain Trusts established on or after 1/1/2000 refer to P.L. 106-109
- Trusts established with assets prior to 1/1/2000 refer to SI 01120.200
- Trusts established with assets prior to 1/1/2000, but added to or augmented on or after 1/1/2000 are still considered established prior to 1/1/2000.

Trust Provisions

- Purpose for which the trust was established;
- Whether trustees have or exercise any discretion under the trust;
- Any restrictions on when or whether distributions may be made from the trust; or
- Any restrictions on the use of distributions from the trust.

Distributions

- Payments to an Individual
- Payments on behalf of or for the benefit of an individual
- Payment to or for the benefit of another
- Disbursements which are Income
- Disbursements which result in In-Kind Support and Maintenance
- Disbursements which are not Income
- Disbursements for credit card bills
- Gift Cards and Gift Certificates
- Reimbursements to a third party

Legal Instrument or Device

- Be cognizant of legal instruments or devices similar to a trust, but may not called a trust under State Law.
- Types of Legal Instruments or Devices:
  - Escrow Accounts
  - Investment Accounts
  - Conservatorship Accounts
  - Pension Funds
  - Annuities
  - Certain Uniform Transfers to Minors; and
  - Other similar devices managed by an individual or entity with fiduciary obligations

References

- Policy Manuals may be located at www.socialsecurity.gov
- Policy Manuals relating to trusts:
  - SI 01120.200
  - SI 01120.201
  - SI 01150.100
  - SI 01120.202
  - SI 01120.203

PRE-CONFERENCE:

Pooled Trust Intensive

Wednesday, October 14, 2015
11:30 A.M. – 12:15 P.M.

ABLE Accounts and More: What Pooled Trust Administrators Need to Know

Presenter:
Stephen W. Dale
Attorney at Law
The Dale Law Firm, PC
Pacheco, CA

- Texas Session Bill 1664
- California Legislature Assembly Bill 449
- ABLE Act Proposed IRS Regs
- PowerPoint

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

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

S.B. No. 1664

AN ACT

relating to the establishment of the Texas Achieving a Better Life Experience (ABLE) Program; authorizing the imposition of fees.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 54.602(b), Education Code, is amended to read as follows:

(b) The board shall administer the following programs:

(1) the prepaid higher education tuition program established under this subchapter; [~~and~~]

(2) the higher education savings plan established under Subchapter G;

(3) the prepaid tuition unit undergraduate education program established under Subchapter H;

(4) the Texas Save and Match Program established under Subchapter I; and

(5) the Texas Achieving a Better Life Experience Program established under Subchapter J.

SECTION 2. Chapter 54, Education Code, is amended by adding Subchapter J to read as follows:

SUBCHAPTER J. TEXAS ACHIEVING A BETTER LIFE EXPERIENCE (ABLE) PROGRAM

Sec. 54.901. PURPOSES OF PROGRAM. The purposes of this subchapter are as follows:

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

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

Sec. 54.902. DEFINITIONS. In this subchapter:

(1) "ABLE account" has the meaning assigned by Section 529A, Internal Revenue Code.

(2) "ABLE program" or "program" means the Texas Achieving a Better Life Experience Program created under this subchapter.

(3) "Board" means the Prepaid Higher Education Tuition Board established under Section 54.602.

(4) "Designated beneficiary" means a resident of this state with a disability who is an eligible individual and named as the designated beneficiary of an ABLE account.

(5) "Eligible individual" means a person who has certified to the board that the person is eligible to participate in the ABLE program.

(6) "Financial institution" means a bank, a trust company, a depository trust company, an insurance company, a broker-dealer, a registered investment company or investment manager, the Texas Safekeeping Trust Company, or another similar financial institution authorized to transact business in this state.

(7) "Internal Revenue Code" means the Internal Revenue

Code of 1986.

(8) "Participant" means a designated beneficiary or the parent or custodian or other fiduciary of the beneficiary who has entered into a participation agreement under this subchapter.

(9) "Participation agreement" means an agreement between a participant and the board under this subchapter that conforms to the requirements prescribed by this subchapter.

(10) "Qualified disability expenses" means any expenses related to the eligible individual's blindness or disability that are made for the benefit of an eligible individual who is the designated beneficiary, and includes expenses for education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, oversight and monitoring, a funeral and burial, and other expenses approved under federal regulations adopted under Section 529A, Internal Revenue Code.

(11) "Texas ABLE savings plan account" means the Texas ABLE savings plan account created under Section 54.903.

Sec. 54.903. CREATION OF PROGRAM AND ACCOUNT; ADMINISTRATION. (a) The Texas Achieving a Better Life Experience (ABLE) Program is created under this subchapter. The Texas ABLE savings plan account is established as a trust fund outside of the state treasury.

(b) The board shall administer the ABLE program.

(c) The board, the office of the comptroller, and any manager or other contractor that contracts with the board to provide services under this subchapter are not covered entities for purposes of Chapter 181, Health and Safety Code.

Sec. 54.904. POWERS AND DUTIES OF BOARD. (a) To establish and administer the ABLE program, the board shall:

(1) develop and implement the program;

(2) adopt rules and establish policies and procedures to implement this subchapter to:

(A) permit the program to qualify as a qualified ABLE program under Section 529A, Internal Revenue Code;

(B) make changes to the program as necessary for the participants in the program to obtain or maintain federal income tax benefits or treatment provided by Section 529A, Internal Revenue Code, and exemptions under federal securities laws; and

(C) make changes to the program as necessary to ensure the program's compliance with all other applicable laws and regulations;

(3) either directly or through a contractual arrangement for investment or plan manager services with a financial institution or plan manager or another qualified entity, develop and provide information for participants and their families necessary to establish and maintain an ABLE account;

(4) enter into agreements with any financial institution or any state or federal agency or contractor or other entity as required to administer the program under this subchapter;

(5) enter into participation agreements with participants;

(6) solicit and accept any gifts, grants, legislative appropriations, and other funds from the state, any unit of federal, state, or local government, or any other person, firm, partnership, or corporation;

(7) invest participant funds in appropriate investment instruments; and

(8) make provision for the payment of costs of administering the program.

(b) The board has all powers necessary or proper to carry out its duties under this subchapter and to effectuate the purposes of this subchapter, including the power to:

(1) sue and be sued;

(2) enter into contracts and other necessary instruments;

(3) enter into agreements or other transactions with the United States, state agencies, and other entities as necessary;

(4) appear on its own behalf before governmental agencies;

(5) contract for necessary goods and services, including specifying in the contract duties to be performed by the provider of a good or service that are a part of or are in addition to the person's primary duties under the contract;

(6) contract with another state that administers a qualified ABLE program as authorized by Section 529A, Internal Revenue Code, to provide residents of this state with access to a qualified ABLE program;

(7) engage the services of private consultants, trustees, records administrators, managers, legal counsel, auditors, and other appropriate parties or organizations for administrative or technical assistance;

(8) participate in any government program;

(9) impose fees and charges;

(10) develop marketing plans or promotional materials or contract with a consultant to market the program;

(11) make reports;

(12) purchase liability insurance covering the board and employees and agents of the board;

(13) make changes to the program as necessary for the participants in the program to obtain or maintain federal income tax benefits or treatment provided by Section 529A, Internal Revenue Code, and exemptions under federal securities laws; and

(14) establish other policies, procedures, and eligibility criteria to implement this subchapter.

Sec. 54.9045. COLLECTION OF FEES. The board shall collect administrative fees and service charges in connection with any agreement, contract, or transaction relating to the program in amounts not exceeding the amount necessary to recover the cost of establishing and maintaining the program.

Sec. 54.905. INVESTMENT OF FUNDS. (a) All money paid by a participant in connection with a participation agreement shall be:

(1) deposited into an individual ABLE account held on behalf of that participant in the Texas ABLE savings plan account; and

(2) promptly invested by the board.

(b) The board at least annually shall establish and review the asset allocation and selection of the underlying investments of the ABLE program.

(c) The board may delegate to duly appointed financial institutions authority to act on behalf of the board in the investment and reinvestment of all or part of the funds and may also delegate to those financial institutions the authority to act on behalf of the board in the holding, purchasing, selling, assigning, transferring, or disposing of any or all of the securities and investments in which the funds in the Texas ABLE savings plan account have been invested, as well as the proceeds from the investment of those funds.

(d) In delegating investment authority to financial institutions, the board may authorize the pooling of funds from the ABLE accounts with other funds administered by the board to

maximize returns for participants. If funds from the ABLE accounts are pooled with other funds administered by the board, the board shall track, monitor, report, and record separately all investment activity related to the ABLE accounts, including any earnings and fees associated with each individual ABLE account.

(e) The board may select one or more financial institutions to serve as custodian of all or part of the program's assets.

(f) In the board's discretion, the board may contract with one or more financial institutions to serve as plan manager and to invest the money in ABLE accounts.

(g) A contract between the board and a financial institution to act as plan manager under this subchapter may be for a term of up to five years and may be renewable.

(h) In exercising or delegating investment powers and authority, members of the board shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision. A member of the board is not liable for any action taken or omitted with respect to the exercise of, or delegation of, those powers and authority if the member discharged the duties of the member's position in good faith and with the degree of diligence, care, and skill that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims.

(i) In administering this subchapter, the board is subject to the board's ethics policy adopted under Section 54.6085.

Sec. 54.906. TREATMENT OF ASSETS. (a) The assets of the ABLE program shall at all times be preserved, invested, and spent only for the purposes provided by this subchapter and in accordance with the participation agreements entered into under this subchapter.

(b) Except as provided by Section 529A, Internal Revenue Code, the state does not have a property right in the assets of the ABLE program.

Sec. 54.9065. EXCLUSION OF ABLE ACCOUNT ASSETS FROM CERTAIN BENEFIT ELIGIBILITY DETERMINATIONS. Notwithstanding any other provision of state law that requires consideration of the financial circumstances of an applicant for assistance or a benefit provided under that law, the agency making the determination of eligibility for the assistance or benefit may not consider the amount in the applicant's ABLE account, including earnings on that amount, and any distribution for qualified disability expenses in determining the applicant's eligibility to receive and the amount of the assistance or benefit with respect to the period during which the individual maintains the ABLE account.

Sec. 54.907. EXEMPTION FROM SECURITIES LAWS. An ABLE account is not a security within the meaning of the term as defined by Section 4, The Securities Act (Article 581-4, Vernon's Texas Civil Statutes), and is exempt from the provisions of The Securities Act (Article 581-1 et seq., Vernon's Texas Civil Statutes).

Sec. 54.908. PARTICIPATION AGREEMENTS. (a) Under the ABLE program, the board may enter into participation agreements with participants on behalf of designated beneficiaries.

(b) A participation agreement may include the following terms:

(1) the requirements and applicable restrictions for:

(A) opening an ABLE account;

(B) making contributions to an ABLE account; and

(C) directly or indirectly, directing the investment of the contributions or balance of the ABLE account;

(2) the eligibility requirements for a participant to enter into a participation agreement and the rights of that participant;

(3) the administrative fee and other fees and charges applicable to an ABLE account;

(4) the terms and conditions under which an ABLE account or participation agreement may be modified, transferred, or terminated;

(5) the method of disposition of abandoned ABLE accounts; and

(6) any other terms and conditions the board considers necessary or appropriate, including those necessary to conform the ABLE account to the requirements of Section 529A, Internal Revenue Code, or other applicable federal law.

(c) The participation agreement may be amended throughout the term of the agreement, including to allow a participant to increase or decrease the level of participation and to change the designated beneficiary or other matters authorized by this section and Section 529A, Internal Revenue Code.

(d) If the board finds a participant has made a material misrepresentation in the application for a participation agreement or in any communication regarding the ABLE program, the board may liquidate the participant's ABLE account. If the board liquidates an ABLE account under this subsection, the participant is entitled to a refund, subject to any charges or fees provided by the participation agreement and the Internal Revenue Code.

Sec. 54.9085. ENCUMBRANCE OR TRANSFER OF ACCOUNT PROHIBITED. (a) An ABLE account may not be assigned for the benefit of creditors, used as security or collateral for any loan, or otherwise subject to alienation, sale, transfer, assignment, pledge, encumbrance, or charge.

(b) Notwithstanding Subsection (a), the state is a permissible creditor upon the death of a designated beneficiary for the purposes set forth in Section 529A, Internal Revenue Code.

Sec. 54.909. USE OF FUND ASSETS. The assets of the program may only be used to:

(1) make distributions to designated beneficiaries;

(2) pay the costs of program administration and operations;

(3) make refunds for cancellations, excess contributions, liquidation under Section 54.908(d), and death, in accordance with a computation method determined by the board;

(4) roll over funds to another ABLE account to the extent authorized by Section 529A, Internal Revenue Code; and

(5) make distributions to the state as authorized by Section 529A, Internal Revenue Code.

Sec. 54.910. DESIGNATED BENEFICIARY. (a) The participant is the designated beneficiary and the owner of the ABLE account except as described by Subsection (b) and as otherwise permitted by Section 529A, Internal Revenue Code.

(b) If the designated beneficiary of the account is a minor or has a custodian or other fiduciary appointed for the purpose of managing the minor's financial affairs, the parent or custodian or other fiduciary of the beneficiary may serve as the participant if that form of ownership is permitted or not prohibited by Section 529A, Internal Revenue Code.

(c) A designated beneficiary may own only one ABLE account, and each ABLE account may have only one owner, except as otherwise permitted by Section 529A, Internal Revenue Code.

Sec. 54.911. VERIFICATION UNDER OATH. The board may require a participant to verify under oath:

(1) the participant's certification as an eligible individual;

(2) the participant's selection to change a designated beneficiary;

(3) the participant's selection to cancel a participation agreement; and

(4) any other information the board may require.

Sec. 54.912. CANCELLATION. (a) A participant may cancel a participation agreement at will.

(b) Each participation agreement must provide that the agreement may be canceled on the terms and conditions and on payment of applicable fees and costs as provided by rule.

Sec. 54.913. REPORTS. (a) The board shall comply with the reporting requirements in Section 529A, Internal Revenue Code.

(b) The board shall report financial information related to the ABLE program in an annual financial report in accordance with the comptroller's requirements and guidelines for state agencies.

(c) The board shall include financial information for the ABLE program in the board's annual report posted on the board's website.

(d) The board shall prepare any other reports required by state or federal rules and regulations.

Sec. 54.914. CONFIDENTIALITY OF RECORDS. (a) Except as otherwise provided by this section, all information relating to the program is public and subject to disclosure under Chapter 552, Government Code.

(b) Information relating to a prospective or current participant or designated beneficiary or to a participation agreement, including any personally identifiable information, is confidential except that the board may disclose that information to:

(1) a participant regarding the participant's account; or

(2) a state or federal agency as necessary to administer the program or as required by Section 529A, Internal Revenue Code, or other federal or state requirements.

Sec. 54.915. PROGRAM LIMITATIONS. (a) Nothing in this subchapter or in any participation agreement entered into under this subchapter may be construed to guarantee that amounts saved under the program will be sufficient to cover the qualified disability expenses of a designated beneficiary.

(b) Nothing in this subchapter or in any participation agreement entered into under this subchapter may be construed to create any obligation of the state, any agency or instrumentality of the state, or a plan manager to guarantee for the benefit of a participant:

(1) the return of any amount contributed to an account;

(2) the rate of interest or other return on an account; or

(3) the payment of interest or other return on an account.

(c) The board by rule shall require that informational materials used in connection with a contribution to an ABLE account clearly indicate that the account is not insured by this state and that neither the principal deposited nor the investment return is guaranteed by the state.

Sec. 54.916. TERMINATION OR MODIFICATION OF PROGRAM. (a) If the comptroller determines that the ABLE program is not financially feasible, the comptroller shall notify the governor and the legislature and recommend that the board not administer an ABLE

program or that the program be modified or terminated. The program may be terminated only by the legislature.

(b) If the comptroller determines that the ABLE program is not financially feasible, the board may adjust the terms of participation agreements as necessary to ensure the financial feasibility of the program.

(c) If the legislature terminates the ABLE program, the balance of each ABLE account shall be paid to the participant, to the extent possible.

Sec. 54.917. ABLE PROGRAM ADVISORY COMMITTEE. (a) The ABLE program advisory committee is established to review rules and procedures related to the ABLE program, to provide guidance, suggest changes, and make recommendations for the administration of the program, and to provide assistance as needed to the board and comptroller during the creation of the program.

(b) The comptroller shall appoint at least five and not more than seven members to the advisory committee, including at least one member from each of the following groups:

(1) persons with a disability who qualify for the program;

(2) family members of a person with a disability who qualifies for the program;

(3) representatives of disability advocacy organizations; and

(4) representatives of the financial community.

(c) The comptroller shall appoint a presiding officer.

(d) The advisory committee shall meet quarterly or more frequently as the presiding officer determines is necessary to carry out the responsibilities of the committee.

(e) A member of the advisory committee is not entitled to compensation or reimbursement for travel expenses.

(f) Chapter 2110, Government Code, does not apply to this section.

(g) This section expires and the advisory committee is abolished December 1, 2019.

SECTION 3. If before implementing any provision of this Act a state agency determines that a waiver or authorization from a federal agency is necessary for implementation of that provision, the agency affected by the provision shall request the waiver or authorization and may delay implementing that provision until the waiver or authorization is granted.

SECTION 4. The Prepaid Higher Education Tuition Board may begin enrollment in the ABLE program as soon as reasonably practical to allow sufficient time for successful development and implementation of the ABLE program.

SECTION 5. Not later than December 1, 2015, the comptroller shall appoint the members of the ABLE program advisory committee as required by Section 54.917, Education Code, as added by this Act.

SECTION 6. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2015.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 1664 passed the Senate on April 15, 2015, by the following vote: Yeas 31, Nays 0; and that the Senate concurred in House amendments on May 28, 2015, by the following vote: Yeas 31, Nays 0.

_____
Secretary of the Senate

I hereby certify that S.B. No. 1664 passed the House, with amendments, on May 24, 2015, by the following vote: Yeas 138, Nays 1, two present not voting.

_____
Chief Clerk of the House

Approved:

_____
Date

_____
Governor

AMENDED IN SENATE JULY 1, 2015

AMENDED IN ASSEMBLY MAY 5, 2015

AMENDED IN ASSEMBLY MARCH 19, 2015

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL No. 449

Introduced by Assembly Member Irwin
(Principal coauthor: Assembly Member Wilk)
(Principal ~~coauthor: Senator~~ *coauthors: Senators Hertzberg and* Pavley)
(Coauthors: Assembly Members Baker, Brown, Chávez, Cristina Garcia, Jones, Maienschein, Steinorth, and Waldron)
(Coauthors: Senators Allen, Anderson, and Vidak)

February 23, 2015

An act to add ~~and repeal~~ Sections 17140.4 and 23711.4 ~~of~~ *to* the Revenue and Taxation Code, and to add ~~and repeal~~ Chapter 15 (commencing with Section 4875) ~~of~~ *to* Division 4.5 of the Welfare and Institutions Code, relating to ~~taxation.~~ *taxation, and making an appropriation therefor.*

LEGISLATIVE COUNSEL'S DIGEST

AB 449, as amended, Irwin. Income taxation: savings plans: Qualified ABLE Program.

The Personal Income Tax Law and the Corporation Tax Law, in specified conformity with federal income tax laws regarding qualified tuition programs, provide that distributions from a qualified tuition program are generally not included in the income of the donor or the beneficiary, as specified.

Existing federal law, the Stephen Beck Jr., Achieving a Better Life Experience Act of 2014 (ABLE Act), for taxable years beginning on

or after January 1, 2015, encourages and assists individuals and families to save private funds for the purpose of supporting persons with disabilities to maintain their health, independence, and quality of life by excluding from gross income distributions used for qualified disability expenses by a beneficiary of a Qualified ABLE Program established and maintained by a state, as specified.

This bill would, for taxable years beginning on or after January 1, 2016, ~~and before January 1, 2021,~~ conform to these federal income tax law provisions relating to the ABLE Act under the Personal Income Tax Law and the Corporation Tax Law, as provided. The bill would also establish in state government a Qualified ABLE Program and the ~~Qualified~~ ABLE Fund for purposes of implementing the federal ABLE Act. *The bill would create the ABLE Act Board. The bill would authorize the Able Fund to accept moneys from ABLE Accounts, to be segregated into the program account and the administrative account. The bill would continuously appropriate funds in the accounts to the board for specified purposes, thereby making an appropriation.* The bill would require the Treasurer to administer the program in compliance with the requirements of the federal ABLE Act. ~~This bill would repeal the Qualified ABLE Program as of January 1, 2022.~~

Vote: majority. Appropriation: ~~no~~ *yes*. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. It is the intent of the Legislature to further the purposes of the federal Stephen Beck Jr., Achieving a Better Life Experience Act to ensure that people with disabilities may save for the future to achieve greater independence.

SEC. 2. This act shall be known, and may be cited, as the California Achieving a Better Life Experience Act.

SEC. 3. Section 17140.4 is added to the Revenue and Taxation Code, to read:

17140.4. For taxable years beginning on or after January 1, 2016, ~~and before January 1, 2021,~~ Section 529A of the Internal Revenue Code, relating to qualified ABLE programs, added by Section 102 of Division B of Public Law 113-295, shall apply, except as otherwise provided.

(a) Section 529A of the Internal Revenue Code is modified as follows:

(1) By substituting the phrase "under this part and Part 11 (commencing with Section 23001)" in lieu of the phrase "under this subtitle."

(2) By substituting "Article 2 (commencing with Section 23731)" in lieu of "Section 511."

(b) A copy of the report required to be filed with the Secretary of the Treasury under Section 529A(d) of the Internal Revenue Code, relating to reports, shall be filed with the Franchise Tax Board at the same time and in the same manner as specified in that section.

~~(c) This section shall remain in effect only until December 1, 2021, and as of that date is repealed.~~

SEC. 4. Section 23711.4 is added to the Revenue and Taxation Code, to read:

23711.4. For taxable years beginning on or after January 1, 2016, ~~and before January 1, 2021,~~ Section 529A of the Internal Revenue Code, relating to qualified ABLE programs, added by Section 102 of Division B of Public Law 113-295, shall apply, except as otherwise provided.

(a) Section 529A of the internal Revenue Code is modified as follows:

(1) By substituting the phrase "under Part 10 (commencing with Section 17001) and this part" in lieu of the phrase "under this subtitle."

(2) By substituting "Article 2 (commencing with Section 23731)" in lieu of "Section 511."

(b) A copy of the report required to be filed with the Secretary of the Treasury under Section 529A(d) of the Internal revenue Code, relating to reports shall be filed with the Franchise Tax Board at the same time and in the same manner as specified in that section.

~~(c) This section shall remain in effect only until December 1, 2021, and as of that date is repealed.~~

SEC. 5. Chapter 15 (commencing with Section 4875) is added to Division 4.5 of the Welfare and Institutions Code, to read:

CHAPTER 15. QUALIFIED ABLE PROGRAM

4875. For purposes of this chapter:

(a) "ABLE account" or "account" means the account an eligible individual makes contributions to pursuant to this chapter for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account.

(b) "ABLE Fund" or "fund" means the fund established by this chapter for purposes of implementing the federal ABLE Act.

(c) "Designated beneficiary" means the eligible individual who established an ABLE account and is the owner of the account.

(d) "Eligible individual" means an individual who is eligible under the program for a taxable year if during that taxable year both of the following criteria are met:

(1) The individual is entitled to benefits based on blindness or disability under Title II or XVI of the federal Social Security Act, and that blindness or disability occurred before the date on which the individual attained 26 years of age.

(2) A disability certification, as defined in the federal ABLE Act, with respect to the individual is filed pursuant to the requirements set forth in the federal ABLE Act.

(e) "Federal ABLE Act" means the federal Stephen Beck Jr., Achieving a Better Life Experience Act of 2014.

(f) "Qualified ABLE Program" or "program" means the program established by this chapter to implement the federal ABLE act pursuant to Section 529A of the Internal Revenue Code.

(g) "Qualified disability expenses" means any expenses related to the eligible individual's blindness or disability that are made for the benefit of an eligible individual who is the designated beneficiary, including expenses related to education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses, which are approved by the Secretary of the Treasury under regulations and consistent with the purposes of the federal ABLE Act.

4876. There is hereby created the ABLE Act Board that consists of the Treasurer, the Director of Finance, the State Controller, the Director of Developmental Services, the chairperson of the State Council on Developmental Disabilities, or their designees.

~~4876.~~

4877. (a) There is hereby established in state government a Qualified ABLE Program and the ~~Qualified~~ ABLE Fund for purposes of implementing the federal ABLE Act pursuant to Section 529A of the Internal Revenue Code.

(b) The Qualified ABLE Program shall be administered by the Treasurer, who shall be responsible for ensuring that the program is administered in compliance with the requirements of the federal ABLE Act.

(c) (1) The ABLE Fund shall accept moneys from all ABLE accounts.

(2) The Able Act Board shall segregate moneys received by the ABLE Fund into two accounts, which shall be identified as the program account and the administrative account.

(A) Notwithstanding Section 13340 of the Government Code, the program account is hereby continuously appropriated, without regard to fiscal years, to the ABLE Act Board for the purposes specified in this act.

(B) Notwithstanding Section 13340 of the Government Code, the administrative account is hereby continuously appropriated, without regard to fiscal years, to the ABLE Act Board for administration of the act. Administrative costs shall not exceed 1 percent of the incoming funds for the fiscal year.

(d) Funding for startup and first-year administrative costs shall be appropriated from the General Fund in the annual Budget Act. The board shall repay, within five years, the amount appropriated, plus interest calculated at the rate earned by the Pooled Money Investment Account. Necessary administrative costs in future years shall be paid out of the administrative fund pursuant to subparagraph (B) of paragraph (2) of subdivision (c).

~~4877.~~

4878. Under the program, a person may make contributions for a taxable year, for the benefit of an individual who is an eligible individual for that taxable year, to an ABLE account that is established for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account, if both of the following criteria are met:

(a) The designated beneficiary is limited to one ABLE account for purposes of this chapter.

(b) The ABLE account is established only for a designated beneficiary who is a resident of this state.

~~4878.~~

4879. Notwithstanding any other law, moneys in, contributions to, and any distribution for qualified disability expenses from, an ABLE account, not to exceed one hundred thousand dollars ($100,000), shall not count toward determining eligibility for a state or local means-tested program.

~~4879.~~

4880. (a) The Treasurer may adopt regulations to implement this chapter.

(b) The Treasurer shall adopt regulations to track all ABLE accounts in California.

~~4880. This chapter shall remain in effect only until January 1, 2022, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2022, deletes or extends that date.~~

O

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 25, 26, and 301

[REG-102837-15]

RIN 1545-BM68

Guidance under Section 529A: Qualified ABLE Programs

AGENCY: Internal Revenue Service (IRS), Treasury.

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

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

requirements. This document also provides notice of a public hearing on these proposed regulations.

DATES: Comments must be received by [**INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. Outlines of topics to be discussed at the public hearing scheduled for October 14, 2015, at 10 am, must be received by [**INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-102837-15), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-102837-15), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at http://www.regulations.gov (IRS REG-102837-15). The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

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

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by [**INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

Comments are specifically requested concerning:

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

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

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

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

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

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

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

Estimated number of recordkeepers: 10,050.

Estimated average annual burden hours per recordkeeper: 1.6 hours.

Estimated total annual recordkeeping burden: 16,080.

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

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

Background

The Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act of 2014, enacted on December 19, 2014, as part of The Tax Increase Prevention Act of 2014 (Public Law 113-295), added section 529A to the Internal Revenue Code. Congress recognized the special financial burdens borne by families raising children with disabilities and the fact that increased financial needs generally continue throughout the disabled person's lifetime. Section 101 of the ABLE Act confirms that one of the purposes of the Act is to "provide secure funding for disability-related expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits" otherwise

available to those individuals, whether through private sources, employment, public programs, or otherwise. Prior to the enactment of the ABLE Act, various types of tax-advantaged savings arrangements existed, but none adequately served the goal of promoting saving for these financial needs. Section 529A allows the creation of a qualified ABLE program by a State (or agency or instrumentality thereof) under which a separate ABLE account may be established for a disabled individual who is the designated beneficiary and owner of that account. Generally, contributions to that account are subject to both an annual and a cumulative limit, and, when made by a person other than the designated beneficiary, are treated as non-taxable gifts to the designated beneficiary. Distributions made from an ABLE account for qualified disability expenses of the designated beneficiary are not included in the designated beneficiary's gross income. The earnings portion of distributions from the ABLE account in excess of the qualified disability expenses is includible in the gross income of the designated beneficiary. An ABLE account may be used for the long-term benefit and/or short-term needs of the designated beneficiary.

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

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

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

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

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

Explanation of Provisions

Qualification as an ABLE program

The proposed regulations provide guidance on the requirements a program must satisfy in order to be a qualified ABLE program described in section 529A. Specifically, in addition to other requirements, the program must: be established and maintained by a State or a State's agency or instrumentality; permit the establishment of an ABLE account only for a designated beneficiary who is a resident of that State, or a State contracting with that State for purposes of the ABLE program; permit the establishment of an ABLE account only for a designated beneficiary who is an eligible individual; limit a designated beneficiary to only one ABLE account, wherever located; permit contributions to an ABLE account established to meet the qualified disability expenses of the account's designated beneficiary; limit the nature and amount of contributions that can be made to an ABLE account; require a separate accounting for the ABLE account of each designated

beneficiary with an ABLE account in the program; limit the designated beneficiary to no more than two opportunities in any calendar year to provide investment direction, whether directly or indirectly, for the ABLE account; and prohibit the pledging of an interest in an ABLE account as security for a loan.

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

Established and maintained

The proposed regulations provide that a program is established by a State, or its agency or instrumentality, if the program is initiated by State statute or regulation, or by an

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

Establishment of an ABLE account

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

The Treasury Department and the IRS recognize, however, that certain eligible individuals may be unable to establish an account themselves. Therefore, the proposed regulations clarify that, if the eligible individual cannot establish the account, the eligible individual's agent under a power of attorney or, if none, his or her parent or legal guardian may establish the ABLE account for that eligible individual. For purposes of these proposed regulations, because each of these individuals would be acting on behalf of the designated beneficiary, references to actions of the designated beneficiary, such as

opening or managing the ABLE account, are deemed to include the actions of any other such individual with signature authority over the ABLE account. The proposed regulations also provide that, consistent with Notice 2015-18, a person other than the designated beneficiary with signature authority over the account of the designated beneficiary may neither have, nor acquire, any beneficial interest in the account during the designated beneficiary's lifetime and must administer the account for the benefit of the designated beneficiary.

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

attained age 26.

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

While evidence of an individual's eligibility based on entitlement to Social Security benefits should be objectively verifiable, the sufficiency of a disability certification that an individual is an eligible individual for purposes of section 529A might not be as easy to establish. Nevertheless, the Treasury Department and the IRS wish to facilitate an eligible individual's ability to establish an ABLE account without undue delay. Therefore, the proposed regulations provide that an eligible individual must present the disability certification, accompanied by the diagnosis, to the qualified ABLE program to demonstrate eligibility to establish an ABLE account. The proposed regulations further

provide that the disability certification will be deemed to be filed with the Secretary once the qualified ABLE program has received the disability certification or a disability certification has been deemed to have been received under the rules of the qualified ABLE program, which information the qualified ABLE program, as discussed further below, will file with the IRS in accordance with the filing requirements under §1.529A-5(c)(2)(iv).

Disability determination

Consistent with section 529A(g)(4), the Treasury Department and the IRS have consulted with the Commissioner of Social Security regarding disability certifications and determinations of disability. For purposes of the disability certification, the proposed regulations provide that the phrase "marked and severe functional limitations" means the standard of disability in the Social Security Act for children claiming benefits under the Supplemental Security Income for the Aged, Blind, and Disabled (SSI) program based on disability, but without regard to the age of the individual. This phrase refers to a level of severity of an impairment that meets, medically equals, or functionally equals the listings in the Listing of Impairments (the listings) in appendix 1 of subpart P of 20 CFR part 404. (See 20 CFR 416.906, 416.924 and 416.926a). This listing developed and used by the Social Security Administration describes for each of the major body systems impairments that cause marked and severe functional limitations. Most body system sections are in two parts: an introduction, followed by the specific listings. The introduction contains information relevant to the use of the listings with respect to that body system, such as examples of common impairments in the body system and definitions used in the listings

for that body system. The introduction may also include specific criteria for establishing a diagnosis, confirming the existence of an impairment, or establishing that an impairment satisfies the criteria of a particular listing with respect to the body system. The specific listings that follow the introduction for each body system specify the objective medical and other findings needed to satisfy the criteria of that listing. Most of the listed impairments are permanent or expected to result in death, although some listings state a specific period of time for which an impairment will meet the listing.

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

Change in eligible individual status

The Treasury Department and the IRS recognize that there may be circumstances in which a designated beneficiary ceases to be an eligible individual but subsequently regains that status. Consequently, the Treasury Department and the IRS believe that it is appropriate to permit continuation of the ABLE account (albeit with some changes in the applicable rules) during the period in which a designated beneficiary is not an eligible individual as long as the designated beneficiary was an eligible individual when the account was established. Therefore, if at any time a designated beneficiary no longer meets the definition of an eligible individual, his or her ABLE account remains an ABLE account to which all of the provisions of the ABLE Act continue to apply, and no (taxable) distribution of the account balance is deemed to occur. However, the proposed regulations provide that, beginning on the first day of the taxable year following the taxable year in which the designated beneficiary ceased to be an eligible individual, no contributions to the ABLE account may be accepted. If the designated beneficiary subsequently again becomes an eligible individual, then additional contributions may be accepted subject to the applicable annual and cumulative limits. In this way, the Treasury Department and the IRS intend to prevent a deemed distribution of the ABLE account (and preserve the account's qualification as an ABLE account for all purposes) if, for example, the disease that caused the impairment goes into a temporary remission, and to preserve the ABLE account with its tax-free distributions for qualified disability expenses if the impairment resumes and once again qualifies the designated beneficiary as an eligible individual. Note that expenses will not be qualified disability expenses if they are incurred at a time when a designated beneficiary is neither disabled nor blind

within the meaning of §1.529A-1(b)(9)(A) or §1.529A-2(e)(1)(i).

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

Contributions to an ABLE account

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

To implement these requirements, the proposed regulations provide that a qualified ABLE program must return contributions in excess of the annual gift tax exclusion (excess contributions) to the contributor(s), along with all net income attributable to those excess contributions. Similarly, the proposed regulations also require the return of all contributions, along with all net income attributable to those contributions, that caused an ABLE account to exceed the limit established by the State for its qualified tuition program (excess aggregate contributions). If an excess contribution or excess aggregate contribution is returned to a contributor other than the designated beneficiary, the qualified ABLE program must notify the designated beneficiary of such return at the time of the return. The proposed regulations further

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

Application of gift tax to contributions to an ABLE account

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

give rise to a gift tax liability.

Contributions may be made by any person. The term person is defined in section 7701(a)(1) to include an individual, trust, estate, partnership, association, company, or corporation. Therefore, for purposes of section 529A(b)(1)(A), a person would include an individual and each of the entities described in section 7701(a)(1). Under section 2501(a)(1), the gift tax applies only to gifts by individuals, but it also applies to gifts made directly or indirectly. As a result, a gift made by a trust, estate, association, company, corporation, or partnership is treated as having been made by the owner(s) of that entity. For example, a gift from a corporation to a designated beneficiary is treated as a gift from the shareholders of the corporation to the designated beneficiary. See Example (1) of §25.2511-1(h). Accordingly, the proposed regulations provide that, for purposes of sections 529A(b)(1)(A) and 529A(c)(1)(C), a contribution by a corporation is treated as a gift by its shareholders and a contribution by a partnership is treated as a gift by its partners. This rule also applies to trusts, estates, associations, and companies. See section 2511 and §25.2511-1(c).

The legislative history of section 529A suggests that a "person" described in section 529A(b)(1)(A) includes the designated beneficiary of an ABLE account. See 160 CONG. REC. H7051, H8317, H8318, H8321, H8322 (2014). A person may transfer his or her property into an account, such as a bank account or a trust, for his or her benefit and retain dominion and control over the property transferred. Because an individual cannot make a transfer of property to himself or herself and a transfer of property is a fundamental requirement for a completed gift, this type of transfer from a person's own

property cannot be treated as a completed gift for tax purposes. See §25.2511-2(b) and (c). Therefore, the proposed regulations provide that any contribution by a designated beneficiary to a qualified ABLE program benefitting the designated beneficiary is not treated as a completed gift. Because the designated beneficiary remains the owner of the account for purposes of chapter 12, if the designated beneficiary transfers the funds in the account to another person as permitted under these proposed regulations, the designated beneficiary making the transfer is the donor for purposes of chapter 12 and the transferor for generation-skipping transfer tax purposes of chapter 13.

Distributions

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

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

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

the final regulations should permit States to require that a successor designated beneficiary also must be a sibling of the designated beneficiary.

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

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

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

only by the qualified State program under which the new ABLE account is being established.

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

Qualified disability expenses

Section 529A(e)(5) defines a qualified disability expense. Consistent with that subsection, the proposed regulations provide that qualified disability expenses are expenses that relate to the designated beneficiary's blindness or disability and are for the benefit of that designated beneficiary in maintaining or improving his or her health, independence, or quality of life. Such expenses include, but are not limited to, expenses for education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses that may be identified from

time to time in future guidance published in the Internal Revenue Bulletin. As previously stated, expenses incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of the proposed regulations are not qualified disability expenses.

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

Limitation on number of ABLE accounts of a designated beneficiary

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

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

Residency requirements

Consistent with section 529A(b)(1)(C), the proposed regulations require that an ABLE account for a designated beneficiary may be established only under the qualified ABLE program of the State in which that designated beneficiary is a resident or with which the State of the designated beneficiary's residence has contracted for the provision of ABLE accounts. If a State does not establish and maintain a qualified ABLE program, it may contract with another State to provide an ABLE program for its residents. The statute is silent as to whether a designated beneficiary must move his or her existing ABLE account when the designated beneficiary changes his or her residence. The Treasury Department and the IRS are concerned about imposing undue administrative burdens and costs on designated beneficiaries who frequently change State residency, such as members of military families. Therefore, the proposed regulations provide that a qualified ABLE program may permit a designated beneficiary to continue to maintain his or her ABLE account that was created in that State, even after the designated beneficiary is no longer a resident of that State. However, in order to enforce the one ABLE account limitation and in accordance with section 529A(g)(1), the proposed regulations provide that, other than in the case of a rollover or a program-to-program transfer of a designated beneficiary's ABLE account, a qualified ABLE program must require the designated beneficiary to verify, under penalties of perjury, when creating an ABLE account that the

account being established is the designated beneficiary's only ABLE account. For example, the eligible individual could be required to check a box providing such verification on a form used to establish the account. The Treasury Department and the IRS are concerned that without such safeguards individuals could inadvertently establish two accounts with adverse tax consequences due to the loss of ABLE account status for the second account and expect qualified ABLE programs to establish safeguards to ensure that the required limit of one ABLE account per designated beneficiary is not violated.

Investment direction

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

Cap on contributions

Section 529A(b)(6) provides that a qualified ABLE program must provide adequate safeguards to prevent aggregate contributions on behalf of a designated beneficiary in excess of the limit established by the State under section 529(b)(6) relating to Qualified State Tuition Programs. The proposed regulations provide a safe harbor that permits a

qualified ABLE program to satisfy this requirement regarding total cumulative contributions if the program prohibits any additional contributions to an account as soon as the account balance reaches the specified contribution limit under such State's program established under section 529. Once the account balance falls below the prescribed limit, contributions may resume, subject to the same limitation. The Treasury Department and the IRS believe that recommencement of contributions is appropriate based on the nature and purposes of the ABLE program.

Gift and generation-skipping transfer (GST) taxes

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

Distribution on death

The proposed regulations provide that, upon the death of the designated beneficiary, all amounts remaining in the ABLE account are includible in the designated beneficiary's gross estate for purposes of the estate tax. See section 2031. Further, the proposed regulations cross-reference section 2053 for purposes of determining the deductibility by the designated beneficiary's estate of amounts payable from the ABLE

account to satisfy claims by creditors such as a State and also cross-reference section 2652(a)(1) for treatment of the deceased designated beneficiary as the transferor of any property remaining in the ABLE account that may pass to a beneficiary.

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

Unrelated business taxable income and filing requirements

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

§§1.6012-2(e) and 1.6012-3(a)(5) if the ABLE program were an organization described in those sections.

Reporting requirements

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

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

give this information to the designated beneficiary upon request.

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

Effective Date/Applicability Date

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

Special Analyses

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

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

Comments and Public Hearing

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

A public hearing has been scheduled for **October 14, 2015**, beginning at **10:00 am** in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For

information about having your name placed on the building access list to attend the hearing, see the “FOR FURTHER INFORMATION CONTACT” section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written comments by **[INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**, and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by [**INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. Submit a signed paper original and eight (8) copies or an electronic copy. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

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

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 25

Gift taxes, Reporting and recordkeeping requirements.

26 CFR Part 26

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

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

Proposed Amendments to the Regulations

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

PART 1--INCOME TAXES

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

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

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

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

§1.511-2 Organizations subject to tax.

* * * * *

(e) ABLE programs--(1) Unrelated business taxable income. A qualified ABLE program described in section 529A generally is exempt from income taxation, but is subject to taxes imposed by section 511 relating to the imposition of tax on unrelated business income. A qualified ABLE program is required to file Form 990-T, “Exempt Organization Business Income Tax Return,” if such filing would be required under the

rules of §§1.6012-2(e) and 1.6012-3(a)(5) if the ABLE program were an organization described in those sections.

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

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

§1.513-1 Definition of unrelated trade or business.

* * * * *

(d) * * *

(4) * * *

(i) * * *

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

* * * * *

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

Sec.

* * * * *

QUALIFIED ABLE PROGRAMS

1.529A-0 Table of contents.
1.529A-1 Exempt status of qualified ABLE program and definitions.

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

* * * * *

§1.529A-0 Table of contents.

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

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

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

§1.529A-2 Qualified ABLE program.

(a) In general.
(b) Established and maintained by a State or agency or instrumentality of a State.

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

§1.529A-3 Tax treatment.

(a) Taxation of distributions.
(b) Additional exclusions from gross income.
(1) Rollover.
(2) Program-to-program transfers.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(8) Earnings ratio means the amount of earnings attributable to the account as of

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

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

(i) Is entitled during that taxable year to benefits based on blindness or disability under title II or XVI of the Social Security Act, provided that such blindness or disability occurred before the date on which the individual attained age 26 (and, for this purpose, an individual is deemed to attain age 26 on his or her 26th birthday); or

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

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

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

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

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

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

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

(16) Qualified disability expenses means any expenses incurred at a time when the designated beneficiary is an eligible individual that relate to the blindness or disability of the designated beneficiary of an ABLE account, including expenses that are for the benefit of the designated beneficiary in maintaining or improving his or her health,

independence, or quality of life. See §1.529A-2(h). Any expenses incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of §1.529-1(b)(9)(A) or §1.529-2(e)(1)(i) are not qualified disability expenses.

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

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

§1.529A-2 Qualified ABLE program.

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

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

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

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

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

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

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

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

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

(ii) The State or its agency or instrumentality is actively involved on an ongoing basis in the administration of the program, including supervising the implementation of decisions relating to the investment of assets contributed under the program. Factors that are relevant in determining whether a State or its agency or instrumentality is actively involved in the administration of the program include, but are not limited to: whether the State or its agency or instrumentality provides services to designated beneficiaries that are not provided to persons who are not designated beneficiaries; whether the State or its agency or instrumentality establishes detailed operating rules for administering the

program; whether officials of the State or its agency or instrumentality play a substantial role in the operation of the program, including selecting, supervising, monitoring, auditing, and terminating the relationship with any private contractors that provide services under the program; whether the State or its agency or instrumentality holds the private contractors that provide services under the program to the same standards and requirements that apply when private contractors handle funds that belong to the State or its agency or instrumentality or provide services to the State or its agency or instrumentality; whether the State or its agency or instrumentality provides funding for the program; and whether the State or its agency or instrumentality acts as trustee or holds program assets directly or for the benefit of the designated beneficiaries. For example, if the State or its agency or instrumentality thereof exercises the same authority over the funds invested in the program as it does over the investments in or pool of funds of a State employees' defined benefit pension plan, then the State or its agency or instrumentality will be considered actively involved on an ongoing basis in the administration of the program.

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

(c) Establishment of an ABLE account--(1) In general. Except as otherwise provided in this paragraph (c), a qualified ABLE program must provide that an ABLE account may be established only for an eligible individual under a qualified ABLE program

of the State in which the eligible individual is a resident. The qualified ABLE program also may allow the establishment of an ABLE account for an eligible individual who is a resident of a Contracting State as defined in §1.529A-1(b)(2). If an eligible individual is unable to establish an ABLE account on his or her own behalf, the ABLE account may be established on behalf of the eligible individual by the eligible individual's agent under a power of attorney or, if none, by a parent or legal guardian of the eligible individual.

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

(ii) Treatment of additional accounts. Except in the case of rollovers or program-to-program transfers, if an ABLE account is established for a designated beneficiary who already has an ABLE account in existence, an additional account will not be treated as an ABLE account. However, if all contributions made to that account are returned in accordance with the rules that apply to excess contributions and excess

aggregate contributions under paragraph (g)(4) of this section, the additional account will be treated as never having been established.

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

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

(2) Frequency of recertification--(i) In general. A qualified ABLE program may choose different methods of ensuring a designated beneficiary's status as an eligible

individual and may impose different periodic recertification requirements for different types of impairments.

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

(3) Loss of qualification as an eligible individual. If the designated beneficiary of an ABLE account ceases to be an eligible individual, then for each taxable year in which the designated beneficiary is not an eligible individual, the account will continue to be an ABLE account, the designated beneficiary will continue to be the designated beneficiary of the ABLE account (and will be referred to as such), and the ABLE account will not be deemed to have been distributed. However, beginning on the first day of the designated beneficiary's first taxable year for which the designated beneficiary does not satisfy the definition of an eligible individual, additional contributions to the designated beneficiary's ABLE account must not be accepted by the qualified ABLE program. Additionally, no

amounts incurred during that year and each subsequent year in which the designated beneficiary does not satisfy the definition of an eligible individual will be qualified disability expenses. If the designated beneficiary subsequently again becomes an eligible individual, contributions to the designated beneficiary's ABLE account again may be accepted subject to the contribution limits under section 529A, and expenses incurred that meet the definition of a qualified disability expense will be qualified disability expenses.

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

(i) The individual--

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

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

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

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

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

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

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

(3) Compassionate allowance list. Conditions listed in the "List of Compassionate Allowances Conditions" maintained by the Social Security Administration (at www.socialsecurity.gov/compassionateallowances/conditions.htm) are deemed to meet the requirements of section 529A(e)(1)(B) regarding the filing of a disability certification, if

the condition was present before the date on which the individual attained age 26. To establish that an individual with such a condition meets the definition of an eligible individual, the individual must identify the condition and certify to the qualified ABLE program both the presence of the condition and its onset prior to age 26, in a manner specified by the qualified ABLE program.

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

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

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

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

(2) Annual contributions limit. A qualified ABLE program must provide that no contribution to an ABLE account will be accepted to the extent such contribution, when added to all other contributions (whether from the designated beneficiary or one or more

other persons) to that ABLE account made during the designated beneficiary's taxable year causes the total of such contributions to exceed the amount in effect under section 2503(b) for the calendar year in which the designated beneficiary's taxable year begins. For this purpose, contributions do not include rollovers or program-to-program transfers.

(3) Cumulative limit--(i) In general. A qualified ABLE program maintained by a State or its agency or instrumentality must provide adequate safeguards to prevent aggregate contributions on behalf of a designated beneficiary in excess of the limit established by that State under section 529(b)(6). For purposes of the preceding sentence, aggregate contributions include contributions to any prior ABLE account maintained by any State or its agency or instrumentality for the same designated beneficiary or any prior designated beneficiary.

(ii) Safe harbor. A qualified ABLE program maintained by a State or its agency or instrumentality satisfies the requirement in paragraph (g)(3)(i) of this section if it refuses to accept any additional contribution to an ABLE account once the balance in that account reaches the limit established by that State under section 529(b)(6). Once the account balance falls below such limit, additional contributions again may be accepted, subject to the limits under this paragraph (g)(3)(i) of this section.

(4) Return of excess contributions and excess aggregate contributions. If an excess contribution as defined in §1.529A-1(b)(10) or an excess aggregate contribution as defined in §1.529A-1(b)(11) is allocated to or deposited into the ABLE account of a designated beneficiary, a qualified ABLE program must return that excess contribution or excess aggregate contribution, including all net income attributable to that excess

contribution or excess aggregate contribution, as determined under the rules set forth in §1.408-11 (treating an IRA as an ABLE account and returned contributions under section 408(d)(4) as excess contributions or excess aggregate contributions), to the person or persons who made that contribution. An excess contribution or excess aggregate contribution must be returned to its contributor(s) on a last-in-first-out basis until the entire excess contribution or excess aggregate contribution, along with all net income attributable to such contribution, has been returned. Returned contributions must be received by the contributor(s) on or before the due date (including extensions) for the Federal income tax return of the designated beneficiary for the taxable year in which the excess contribution or excess aggregate contribution was made. See §1.529A-3(e) for income tax considerations for the contributor(s). If an excess contribution or excess aggregate contribution and the net income attributable to the excess contribution or excess aggregate contribution are returned to a contributor other than the designated beneficiary, the qualified ABLE program must notify the designated beneficiary of such return at the time of the return.

(h) Qualified disability expenses--(1) In general. Qualified disability expenses, as defined in §1.529A-1(b)(16), are expenses incurred that relate to the blindness or disability of the designated beneficiary of the ABLE account and are for the benefit of that designated beneficiary in maintaining or improving his or her health, independence, or quality of life. Such expenses include, but are not limited to, expenses related to the designated beneficiary's education, housing, transportation, employment training and support, assistive technology and related services, personal support services, health,

prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, and funeral and burial expenses, as well as other expenses that may be identified from time to time in future guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2) of this chapter. Qualified disability expenses include basic living expenses and are not limited to items for which there is a medical necessity or which solely benefit a disabled individual. A qualified ABLE program must establish safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions, and to permit the identification of the amounts distributed for housing expenses as that term is defined for purposes of the Supplemental Security Income program of the Social Security Administration.

(2) Example. The following example illustrates this paragraph (h):

Example. B, an individual, has a medically determined mental impairment that causes marked and severe limitations on her ability to navigate and communicate. A smart phone would enable B to navigate and communicate more safely and effectively, thereby helping her to maintain her independence and to improve her quality of life. Therefore, the expense of buying, using, and maintaining a smart phone that is used by B would be considered a qualified disability expense.

(i) Separate accounting. A program will not be treated as a qualified ABLE program unless it provides separate accounting for each ABLE account. Separate accounting requires that contributions for the benefit of a designated beneficiary and any earnings attributable thereto must be allocated to that designated beneficiary's account. Whether or not a program provides each designated beneficiary an annual account statement showing the total account balance, the investment in the account, the accrued

earnings, and the distributions from the account, the program must give this information to the designated beneficiary upon request.

(j) Program-to-program transfers. A qualified ABLE program may permit a change of qualified ABLE program or a change of designated beneficiary by means of a program-to-program transfer as defined in §1.529A-1(b)(14). In that event, subject to any contrary provisions or limitations adopted by the qualified ABLE program, rules similar to the rules of §1.401(a)(31)-1, Q&A-3 and 4 (which apply for purposes of a direct rollover from a qualified plan to an eligible retirement plan) apply for purposes of determining whether an amount is paid in the form of a program-to-program transfer.

(k) Carryover of attributes. Upon a rollover or program-to-program transfer, all of the attributes of the former ABLE account relevant for purposes of calculating the investment in the account and applying the annual and cumulative limits on contributions are applicable to the recipient ABLE account. The portion of the rollover or transfer amount that constituted investment in the account from which the distribution or transfer was made is added to investment in the recipient ABLE account. Similarly, the portion of the rollover or transfer amount that constituted earnings of the account from which the distribution or transfer was made is added to the earnings of the recipient ABLE account.

(l) Investment direction. A program will not be treated as a qualified ABLE program unless it provides that the designated beneficiary of an ABLE account established under such program may direct, whether directly or indirectly, the investment of any contributions to the program (or any earnings thereon) no more than two times in any calendar year.

(m) No pledging of interest as security. A program will not be treated as a qualified ABLE program unless the terms of the program, or a state statute or regulation that governs the program, prohibit any interest in the program or any portion thereof from being used as security for a loan. This restriction includes, but is not limited to, a prohibition on the use of any interest in the ABLE program as security for a loan used to purchase such interest in the program.

(n) No sale or exchange. A qualified ABLE program must ensure that no interest in an ABLE account may be sold or exchanged.

(o) Change of residence. A qualified ABLE program may continue to maintain the ABLE account of a designated beneficiary after that designated beneficiary changes his or her residence to another State.

(p) Post-death payments. A qualified ABLE program must provide that a portion or all of the balance remaining in the ABLE account of a deceased designated beneficiary must be distributed to a State that files a claim against the designated beneficiary or the ABLE account itself with respect to benefits provided to the designated beneficiary under that State's Medicaid plan established under title XIX of the Social Security Act. The payment of such claim (if any) will be made only after providing for the payment from the designated beneficiary's ABLE account of all outstanding payments due for his or her qualified disability expenses, and will be limited to the amount of the total medical assistance paid for the designated beneficiary after the establishment of the ABLE account (the date on which the ABLE account, or any ABLE account from which amounts were rolled or transferred to the ABLE account of the same designated beneficiary, was

opened) over the amount of any premiums paid, whether from the ABLE account or otherwise by or on behalf of the designated beneficiary, to a Medicaid Buy-In program under any such State Medicaid plan.

(q) Reporting requirements. A qualified ABLE program must comply with all applicable reporting requirements, including without limitation those described in §§ 1.529A-5 through 1.529A-7.

(r) Effective/applicability dates. This section applies to taxable years beginning after December 31, 2014.

§1.529A-3 Tax treatment.

(a) Taxation of distributions. Each distribution from an ABLE account consists of earnings (computed in accordance with paragraph (c) of this section) and investment in the account. If the total amount distributed from an ABLE account to or for the benefit of the designated beneficiary of that ABLE account during his or her taxable year does not exceed the qualified disability expenses of the designated beneficiary for that year, no amount distributed is includible in the gross income of the designated beneficiary for that year. If the total amount distributed from an ABLE account to or for the benefit of the designated beneficiary of that ABLE account during his or her taxable year exceeds the qualified disability expenses of the designated beneficiary for that year, the distributions from the ABLE account, except to the extent excluded from gross income under this section or any other provision of chapter 1 of the Internal Revenue Code, must be included in the gross income of the designated beneficiary in the manner provided under this section and section 72. In such a case, the earnings portion of the distribution

includible in gross income is equal to the earnings portion of the distribution reduced by an amount that bears the same ratio to the earnings portion as the amount of qualified disability expenses during the year bears to the total distributions during the year. For this purpose, all amounts relevant under section 72 are determined as of December 31 of the year in which the designated beneficiary's taxable year begins, and all amounts distributed from an ABLE account to or for the benefit of the designated beneficiary during his or her taxable year are treated as one distribution. If an excess contribution or excess aggregate contribution is returned within the time period required in §1.529A-2(g)(4), any net income distributed is includible in the gross income of the contributor(s) in the taxable year in which the excess contribution or excess aggregate contribution was made.

(b) Additional exclusions from gross income--(1) Rollover. A rollover as defined in §1.529A-1(b)(17) is not includible in gross income under paragraph (a) of this section.

(2) Program-to-program transfers. A program-to-program transfer as defined in §1.529A-1(b)(14) is not a distribution and is not includible in gross income under paragraph (a) of this section.

(3) Change of designated beneficiary--(i) In general. A change of designated beneficiary of an ABLE account is not treated as a distribution for purposes of section 529A, and is not includible in gross income under paragraph (a) of this section, if the successor designated beneficiary is--

(A) An eligible individual for such calendar year; and

(B) A member of the family of the former designated beneficiary.

(ii) Other designated beneficiary changes. In the case of any change of designated beneficiary not described in paragraph (b)(3)(i) of this section, the former designated beneficiary of that ABLE account will be treated as having received a distribution of the fair market value of the assets in that ABLE account on the date on which the change is made to the new designated beneficiary.

(4) Payments to creditors post-death. Distributions made after the death of the designated beneficiary in payment of outstanding obligations due for qualified disability expenses of the designated beneficiary are not includible in the gross income of the designated beneficiary or his or her estate. Included among these obligations is the post-death payment of any part of a claim filed against the designated beneficiary or the ABLE account by a State under a State Medicaid plan.

(c) Computation of earnings. The earnings portion of a distribution is equal to the product of the amount of the distribution and the earnings ratio, as defined in §1.529A-1(b)(8). The balance of the distribution (the amount of the distribution minus the earnings portion of that distribution) is the portion of that distribution that constitutes the return of investment in the account.

(d) Additional tax on amounts includible in gross income--(1) In general. If any amount of a distribution from an ABLE account is includible in the gross income of a person for any taxable year under paragraph (a) of this section (the “includible amount”), the tax imposed on that person by Chapter 1 of the Internal Revenue Code shall be increased by an amount equal to 10 percent of the includible amount.

(2) Exceptions--(i) Distributions on or after the death of the designated beneficiary. Paragraph (d)(1) of this section does not apply to any distribution made from the ABLE account on or after the death of the designated beneficiary to the estate of the designated beneficiary, to an heir or legatee of the designated beneficiary, or to a creditor described in paragraph (b)(4) of this section.

(ii) Returned excess contributions and additional accounts. Paragraph (d)(1) of this section does not apply to any return made in accordance with §1.529A-2(g)(4) of an excess contribution, excess aggregate contribution, or additional account.

(e) Tax on excess contributions. Under section 4973(h), a contribution to an ABLE account in excess of the annual contributions limit described in §1.529A-2(g)(2) is subject to an excise tax in an amount equal to 6 percent of the excess contribution. However, if the excess contribution is returned in accordance with the provisions of §1.529A-2(g)(4), it is treated as an amount not contributed.

(f) Filing requirements. A qualified ABLE program is not required to file Form 990, "Return of Organization Exempt From Income Tax," Form 1041, "U.S. Income Tax Return for Estates and Trusts," or Form 1120, "U.S. Corporation Income Tax Return." However, a qualified ABLE program is required to file Form 990-T, "Exempt Organization Business Income Tax Return," if such filing would be required under the rules of §§1.6012-2(e) and 1.6012-3(a)(5) if the ABLE program were an organization described in those sections.

(g) Effective/applicability dates. This section applies to taxable years beginning after December 31, 2014.

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

(a) Contributions--(1) In general. Each contribution by a person to an ABLE account other than by the designated beneficiary of that account is treated as a completed gift to the designated beneficiary of the account for gift tax purposes. Under the applicable gift tax rules, a contribution from a corporation, partnership, trust, estate, or other entity is treated as a gift by the shareholders, partners, or other beneficial owners in proportion to their respective ownership interests in the entity. See §25.2511-1(c) and (h). A gift into an ABLE account is not treated as either a gift of a future interest in property, or a qualified transfer under section 2503(e). To the extent a contributor's gifts to the designated beneficiary, including gifts paid into the designated beneficiary's ABLE account, do not exceed the annual limit in section 2503(b), the contribution is not subject to gift tax. This provision, however, does not change any other provision applicable to the transfer. For example, a contribution by the employer of the designated beneficiary's parent continues to constitute earned income to the parent and then a gift by the parent to the designated beneficiary.

(2) Generation-skipping transfer (GST) tax. To the extent the contribution into an ABLE account is a nontaxable gift for gift tax purposes, the inclusion ratio for purposes of the GST tax will be zero pursuant to section 2642(c)(1).

(3) Designated beneficiary as contributor. A designated beneficiary may make a contribution to fund his or her own ABLE account. That contribution is not a gift. However, in the event of any change of designated beneficiary, the portion of the then fair market value of the ABLE account attributable to that contribution and any earnings attributable to that contribution will constitute a gift by the designated beneficiary to the

successor designated beneficiary, and the usual gift and GST tax rules will apply.

(b) Distributions. No distribution from an ABLE account to or for the benefit of the designated beneficiary is treated as a taxable gift to that designated beneficiary.

(c) Change of designated beneficiary. Neither gift tax nor generation-skipping transfer tax applies to a change of designated beneficiary if the successor designated beneficiary is both an eligible individual and a member of the family (as described in §1.529A-1(b)(13)) of the designated beneficiary. The previous sentence does not apply to any other change of designated beneficiary.

(d) Transfer tax on death of designated beneficiary. Upon the death of the designated beneficiary, the designated beneficiary's ABLE account is includible in his or her gross estate for estate tax purposes under section 2031. The payment of outstanding qualified disability expenses and the payment of certain claims made by a State under its Medicaid plan may be deductible for estate tax purposes if the requirements of section 2053 are satisfied.

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

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

(a) In general. A filer defined in paragraph (b)(1) of this section must, with respect to each ABLE account--

(1) File an annual information return, as described in paragraph (c) of this section, with the Internal Revenue Service; and

(2) Furnish an annual statement, as described in paragraph (d) of this section, to the designated beneficiary of the ABLE account.

(b) Additional definitions. In addition to the definitions in §1.529A-1(b), the following definitions also apply for purposes of this section--

(1) Filer means the State or its agency or instrumentality that establishes and maintains the qualified ABLE program under which an ABLE account is established. The filing may be done by either an officer or employee of the State or its agency or instrumentality having control of the qualified ABLE program, or the officer's or employee's designee.

(2) TIN means taxpayer identification number as defined in section 7701(a)(41).

(c) Requirement to file return--(1) Form of return. For purposes of reporting the information described in paragraph (c)(2) of this section, the filer must file Form 5498-QA, "ABLE Account Contribution Information," or any successor form, together with Form 1096, "Annual Summary and Transmittal of U.S. Information Returns."

(2) Information included on return. With respect to each ABLE account, the filer must include on the return--

(i) The name, address, and TIN of the designated beneficiary of the ABLE account;

(ii) The name, address, and TIN of the filer;

(iii) Information regarding the establishment of the ABLE account, as required by the form and its instructions;

(iv) Information regarding the disability certification or other basis for eligibility of the designated beneficiary, as required by the form and its instructions. For further

information regarding eligibility and disability certification, see §1.529A-2(d) and (e), respectively;

(v) The total amount of any contributions made with respect to the ABLE account during the calendar year;

(vi) The fair market value of the ABLE account as of the last day of the calendar year; and

(vii) Any other information required by the form, its instructions, or published guidance. See §§601.601(d) and 601.602 of this chapter.

(3) Time and manner of filing return--(i) In general. Except as provided in paragraph (c)(3)(ii) of this section, the information returns required under this paragraph must be filed on or before May 31 of the year following the calendar year with respect to which the return is being filed, in accordance with the forms and their instructions.

(ii) Extensions of time. See §§1.6081-1 and 1.6081-8 of this chapter for rules relating to extensions of time to file information returns required in this section.

(iii) Electronic filing. See §301.6011-2 of this chapter for rules relating to electronic filing.

(iv) Substitute forms. The filer may file the returns required under this paragraph (c) on a substitute form. A substitute form must comply with applicable revenue procedures (see §601.601(d)(2) of this chapter) or other guidance published by the IRS, including Publication 1179, “General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns.”

(d) Requirement to furnish statement--(1) In general. The filer must furnish a statement to the designated beneficiary of the ABLE account for which it is required to file a Form 5498-QA (or any successor form). The statement must include--

(i) The information required under paragraph (c)(2) of this section;

(ii) A legend that identifies the statement as important tax information that is being furnished to the Internal Revenue Service; and

(iii) The name and address of the office or department of the filer that is the information contact for questions regarding the ABLE account to which the Form 5498-QA relates.

(2) Time and manner of furnishing statement--(i) In general. Except as provided in paragraph (d)(2)(ii) of this section, the filer must furnish the statement described in paragraph (d)(1) of this section to the designated beneficiary on or before March 15 of the year following the calendar year with respect to which the statement is being furnished. If mailed, the statement must be sent to the designated beneficiary's last known address. The statement may be furnished electronically, as provided in §1.529A-7.

(ii) Extensions of time. The Internal Revenue Service may grant an extension of time to furnish statements required in this section upon a showing of good cause. See the instructions to Form 5498-QA.

(3) Copy of Form 5498-QA. The filer may satisfy the requirement of this paragraph (d) by furnishing either a copy of Form 5498-QA (or successor form) or another document that contains the information required by paragraph (d)(1) of this section, if the document complies with applicable revenue procedures (see §601.601(d)(2) of this

chapter) or other guidance published by the IRS relating to substitute statements, including Publication 1179, “General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns.”

(e) Request for TIN of designated beneficiary. The filer must request the TIN of the designated beneficiary at the time the ABLE account is opened if the filer does not already have a record of the designated beneficiary’s correct TIN. The filer must clearly notify the designated beneficiary that the law requires the designated beneficiary to furnish a TIN so that it may be included on an information return to be filed by the filer. The designated beneficiary may provide his or her TIN in any manner including orally, in writing, or electronically. If the TIN is furnished in writing, no particular form is required. Form W-9, “Request for Taxpayer Identification Number and Certification,” may be used, or the request may be incorporated into the forms related to the establishment of the ABLE account.

(f) Penalties--(1) Failure to file return. The section 6693 penalty may apply to the filer that fails to file information returns at the time and in the manner required by this section, unless it is shown that such failure is due to reasonable cause. See section 6693 and the regulations thereunder.

(2) Failure to furnish TIN. The section 6723 penalty may apply to any designated beneficiary who fails to furnish his or her TIN to the filer. See section 6723, and the regulations thereunder, for rules relating to the penalty for failure to furnish a TIN.

(g) Effective/applicability date. The rules of this section apply to information returns required to be filed, and payee statements required to be furnished, after

December 31, 2015.

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

(a) In general. The filer as defined in §1.529A-5(b)(1) must, with respect to each ABLE account from which any distribution is made or which is terminated during the calendar year--

(1) File an annual information return, as described paragraph (b) of this section, with the Internal Revenue Service; and

(2) Furnish an annual statement, as described in paragraph (c) of this section, to the designated beneficiary of the ABLE account and to each contributor who received a returned contribution in accordance with §1.529A-2(g)(4) attributable to the calendar year.

(b) Requirement to file return--(1) Form of return. For purposes of reporting the information in paragraph (b)(2) of this section, the filer must file Form 1099-QA, "Distributions from ABLE Accounts," or any successor form, together with Form 1096, "Annual Summary and Transmittal of U.S. Information Returns."

(2) Information included on return. The filer must include on the return--

(i) The name, address, and TIN of the designated beneficiary of the ABLE account or of any contributor who received a returned contribution in accordance with §1.529A-2(g)(4) attributable to the calendar year, as applicable;

(ii) The name, address, and TIN of the filer;

(iii) The aggregate amount of distributions from the ABLE account during the calendar year;

(iv) Information as to basis and earnings with respect to such distributions or returns of contributions;

(v) Information regarding termination (if any) of the ABLE account;

(vi) Information regarding each rollover and any program-to-program transfer to or from the ABLE account during the designated beneficiary's taxable year;

(vii) Whether the return is being furnished to the designated beneficiary or to a contributor; and

(viii) Any other information required by the form, its instructions, or published guidance. See §§601.601(d) and 601.602 of this chapter.

(3) Time and manner of filing return--(i) In general. Except as provided in paragraph (b)(3)(ii) of this section, the Forms 1099-QA and 1096 must be filed on or before February 28 (March 31 if filing electronically) of the year following the calendar year with respect to which the return is being filed, in accordance with the forms and their instructions.

(ii) Extensions of time. See §§1.6081-1 and 1.6081-8 of this chapter for rules relating to extensions of time to file information returns required in this section.

(iii) Electronic filing. See §301.6011-2 of this chapter for rules relating to electronic filing.

(iv) Substitute forms. The filer may file the return required under this paragraph (b) on a substitute form. A substitute form must comply with applicable revenue procedures (see §601.601(d)(2) of this chapter) or other guidance published by the IRS,

including Publication 1179, “General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns.”

(c) Requirement to furnish statement--(1) In general. The filer must furnish a statement to the designated beneficiary and each contributor (if any) of the ABLE account for which it is required to file a Form 1099-QA (or any successor form). The statement must include--

(i) The information required under paragraph (b)(2) of this section.

(ii) A legend that identifies the statement as important tax information that is being furnished to the Internal Revenue Service;

(iii) The name and address of the office or department of the filer that is the information contact for questions regarding the ABLE account to which the Form 1099-QA relates.

(2) Time and manner of furnishing statement--(i) In general. Except as provided in paragraph (c)(2)(ii) of this section, a filer must furnish the statement described in paragraph (c)(1) of this section to the designated beneficiary on or before January 31 of the year following the calendar year with respect to which the statement is being furnished. If mailed, the statement must be sent to the recipient’s last known address. The statement may be furnished electronically, as provided in §1.529A-7.

(ii) Extensions of time. The Internal Revenue Service may grant an extension of time to furnish statements required in this section upon a showing of good cause. See the instructions to Form 1099-QA.

(3) Copy of Form 1099-QA. A filer may satisfy the requirement of this paragraph (c) by furnishing either a copy of Form 1099-QA (or successor form) or another document that contains the information required by paragraph (c)(1) of this section and that complies with applicable revenue procedures (see §601.601(d)(2) of this chapter) or other guidance published by the IRS relating to substitute statements, including Publication 1179, "General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns."

(d) Request for TIN of contributor(s). A filer must request the TIN for each contributor to the ABLE account at the time a contribution is made, if the filer does not already have a record of that person's correct TIN. The filer must clearly notify each contributor to the account that the law requires that person to furnish a TIN so that it may be included on an information return to be filed by the filer. The contributor may provide his or her TIN in any manner including orally, in writing, or electronically. If the TIN is furnished in writing, no particular form is required. Form W-9, "Request for Taxpayer Identification Number and Certification," may be used, or the request may be incorporated into the forms related to the establishment of the ABLE account.

(e) Penalties--(1) Failure to file return. The section 6693 penalty may apply to a filer that fails to file information returns at the time and in the manner required by this section, unless it is shown that such failure is due to reasonable cause. See section 6693 and the regulations thereunder.

(2) Failure to furnish TIN. The section 6723 penalty may apply to any contributor who fails to furnish his or her TIN to the filer. See section 6723, and the regulations thereunder, for rules relating to the penalty for failure to furnish a TIN.

(f) Effective/applicability date. The rules of this section apply to information returns required to be filed, and payee statements required to be furnished, after December 31, 2015.

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

(a) Electronic furnishing of statements--(1) In general. A filer required under §1.529A-5 or §1.529A-6 of this chapter to furnish a written statement to a designated beneficiary of or contributor to an ABLE account may furnish the statement in an electronic format in lieu of a paper format. A filer who meets the requirements of paragraphs (a)(2) through (6) of this section is treated as furnishing the required statement.

(2) Consent--(i) In general. The recipient of the statement must have affirmatively consented to receive the statement in an electronic format. The consent may be made electronically in any manner that reasonably demonstrates that the recipient can access the statement in the electronic format in which it will be furnished to the recipient. Alternatively, the consent may be made in a paper document if it is confirmed electronically.

(ii) Withdrawal of consent. The consent requirement of this paragraph (a)(2) is not satisfied if the recipient withdraws the consent and the withdrawal takes effect before

the statement is furnished. The filer may provide that a withdrawal of consent takes effect either on the date it is received by the filer or on another date no more than 60 days later. The filer also may provide that a request for a paper statement will be treated as a withdrawal of consent.

(iii) Change in hardware or software requirements. If a change in the hardware or software required to access the statement creates a material risk that the recipient will not be able to access the statement, the filer must, prior to changing the hardware or software, provide the recipient with a notice. The notice must describe the revised hardware and software required to access the statement and inform the recipient that a new consent to receive the statement in the revised electronic format must be provided to the filer if the recipient does not want to withdraw the consent. After implementing the revised hardware and software, the filer must obtain from the recipient, in the manner described in paragraph (a)(2)(i) of this section, a new consent or confirmation of consent to receive the statement electronically.

(iv) Examples. For purposes of the following examples that illustrate the rules of this paragraph (a)(2), assume that the requirements of §1.529A-7(a)(3) have been met:

Example 1. Filer F sends Recipient R a letter stating that R may consent to receive statements required under §1.529A-5 or §1.529A-6 electronically on a Web site instead of in a paper format. The letter contains instructions explaining how to consent to receive the statements electronically by accessing the Web site, downloading the consent document, completing the consent document, and e-mailing the completed consent back to F. The consent document posted on the Web site uses the same electronic format that F will use for the electronically furnished statements. R reads the instructions and submits the consent in the manner provided in the instructions. R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

Example 2. Filer F sends Recipient R an e-mail stating that R may consent to receive statements required under §1.529A-5 or §1.529A-6 electronically instead of in a paper format. The e-mail contains an attachment instructing R how to consent to receive the statements electronically. The e-mail attachment uses the same electronic format that F will use for the electronically furnished statements. R opens the attachment, reads the instructions, and submits the consent in the manner provided in the instructions. R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

Example 3. Filer F posts a notice on its Web site stating that Recipient R may receive statements required under §1.529A-5 or §1.529A-6 electronically instead of in a paper format. The Web site contains instructions on how R may access a secure Web page and consent to receive the statements electronically. By accessing the secure Web page and giving consent, R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

(3) Required disclosures--(i) In general. Prior to, or at the time of, a recipient's consent, the filer must provide to the recipient a clear and conspicuous disclosure statement containing each of the disclosures described in paragraphs (a)(3)(ii) through (viii) of this section.

(ii) Paper statement. The recipient must be informed that the statement will be furnished on paper if the recipient does not consent to receive it electronically.

(iii) Scope and duration of consent. The recipient must be informed of the scope and duration of the consent. For example, the recipient must be informed whether the consent applies to statements furnished every year after the consent is given until it is withdrawn in the manner described in paragraph (a)(3)(v)(A) of this section, or only to the statement required to be furnished on or before the due date immediately following the date on which the consent is given.

(iv) Post-consent request for a paper statement. The recipient must be informed of any procedure for obtaining a paper copy of the recipient's statement after giving the

consent and whether a request for a paper statement will be treated as a withdrawal of consent.

(v) Withdrawal of consent. The recipient must be informed that--

(A) The recipient may withdraw a consent by writing (electronically or on paper) to the person or department whose name, mailing address, and e-mail address is provided in the disclosure statement;

(B) The filer will confirm, in writing (either electronically or on paper), the withdrawal and the date on which it takes effect; and

(C) A withdrawal of consent does not apply to a statement that was furnished electronically in the manner described in this paragraph (a) before the date on which the withdrawal of consent takes effect.

(vi) Notice of termination. The recipient must be informed of the conditions under which a filer will cease furnishing statements electronically to the recipient.

(vii) Updating information. The recipient must be informed of the procedures for updating the information needed by the filer to contact the recipient. The filer must inform the recipient of any change in the filer's contact information.

(viii) Hardware and software requirements. The recipient must be provided with a description of the hardware and software required to access, print, and retain the statement, and the date when the statement will no longer be available on the Web site.

(4) Format. The electronic version of the statement must contain all required information and comply with applicable revenue procedures or other guidance published by the IRS relating to substitute statements to recipients, including Publication 1179,

"General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns."

(5) Notice--(i) In general. If the statement is furnished on a Web site, the filer must notify the recipient that the statement is posted on a Web site. The notice may be delivered by mail, electronic mail, or in person. The notice must provide instructions on how to access and print the statement. The notice must include the following statement in capital letters, "IMPORTANT TAX RETURN DOCUMENT AVAILABLE." If the notice is provided by electronic mail, the foregoing statement must be on the subject line of the electronic mail.

(ii) Undeliverable electronic address. If an electronic notice described in paragraph (a)(5)(i) of this section is returned as undeliverable, and the correct electronic address cannot be obtained from the filer's records or from the recipient, then the filer must furnish the notice by mail or in person within 30 days after the electronic notice is returned.

(iii) Corrected statements. If the filer has corrected a recipient's statement that was furnished electronically, the filer must furnish the corrected statement to the recipient electronically. If the recipient's statement was furnished though a Web site posting and the filer has corrected the statement, the filer must notify the recipient that it has posted the corrected statement on the Web site within 30 days of such posting in the manner described in paragraph (a)(5)(i) of this section. The corrected statement or the notice must be furnished by mail or in person if--

(A) An electronic notice of the Web site posting of an original statement or the corrected statement was returned as undeliverable; and

(B) The recipient has not provided a new e-mail address.

(6) Access period. Statements furnished on a Web site must be retained on the Web site through October 15 of the year following the calendar year to which the statements relate (or the first business day after such October 15 if October 15 falls on a Saturday, Sunday, or legal holiday). The filer must maintain access to corrected statements that are posted on the Web site through October 15 of the year following the calendar year to which the statements relate (or the first business day after such October 15 if October 15 falls on a Saturday, Sunday, or legal holiday) or the date 90 days after the corrected statements are posted, whichever is later. The rules in this paragraph (a)(6) do not replace the filer's obligation to keep records under section 6001 and §1.6001-1(a) of this chapter.

(b) Effective/applicability date. This section applies to statements required to be furnished after December 31, 2015.

Part 25—GIFT TAXES

Par. 5. The authority citation for part 25 continues to read in part as follows:

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

Par. 6. Section 25.2501-1 is amended by adding a sentence at the end of paragraph (a)(1) to read as follows:

§25.2501-1 Imposition of Tax.

(a) * * *

(1) * * * For gift tax rules related to an ABLE account established under section 529A, see regulations promulgated thereunder.

* * * * *

Par. 7. Section 25.2503-3 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§25.2503-3 Future interests in property.

(a)* * * A contribution to an ABLE account established under section 529A is not a future interest.

* * * * *

Par. 8. Section 25.2503-6 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§25.2503–6 Exclusion for certain qualified transfers to tuition or medical expenses.

(a) * * * A contribution to an ABLE account established under section 529A is not a qualified transfer.

* * * * *

Par. 9. Section 25.2511-2 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§25.2511-2 Cessation of donor's dominion and control.

(a) * * * For gift tax rules related to an ABLE account established under section 529A, see regulations promulgated thereunder.

* * * * *

Part 26--ESTATE TAXES

Par. 10. The authority citation for part 26 continues to read in part as follows:

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

Par. 11. Section 26.2642-1 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§26.2642-1 Inclusion ratio.

(a) * * * For generation-skipping transfer tax rules related to an ABLE account established under section 529A, see regulations promulgated thereunder.

* * * * *

Par. 12. Section 26.2652-1 is amended by adding a sentence at the end of paragraph (a)(1) to read as follows:

§26.2652-1 Transferor defined; other definitions.

(a) * * *

(1) * * * For generation-skipping transfer tax rules related to an ABLE account established under section 529A, see regulations promulgated thereunder.

* * * * *

Part 301—REPORTING AND RECORDKEEPING REQUIREMENTS

Par. 13. The authority citation for part 301 continues to read in part as follows:

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

§ 301.6011-2 [Amended]

Par. 14. Section 301.6011-2 is amended by adding the word “series” after

“5498” in the first sentence of paragraph (b)(1).

John Dalrymple

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2015-15280 Filed: 6/19/2015 08:45 am; Publication Date: 6/22/2015]

ABLE Accounts and More: What Pooled Trust Administrators Need to Know

Presented By:
Stephen W. Dale, Esq, LLM
The Dale Law Firm

The *Achieving a Better Life Experience (ABLE) Act of 2014*

- As we walk through a review of the ABLE Act, think of it as one tool in a toolbox with many tools.
- If you are driving a nail into a board – you certainly would not try to pound it in with a screw driver.

The *Achieving a Better Life Experience (ABLE) Act of 2014*

- While this is a new tool – it has very specific applications, and it is important to understand
  - when an ABLE Account is the right tool, and
  - when other options are more appropriate

The *Achieving a Better Life Experience (ABLE) Act of 2014*

- What is important for all persons with disabilities and their families whether this new tool works for a your needs, the ABLE Act focuses our country on the real issue – **the need for sustainable funding and options for all persons with disabilities.**

An Overview of the ABLE Act

- **The details:** Starting **in 2015, States would have the option** to establish an ABLE program, under which eligible individuals with disabilities could start an ABLE account, modeled after current Section 529 savings accounts.

An Overview of the ABLE Act

- Eligible individuals **must be severely disabled before turning age 26**, based on a marked and severe functional limitation or receipt of benefits under the SSI or Disability Insurance (DI) programs.

Who Qualifies?

1. Persons Diagnosed as Disabled Before Age 26 and Receiving SSI or SSDI

- *Any individual who has been diagnosed with a disability before the age of 26 years old*, and who is receiving, deemed to be, or treated as receiving supplemental security income benefits or disability benefits under Title II of the Social Security Act.

Or

2. Persons Diagnosed as Disabled Before Age 26 and Certified as Meeting Conditions Similar to that Required by SSI or SSDI

- *Any individual who has been diagnosed with a disability before the age of 26 years old*, who has a medically determined physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 month or is blind, **and** provides a copy of their diagnosis signed by a physician.

Who Qualifies?

- If the ABLE account beneficiary qualifies because of certification, ABLE eligibility cannot be used to secure supplemental security income (SSI) or Medicaid

An Overview of the ABLE Act

Other key features:

- **Contributions** into an ABLE account **could be made by any person;**
- Contributions would **not** be **tax deductible**;
- **Income earned** by the accounts would **not** be **taxed;**
- Account **withdrawals**, including portions attributable to investment earnings generated by the account, **for qualified expenses** would **not be taxable;**

An Overview of the ABLE Act

- Individuals would be **limited to one ABLE account**, and **total annual contributions** by all individuals to any one account could be made **up to the gift tax limit ($14,000 in 2015)**
- **Aggregate contributions** to an ABLE account would be **subject to an overall limit matching the State limit for Section 529 accounts.**
- (Example – **The** 529 limit in California is i**$370**,000 .) **$370,000/$14,000 = 26.42 years**

10

An Overview of the ABLE Act

- Individuals with ABLE accounts could maintain eligibility for means-tested

In SSI, the first $100,000 in account balances are excluded from counting as resources, as are most account withdrawals.	**ABLE account balances and withdrawals are completely excluded for the purpose of Medicaid and other benefit programs.**

ABLE and SSI Eligibility

- If the beneficiary is receiving Supplemental Security Income (SSI) benefits, when the assets in the account total $100,000, any monthly SSI benefits will be placed in suspension.
- If the assets in the ABLE Account drop back below $100,000, the SSI benefit suspension ceases and any SSI benefit resumes.
- The beneficiary will not have to reapply for SSI benefits once the account drops back below the $100,000 threshold.

12

ABLE and Medicaid Eligibility

- ABLE account beneficiaries do not lose Medicaid eligibility based on assets in their ABLE account or suspension of SSI benefits.
- For instance, in Arizona the maximum amount that can be placed in a 529 plan is $412,000 .
- Therefore – if contributions exceed $100,000 – SSI eligibility would be lost – but as long as the account remains below $412,000 – Medicaid eligibility continues.

13

What can be Contributed to an ABLE Account

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

- (A) unless it is in **cash**, or"
- (B) except for ***rollovers to another beneficiary*** .....

if such contribution to an ABLE account would result in aggregate contributions from all contributors to the ABLE account for the taxable year exceeding the amount in effect under section 2503(b) for the calendar year in which the taxable year begins.

14

Transfers of the Account during the Beneficiaries Lifetime or Upon the Beneficiaries Death

- The ABLE Act allows in transfers of an ABLE Account during the lifetime of the ABLE Account beneficiary or the beneficiaries death in very limited situations to other family members that are disabled **if the new beneficiary is an eligible individual for such taxable year and a member of the family of the beneficiary** as listed in IRC (ii) Section 102(c.)(1)(C).

15

Change in Designated Beneficiaries

- THAT IS BROTHER – SISTER – STEP BROTHER OR STEP SISTER
- So for example – if the beneficiary upon death of the ABLE Account is the brother or step brother of the ABLE Account beneficiary then it can pass to them with no Medicaid lien.
- If instead the account passes to the beneficiaries spouse, then there is a Medicaid lien.

16

Qualified Disability Expenses

- education,
- housing,
- transportation,
- employment training and support,
- assistive technology and personal support services,
- health,
- prevention and wellness,
- financial management and administrative services,
- legal fees,
- expenses for oversight and monitoring,
- funeral and burial expenses.

17

Limited Investment Direction

- **Beneficiaries may direct the investment of any contributions to the program (or any earnings thereon) no more than 2 times in any calendar year.**
- As with 529 college savings accounts, the **range of investment options available for ABLE accounts would be determined by the States.**

18

Tax Free Growth and Penalties if Used for Non Qualified Expenses

- **Contributions are in after-tax dollars but earnings would grow tax-free** just like with 529 college savings accounts (Roth style).
- **Withdrawals must be for qualified expenses or else the earning portion would be subject to regular income tax and a 10% penalty** (state penalties could also apply).

19

Tax Free Growth and Penalties if Used for Non Qualified Expenses

- Example – Bob over a decade saves $50,000, and over that period the account earns $10,000 for a total of $60,000.
- If Bob were to use the $60,000 for a down payment on a home, no taxes would be due
- If instead Bob were to use $5,000 to pay for a trip to Disneyland – the $5,000 would be taxable, plus a 10% penalty.

20

ABLE Accounts Must Be Opened in the State Beneficiary Resides

- Qualified individuals or their families **must open ABLE account in the state in which the beneficiary resides or in a state that has a memorandum of understanding** with another state to provide accounts.
- There is a limit of one ABLE account per eligible individual

Comparing ABLE Accounts to Special Needs Trust

- To make an intelligent decision about what tool to use – it is important to understand the basics of special needs trusts.

22

Third-Party Trust Social Security says

SI 01120.200 E.17

- A **third-party trust** is a trust established by someone other than the beneficiary as grantor. For example, a third-party trust may be established by a grandparent for a grandchild.

Third Party Special Needs Trust

23

Third-Party Trust

- A third-party trust can have great latitude, and upon the death of the beneficiary can be left to anyone you wish (except for the drafting attorney) with no payback to the state.
- There are no limits to how much can be placed in a third party special needs trust
- A third-party trust had no age limit for the beneficiary

Third Party Special Needs Trust

24

LET'S TALK ABOUT PAYBACKS AND MEDICAID LIENS

25

ABLE and the Medicaid Payback

- **In the event the qualified beneficiary dies with remaining assets in an ABLE account:**
  - The assets in the ABLE Account are **first distributed to any State Medicaid plan** that provided medical assistance to the designated beneficiary
  - The amount of any such Medicaid payback is calculated based on amounts paid by Medicaid **after the creation** of the ABLE Account

26

Medicaid Payback

- While the Medicaid Payback should be a major consideration when selecting what tool to use, it is only one factor.
- Basically –this is a 529 plan with a lien for any Medicaid used by the beneficiary from the time the account was created.
- Compare this with a traditional 529 plan where there are no liens.

27

Medicaid Payback

Medi-Cal Recovery	ABLE Account	3rd Party SNT	D4A Trust
Medi-Cal used for medical purposes **after age 55**	The amount of any such Medicaid payback is calculated based on amounts paid by Medicaid **after the creation of the ABLE Account**	**No lien**	**All Medicaid paid during lifetime**

Medicaid Payback

PLAN FOR LIEN UPON DEATH

- If family are using this as a savings tool – ideally the funds will be expended before death. This is a 529 plan with a lien.

MAKE SURE THAT THE PAYBACK IS EVEN AN ISSUE

- No every person with a disability uses Medicaid. Some use massive amounts of Medicaid.
- Many folks do not realize they are using Medicaid – for instance Medicaid waivers

29

Example
The $10,000 Inheritance Dilemma

- Bob has a disability that occurred before the age of 26 and is on SSI and Medicaid
- Bob inherited $10,000.
- He has the following options
  - Spend down the assets in the month of receipt
  - Join a pooled trust or have parents or grandparents establish a self settled trust
  - Put the funds in an ABLE Account
  - Keep in mind that Bob has to have the capacity to transfer the funds into the ABLE Account.

30

Example

Difficulty Remaining Below Resource Limit

- Jane has a disability that occurred before the age of 26 and is on SSI and Medicaid
- She has a job – receives Section 8 – lives very frugally – and has difficulty staying below the $2,000 resource limitation

Example

Difficulty Remaining Below Resource Limit

- She could transfer up to $14,000 a year of his excess wages to her ABLE Account to be used at a later date.

ABLE Act – Review of Proposed IRS Regs

Proposed IRS Regulations

The IRS recently released a notice that provides advance notification of a provision anticipated to be included in the proposed regulations to be issued under section 529A of the Internal Revenue Code.

A public hearing has been scheduled for **October 14, 2015**, beginning at **10:00 am** in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

Proposed IRS Regulations

For purposes of this presentation – if the slide has this in the corner – this is copied straight out of the proposed regulation.

If it doesn't – it is commentary

To download materials related to this program go to

ACHIEVING INDEPENDENCE

WHAT HAPPENS IF ACCOUNT HOLDER NO LONGER MEETS THE DEFINITION OF BEING DISABLED?

ACHIEVING INDEPENDENCE

Change in eligible individual status

Example

- Erica has been on SSI for many years and has set up an ABLE Account that Uncle Steve and Aunt Terri has been contributing into annually. This year they contributed $10,000 and the account now has $60,000.
- Erica gets a job, and is being paid a salary of $34,000 a year.
- Therefore she no longer meets the definition of being disabled under the first category because no longer receiving supplemental security income benefits or disability benefits under Title II of the Social Security Act.

ACHIEVING INDEPENDENCE

Who Qualifies?

1. Persons Diagnosed as Disabled Before Age 26 and Receiving SSI or SSDI

- *Any individual who has been diagnosed with a disability before the age of 26 years old*, and who is receiving, deemed to be, or treated as receiving supplemental security income benefits or disability benefits under Title II of the Social Security Act.

OR

2. Persons Diagnosed as Disabled Before Age 26 and Certified as Meeting Conditions Similar to that Required by SSI or SSDI

- *Any individual who has been diagnosed with a disability before the age of 26 years old*, who has a medically determined physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 month or is blind, and provides a copy of their diagnosis signed by a physician.

Change in eligible individual status

She **MAY** qualify under the second category as Certified as eligible if she who has a medically determined physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 month or is blind, **and** provides a copy of their diagnosis signed by a physician.

40

Change in eligible individual status

Therefore, **if** at any time a designated **beneficiary no longer meets the definition of an eligible individual**, his or her **ABLE account remains an ABLE account** to which all of the provisions of the ABLE Act continue to apply, **and no (taxable) distribution of the account balance is deemed to occur.**

41

Change in eligible individual status

In this way, the Treasury Department and the IRS intend to prevent a deemed distribution of the ABLE account (and preserve the account's qualification as an ABLE account for all purposes) if, **for example, the disease that caused the impairment goes into a temporary remission, and to preserve the ABLE account with its tax-free distributions for qualified disability expenses if the impairment resumes and once again qualifies the designated beneficiary as an eligible individual.**

42

Change in eligible individual status

Note that expenses will not be qualified disability expenses if they are incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of §1.529A-1(b)(9)(A) or §1.529A-2(e)(1)(i).

43

Change in eligible individual status

However, the proposed regulations provide that, beginning on **the first day of the taxable year following the taxable year** in which the designated beneficiary ceased to be an eligible individual, **no contributions to the ABLE account may be accepted.**

44

Change in eligible individual status

If the designated beneficiary subsequently again becomes an eligible individual, then additional contributions may be accepted subject to the applicable annual and cumulative limits

45

Change in eligible individual status

- What this tells us is that that the ABLE Account does not automatically become taxable just because she does not meet the definition of being disabled.
- Uncle Steve can no longer make contributions to the ABLE Account next year IF ERICA DOES NOT QUALIFY UNDER A CERTIFICATION, but she could contribute $4,000 this year – assuming no one else contributed

46

What Happens if A State Passes Laws Before Regs are Implemented?

47

What Happens if State Passes Laws Before Regs are Implemented?

The Treasury Department and the IRS reiterate that States that enact legislation creating an ABLE program in accordance with section 529A, and those individuals establishing ABLE accounts in accordance with such legislation, **will not fail** to receive the benefits of section 529A **merely because the legislation or the account documents do not fully comport with the final regulations when they are issued**.

48

What Happens if State Passes Laws Before Regs Issue?

The Treasury Department and **the IRS intend to provide transition relief** to enable those State programs and accounts to be brought into compliance with the requirements in the final regulations, including **providing sufficient time after issuance of the final regulations in order for changes to be implemented.**

Who is in Charge of the ABLE Account?

Who Owns the ABLE Account?

The proposed regulations also presumes that the designated beneficiary is the owner of that account and manages the distributions.

What if Account Holder Lacks Capacity?

The Treasury Department and the IRS recognize, however, that **certain eligible individuals may be unable to establish an account themselves**.

52

What if Account Holder Lacks Capacity?

Therefore, the proposed regulations clarify that, if the eligible individual cannot establish the account, **the eligible individual's agent under a power of attorney or, if none, his or her parent or legal guardian may establish the ABLE account for that eligible individual**.

53

What if Account Holder Lacks Capacity?

For purposes of these proposed regulations, because each of these individuals would be acting on behalf of the designated beneficiary, **references to actions of the designated beneficiary, such as opening or managing the ABLE account, are deemed to include the actions of any other such individual with signature authority over the ABLE account.**

54

What if Account Holder Lacks Capacity?

The proposed regulations also provide that, consistent with Notice 2015-18, a person other than the designated beneficiary with signature authority over the account of the designated beneficiary **may neither have, nor acquire, any beneficial interest in the account during the designated beneficiary's lifetime and must administer the account for the benefit of the designated beneficiary.**

55

Definition of Designated Beneficiary

If the designated beneficiary is not able to exercise signature authority over his or her ABLE account or chooses to establish an ABLE account but not exercise signature authority, references to the designated beneficiary with respect to his or her actions include actions by the designated beneficiary's **agent under a power of attorney or, if none, a parent or legal guardian of the designated beneficiary.**

56

Practice Tip

- If the eligible individual under an ABLE Account has capacity – it is best to have the individual sign a power of attorney immediately.
- Also – if these rules are adopted and the eligible individual want for instance a to have a sibling have signature authority – then the power of attorney is the method to make this happen.

57

Post-Death Payments – The Medicaid Lien

58

Post-Death Payments

A qualified ABLE program must provide that a portion or **all of the balance remaining in the ABLE account of a deceased designated beneficiary must be distributed to a State that files a claim against the designated beneficiary or the ABLE account itself** with respect to benefits provided to the designated beneficiary under that State's Medicaid plan established under title XIX of the Social Security Act.

59

Commentary

- Could the account be used for funeral expenses even if arrangements were not made prior to the death of the account holder?
- What if the contract is signed, payable upon death.

60

Can a Traditional 529 be rolled into an ABLE Account?

61

Can a Traditional 529 Plan be Rolled into an ABLE Account?

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

62

Issues Concerning Qualified Disability Expenses, Cell Phones and Housing Examples

63

Qualified Disability Expenses

- Qualified disability expenses are any expenses made for the designated beneficiary related to their disability, including:
  - education,
  - **housing**,
  - transportation,
  - employment training and support,
  - assistive technology and personal support services, health,
  - prevention and wellness,
  - financial management and administrative services,
  - legal fees,
  - expenses for oversight and monitoring,
  - funeral and burial expenses

64

Qualified Disability Expenses

In order to implement the legislative purpose of assisting eligible individuals in maintaining or improving their health, independence, or quality of life, the Treasury Department and the IRS conclude that the term **"qualified disability expenses" should be broadly construed** to permit the inclusion of basic living expenses and **should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to the eligible individual.**

65

Qualified Disability Expenses

For example, expenses for common items such as smart phones could be considered qualified disability expenses if they are an effective and safe communication or navigation aid for a child with autism.

66

Housing

- One question we all have is whether utilization of expenses for housing will cause a reduction in SSI.
- Currently under SSI – payments from a trust for housing from a family member or a trust cause a reduction in benefits by $264.66
- There are POMS that go the other direction.

Residency Requirements

The ABLE Accounts Must Be Opened in the State Beneficiary Resides

- Qualified individuals or their families **must open ABLE account in the state in which the beneficiary resides or in a state that has a memorandum of understanding** with another state to provide accounts.
- There is a limit of one ABLE account per eligible individual

Residency Requirements

If a State does not establish and maintain a qualified ABLE program, it may contract with another State to provide an ABLE program for its residents. **The statute is silent as to whether a designated beneficiary must move his or her existing ABLE account when the designated beneficiary changes his or her residence.**

70

Residency Requirements

The Treasury Department and the IRS are concerned about imposing undue administrative burdens and costs on designated beneficiaries who frequently change State residency, such as members of military families. Therefore, **the proposed regulations provide that a qualified ABLE program may permit a designated beneficiary to continue to maintain his or her ABLE account that was created in that State, even after the designated beneficiary is no longer a resident of that State.**

71

Comments and Public Hearing

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are timely submitted to the IRS as prescribed in this preamble under the "Addresses" heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules.

Comments and Public Hearing

A public hearing has been scheduled for **October 14, 2015**, beginning at **10:00 am** in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

What's Next?

- SSA for SSI and CMS for Medicaid are working on new regulations for ABLE Account.
- This will be a good opportunity to look at all rules of distributions for persons with disabilities, be it from family and friends, special needs trusts, or ABLE Accounts.

ACHIEVING INDEPENDENCE

An Advocates Guide to Enacting the ABLE Act in your State

ACHIEVING INDEPENDENCE

Summary of Enactment by States

Summary:

Total Number of States with Pending ABLE Legislation: (Note: Four have adjourned and legislation will not be reconsidered until 2016)	10/51 (19.6%)
Total Number of States with Signed ABLE Legislation:	31/51 (60.8%)
Total Number of States with ABLE Legislation (Pending or Signed):	41/51 (80.4%)
Number of States Which Have Not Introduced ABLE Legislation: (Note: All have adjourned their 2015 legislative session)	8/51 (15.7%)
Number of States Where All ABLE Legislation Has Died Due to Adjournment:	2/51 (3.9%)
Total Number of States with No Current ABLE Legislation	10/51 (19.6%)

ACHIEVING INDEPENDENCE

The Opportunities Presented by the ABLE Act

- The ABLE Act is another tool and though it will seldom replace the need for a special needs trust, in specific situations it is a good tool.
- Most states as they roll this out are going to need to do a great amount of education for the public and professionals.
- The are many opportunities to work with the entities that are creating policies and procedures to collaborate and provide guidance and education.

Where Can You Learn About Your State?

http://www.thearc.org/

ABLE Legislation By State

Current as of August 31st, 2015

Examples

Texas ABLE Timeline

- May 30, 2015 - Texas unanimously passes Texas ABLE Act
- Sept. 21, 2015* - 90 days comment or suggestion period for the proposed guidance rules
- Oct. 14, 2015* - Public hearing in Washington DC for verbal comments on the proposed rules
- Dec. 01, 2015* - Texas Comptroller appoints the "ABLE program advisory committee" members
- Ongoing - The Prepaid Higher Education Tuition Board creates rules to implement, manage and govern the program as soon as possible.
- Mid 2016* - Texas ABLE account applications are available and ready for business
- *estimated - based on current implementation discussions

POWERS AND DUTIES OF BOA

From page 4 of SB 1664

To establish and administer the ABLE program, the board shall:

- (1)develop and implement the program;
- (2)adopt rules and establish policies and procedures to implement this subchapter to:
  - (A)permit the program to qualify as a qualified ABLE program under Section 529A, Internal Revenue Code;
  - (B)make changes to the program as necessary for the participants in the program to obtain or maintain federal income tax benefits or treatment provided by Section 529A, Internal Revenue Code, and exemptions under federal securities laws; and
  - (C)make changes to the program as necessary to ensure the program 's compliance with all other applicable laws and regulations;

POWERS AND DUTIES OF BOA

From page 4 of SB 1664

- (3)either directly or through a contractual arrangement for investment or plan manager services with a financial institution or plan manager or another qualified entity, develop and provide information for participants and their families necessary to establish and maintain an ABLE account;
- (4)enter into agreements with any financial institution or any state or federal agency or contractor or other entity as required to administer the program under this subchapter

POWERS AND DUTIES OF BOA

From page 5 of SB 1664

- (7)Engage the services of private consultants, trustees, records administrators, managers, legal counsel, auditors, and other appropriate parties or organizations for administrative or technical assistance;
- (10)Develop marketing plans or promotional materials or contract with a consultant to market the program;
- (14)Establish other policies, procedures, and eligibility criteria to implement this subchapter.

Advisory Committee

Page 15

- Sec. 64.917. ABLE PROGRAM ADVISORY COMMITTEE.
(a) The ABLE program advisory committee is established to review rules and procedures related to the ABLE program, to provide guidance, suggest changes, and make recommendations for the administration of the program, and to provide assistance as needed to the board and comptroller during the creation of the program.

Advisory Committee

Page 15

(b)The comptroller shall appoint at least five and not more than seven members to the advisory committee, including at least one member from each of the following groups:

- (1)persons with a disability who qualify for the program;
- (2)family members of a person with a disability who qualifies for the program;
- (3)representatives of disability advocacy organizations; and
- (4)representatives of the financial community.

(c)The comptroller shall appoint a presiding officer.

(d)The advisory committee shall meet quarterly or more frequently as the presiding officer determines is necessary to carry out the responsibilities of the committee.

(e)A member of the advisory committee is not entitled to compensation or reimbursement for travel expenses.

California

- *California's legislation for the ABLE Act basically mirrors the federal legislation except that it creates an advisory board.*

California

- *4876. There is hereby created the ABLE Act Board that consists of the Treasurer, the Director of Finance, the State Controller, the Director of Developmental Services, the chairperson of the* ***State Council on Developmental Disabilities****, or their designees.*

The State Council on Developmental Disabilities http://www.scdd.ca.gov/

The State Council on Developmental Disabilities http://www.scdd.ca.gov/

- The State Council has 13 Regional Offices throughout California and will be coordinating trainings across the state for the community as well as for persons with disabilities and their families.

In Conclusion

- The ABLE Act is a new tool – and in limited situations can be an easy way to shelter assets and still remain qualified for SSI and Medicaid.
- ABLE in most cases is not a substitute for a special needs trust.
- There is a great need for broad education about all the different options for setting aside assets for persons with disabilities to ensure quality of life.

PRE-CONFERENCE:
Pooled Trust Intensive

Wednesday, October 14, 2015
Breakout Session 1

1:00 P.M. – 1:50 P.M.

Too Old for a Pooled SNT? – Think Again! Funding Pooled Trust Subaccounts for Beneficiaries Age 65 and Older – 2015 Update

Presenters:
Megan Brand
Executive Director
Colorado Fund for People with Disabilities
Denver, CO
and
Laurie Hanson
Attorney at Law
Long, Reher & Hanson, P.A.
Minneapolis, MN

- Materials
- Exhibits A-H
- PowerPoint

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

Funding Pooled Trust Subaccounts for Beneficiaries Age 65 and Older – 2015 Update.

By Megan Brand and Laurie Hanson

INTRODUCTION

Marnie* funded her Colorado Fund for People with Disabilities (CFPD) pooled trust sub-account with $34,240.00 just a couple of weeks before her 95th birthday. She was living in an independent living apartment at Porter Place, an Assisted Living Facility. Before establishing her CFPD Pooled Trust sub-account, a CFPD Case Manager met with her in her residence to discuss her background and needs and then developed a spending plan for spending the funds that would be transferred into trust. Marnie was a mother of four and her husband had recently died. She had been a primary caregiver to their four children and had worked off and on as a substitute teacher and cashier at the grocery store. Since living in the Assisted Living, Marnie enjoyed shopping, watching TV, spending time with her family and attending church at the facility. She also greatly benefited from paid companion services to assist her in participating in community activities.

Per the spending plan submitted and approved by HCPF (Colorado's Dept. of Healthcare, Policy and Financing), CFPD planned to use Marnie's trust for a Sleep Number Twin Bed, annual family visits (as she was not able to travel), companionship services, clothing and personal needs items, hair/nail care, cable TV service, and renter's insurance.

At the projected annual rate of spending, coupled with one time expenditures, the plan concluded that Marnie's trust would be exhausted ahead of her life expectancy of 3.26 years.

Over the next 3 ½ year, funds from Marnie's sub-account were used for all of the above purposes, greatly enriching her life by allowing her to participate in community activities with a companion, visiting with her very close-knit family, and having the enjoyment of getting her hair/nails done and cable television to watch during her down time.

In January 2015, the trust was able to provide for some additional supplemental care giving while Marnie transitioned to the memory care unit at Porter Place due to a decline in health; this final expense closed her trust with CFPD. Marnie passed away in June 2015. In a follow up survey, her son noted:

"Engaging CFPD in 2011 was a positive choice in managing my mother's financial assets after my father passed in June of that year. The fund was able to supplement her lifestyle, giving her an enjoyable quality of life at Porter Place. When her health problems became an issue, we were able to use the remaining funds to assist in caregiver services. We have had a very positive experience with CFPD and our case manager…"

**Name has been changed*

Marnie was lucky – she was living in Colorado at a time when HCPF was allowing individuals age 65 and older to transfer funds into pooled trust sub-accounts without imposing a transfer penalty. If Marnie had lived in the neighboring states of Utah, Wyoming or New Mexico in 2011 – or if this had happened in Colorado in 2015 - a period of ineligibility would have been imposed following her deposit of funds into the pooled trust sub-account and the state Medicaid program would not have paid for her long-term care services during that period.

Based on an informal survey of lawyers and pooled trust administrators,[1] nineteen states allow transfers by individuals over the age of 64 without penalty[2] and twenty two states impose a period of ineligibility without considering whether the individual transferring assets to pooled trust sub-accounts has received fair market value.[3] Five states are in flux – either advocates are currently litigating the imposition of a penalty or are developing fair market value criteria[4] and we currently have no information about two states.[5]

The authors of this paper are from Colorado and Minnesota, two states in which the fair market value issue has been litigated. It is our hope that pooled trust administrators start to allow individuals age 65 and older to establish sub-accounts with their trusts and to support the beneficiaries in challenging agency impositions of penalty periods by showing that fair market value was received. So far, to our knowledge, all cases where fair market value was argued at

---

[1] Informal survey of 50 states and the District of Columbia, conducted by and on file with Laurie Hanson, Long, Reher & Hanson, P.A., Minneapolis, Minnesota. Last updated August 16, 2015.
[2] (*Id.*) – they are: AL, AK, CA, CT, DE, FL, IA, IN, ID, KS, KY, MA, MD, MT, NY, OH, OK, RI, WV, WI, AND DC (20 states and DC).

[3](*Id.*) – they are AZ, GA, HI, LA,ME, MS, NC,ND, NH, NJ, NM, NV, OR, PA, SC, SD, TX, UT, VA,VT, WA,WY
[4] (*Id.*) – they are CO, MI, MN, TN (Fair Market Value/Litigation) IL (allows a public guardian to establish a pooled trust sub-account for a ward without penalty but imposes a penalty on all other applicants and recipients. 305 ILCS 5/3-1.2 (Section 3-1.2)(2013). This is a distinction without precedent in federal Medicaid law.)
[5] (*Id.*) - they are AR and NE.

the first stage of the appeal (or better yet, when the application was made) have been successful to reverse the imposition of a period of ineligibility. The purpose of this paper is to outline the various strategies to prove that fair market value was received and to provide the law supporting such strategies.

A BRIEF HISTORY OF POOLED TRUSTS AND TRANSFERS

In enacting the Omnibus Reconciliation Budget Act of 1993 (OBRA '93), Congress sought to stop divestment of assets into irrevocable trusts by wealthy individuals seeking to qualify themselves for MA-LTC without suffering the otherwise applicable penalty periods. It succeeded. OBRA '93 eliminated this practice by providing that the income and assets of self-settled trusts would be deemed available if a trustee could make a distribution to the grantor under "any circumstances."[6] If the trustee could not be compelled to make a distribution to the grantor, then a period of ineligibility would be imposed if the transfer was made within the relevant look back period.[7]

Congress did not stop the establishment of trusts by individuals altogether; rather it established three exempt trusts[8] thereby acknowledging the importance of certain trusts to provide a means for people living with chronic diseases or disabilities to save money to pay for extras not afforded by the personal needs allowance or income they are allowed to keep when relying on Medical Assistance for their most basic needs.[9] Congress specifically permitted the

[6] 42 U.S.C. § 1396p(d)(3)(B)(i).
[7] *Id.*
[8] *Id.* – The Special Needs Trust, Miller Trust, and Pooled Trust 1396p(d)(4)(A)(B) and (C).
[9] *Lewis v. Alexander*, 695 F.3d 325 (3rd Cir., 2012), cert denied, 184 L.Ed.2d 724 (2013) "[Congress's] primary objective was unquestionably to prevent Medicaid recipients from receiving taxpayer-funded health care while they sheltered their own assets….But its secondary objective was to shield special needs trust from impacting Medicaid eligibility." Slip op. at 32-33.

use of pooled special needs trusts for individuals of any age. Congress also specifically stated that only the trust rules in the federal statute apply to trusts. The imposition of a penalty *per se* for individuals over age 64 establishing pooled trust sub-accounts is not supported by the federal statute. In fact, states that impose a penalty, especially without a fair market value analysis are out of compliance with federal law.

DEFINITIONS PERTINENT TO UNDERSTANDING TRANSFERS AND TRUSTS

- *Medical Assistance for Long-term Care (MA-LTC).* There are many bases of eligibility, each of which has different financial eligibility criteria. Relevant to this discussion is MA-LTC which is the MA program which pays for long-term care services, most importantly assisted living and nursing home care. This also includes eligibility for the waiver programs which pay for extended home and community based services. An individual over the age of 64 may fund a pooled trust sub-account without penalty for MA, but not for MA-LTC.

- *Individual* means a person applying for or currently receiving MA-LTC as well as the individual for whom the pooled trust sub-account is *established.*

- *Basic Eligibility for MA-LTC:*[10]

    1. The individual may have only $3,000 [your state's limit] in *available assets*.
    2. The individual's *income:*
        a. Must be below 100% of the Federal Poverty Guidelines (currently $958.00 per month); OR
        b. Must be less than the cost of care; and
    3. The individual *must not have transferred assets* for less than fair market value in the 60 months immediately preceding the application or while receiving benefits.

- *Available assets* are those assets that can be converted to cash to pay for long-term care that are neither exempt nor unavailable. Whether or not *assets in a trust* are available for purposes of MA-LTC depends upon the type of trust:

    - Assets in *revocable trusts* are always available because the grantor can revoke or amend the trust and have all assets available to pay for care.

    - Assets in an *irrevocable trust* are available if there is any way the individual (in the state agency's opinion) can force the trustee to distribute the assets to pay for care.

[10] Figures may differ from state to state.

For instance if there is an articulated standard, the assets in the trust will be available. Only if the trustee has sole and absolute discretion, including discretion not to distribute assets at all would assets be considered unavailable.

- *Exempt or excluded assets* are not counted when determining eligibility for Medical Assistance. For instance, the homestead, one automobile, personal belongings are exempt. Assets or income in special needs trusts and pooled trust sub-accounts are exempt/excluded.

- *Special Needs Trust or (d)(4)(A) trust* means a first party special needs trust in accordance with the federal Medicaid statute.[11] The trust is for the benefit of a disabled individual under age 65; it is established by the person's parent, grandparent, court, or guardian and is funded with only the assets of the disabled person. The trust agreement must state that, at the death of the disabled person, any remaining trust assets must be distributed first to the state as repayment for any Medical Assistance received by the disabled person. When these requirements are met, the assets held in trust are not considered available to the disabled person except to the extent they are distributed to the disabled person, and the transfer of the disabled person's assets into trust is not penalized.

- *Pooled SNT* or *(d)(4)(C) trust* means a first party pooled special needs trust in accordance with the federal Medicaid statute.[12] A pooled trust is managed by a non-profit corporation and is made up of individual sub-accounts for individual disabled persons of any age. Each account established for the benefit of a disabled person holds only the assets of the disabled person and is maintained for that person. The trust sub-account may be established by a parent, grandparent, guardian, court, or by the disabled person. The trust must provide that any assets remaining at the death of the disabled person, to the extent that they are not held in trust for other disabled persons, must be paid to the state for Medical Assistance that the person received.

- *Grantor* – in the case of a pooled trust, the grantor is the non-profit corporation establishing the trust. Generally, a grantor is an individual who establishes and funds a trust.

- *Pooled Trust Sub-account* means an account established within a pooled trust for the sole benefit of the individual in accordance with 42 U.S.C. § 1396p(d)(4)(C). The individual's social security number is used when establishing the sub-account because the money in the sub-account belongs to the individual. Sometimes the establisher of a sub-account is also called a grantor.

MA-LTC ELIGBILITY, TRANSFERS AND TRUSTS[13]

[11] 42 U.S.C. § 1396p(d)(4)(A);
[12] 42 U.S.C. § 1396p(d)(4)(C);
[13] *See* Attachment A.

MA-LTC rules provide that if an individual transfers assets for less than fair market value within the five years prior to applying for MA-LTC, a period of ineligibility will be imposed during which the MA program will not pay for long-term care services. The period of ineligibility is calculated by dividing the amount transferred by the statewide average nursing facility payment (currently, for instance in Minnesota is $6,141). So, for instance if the individual transfers $100,000, the individual would not be eligible for MA-LTC for 16.29 months ($100,000 ÷ $6,141).[14]

The rules regarding transfers and trusts depend upon who is transferring assets into the trust, who is the grantor of the trust, who is the beneficiary of the trust, and whether the trust is revocable or irrevocable. The rules can be summarized as follows:

- A transfer of assets into a revocable trust is not penalized because the assets are available.
- Transfers into irrevocable trusts where there is no retained interest by the individual are penalized if the transfer occurs within 60 months of application or while receiving benefits. 42 U.S.C. § 1396p(d)(3)(B)(i).
- Since the pooled trust has an articulated standard, then technically the trust is an available asset but since the trust account is exempt it is excluded and cannot be considered available.
- Transfers into (d)(4)(A) trusts are not penalized (there is no specific authority). Assets in the trust are not exempt if the individual is over the age of 64.
- Transfers into (d)(4)(B) trusts for individuals of any age are not penalized (again, no specific authority – and not penalty for individuals age 65 and older).
- Transfers into (d)(4)(C) trusts by individuals under age 65 are not penalized (likewise, there is no specific authority).
- Transfers into (d)(4)(C) by individuals over age 64 are penalized in some states and not in others.
- Transfers by the individual applying for MA into a trust established for the sole benefit of the individual's child are exempt.[15]
- Transfers by the individual applying for MA into a special needs trust or a pooled special needs trust for a person **other than the individual** under the age of 65 are exempt. (Emphasis added).[16]

EMERGENCE OF THE FAIR MARKET VALUE ANALYSIS

The authors believe that that the transfer rules do not apply to transfers of assets into pooled trust sub-accounts. That is not the subject of this paper and will not be explored here. This paper explores what it means if your state determines that the transfer provisions do apply. Since the

[14] 42 U.S.C. § 1396p(c);
[15] 42 U.S.C. § 1396p(c)(2)(B)(iii). *See also* Attachment A.
[16] 42 U.S.C. § 1396p(c)(2)(B)(iv). *See also* Attachment A.

federal Medicaid statute does not impose a period of ineligibility per se on transfers by individuals over age 64 into pooled trust sub-accounts, the transfer must be analyzed like any other transfer in the Medicaid context. Given the lack of clarity and the inconsistent interpretations over the years by state Medicaid agencies, the Center for Medicaid and Medicare Services (CMS) issued a series of letters to the regional offices in 2008 and 2009 attempting to clarify this issue. The letter to the Chicago Regional Office reads in pertinent part:

> Although a pooled trust may be established for beneficiaries of any age, funds placed in a pooled trust established for an individual age 65 or older ***may*** be subject to penalty as a transfer of assets for less than fair market value. When a person places funds in a trust, the person gives up ownership of those funds. ***Since the individual generally does not receive anything of comparable value in return, placing funds in a trust is usually a transfer for less than fair market value***. The statute does provide an exception to imposing a transfer penalty for funds that are placed in a trust established for a disabled individual. However, only trusts established for disabled individuals age 64 or younger are exempt from application of the transfer of assets penalty provisions (see section 1917(c)(2)B(iv) of the Act.)[17]
>
> If States are allowing individuals age 65 or older to establish pooled trusts ***without applying the transfer of assets provisions,*** they are not in compliance with the statute.[18] (Emphasis added)

This letter did not settle the issue at all. Seven years later less than half the states impose the transfer provisions and less than half the states allow the transfers without penalty. Some states that were allowing them before 2008 now impose a transfer penalty and others that were not imposing a penalty, now do. Changes occurred legislatively and by "Policy Clarification." As a result, beneficiaries began appealing the imposition of periods of ineligibility arguing they received fair market value– and state district courts are agreeing with them. The following is a list of arguments and procedures that have been successful.

A. ***The establisher of a pooled trust sub-account does not lose value because of the change from legal to equitable owner***. When Marnie placed the assets in her pooled trust sub-account those assets could be used only for her during her life time. The establisher of a pooled trust subaccount receives fair market value upon creation of the subaccount because no value is

[17] Chicago Regional Letter, July, 2008 (Attachment B)
[18] *Id.*

lost when legal title is exchanged for equitable title.[19] The beneficiary is not divesting himself or herself of the assets; rather he or she becomes the equitable owner[20] of the assets in the trust, so that fair market value is received.[21] This is underscored by the sole benefit requirement. ***No one else*** can benefit from the trust account during the beneficiary's lifetime, and the assets are always available for his or her supplemental needs.

> . . . a disabled person who funds a pooled trust for her sole benefit during her lifetime has not made a disqualifying transfer because the individual has received market value for the transfer . . . and has merely exchanged legal ownership for equitable ownership.[22]

The assets are thus of no value to anyone else, and they have not disappeared. The beneficiary still has the full value of the assets he or she conveyed to the trustee.

B. ***The contractual obligation to use the funds for the individual gives fair market value.*** The creation of a trust is equivalent to the creation of a contract because the "deal between

---

[19] In *Beinke vs. Minnesota Dep't of Human Services*, CV-14-271 (Minn. Dist. Ct Blue Earth Co. June 24, 2014), a 72-year old disabled individual placed funds received from a workers compensation settlement into a pooled (d)(4)(c) trust. The court, on appeal, held that "when Appellant transferred her assets into the pooled trust, she vested in herself an equitable interest in the trust assets … and received FMV for her assets when she transferred them into the pooled trust." *Id* at 7. (Attachment C) *See also In re Guardianship of Scott G.G*, 261 Wis. 2d 679, 659 N.W.2d 438 (Wisc. Ct. App. 2003). (A guardian sought authority to transfer a settlement fund into a special needs trust for the ward. The court reasoned that the transfer was an exchange for equal value and that the disabled beneficiary "will receive the beneficial interest in the trust in return for relinquishing his legal title to the property." *Id.* at 442.

[20] *Id*. *See also* Dep't *of Social Services v. Saunders*, 247 Conn. 686, 724 A.2d 1093 (Conn. 1999). The funding of a special needs trust by a conservator was permissible because even though "transferring a ward's assets into a trust does indeed divest the ward of legal title to the assets, the ward remains the sole person who can benefit from the trust . . . [and] therefore, the equitable owner of the assets." *Id.* at 1105; *See also Ruby Beach v. State of Tennessee, Dep't of Human Services*, No. 09-2120-III (Tenn. Chancery Ct. 2010)

[21] *Wierzbinski v. State of Michigan, Dep't of Human Services*, Case No. 2010-4343-AA (Mich. Cir. Ct. Macomb Co. July 26, 2011). A 95-year old beneficiary funded a pooled trust and the court reversed the imposition of a penalty by the administrative agency because all of the trust principal and/or income could be paid to the beneficiary and "as a result, the funding of the trust with the cash was not a transfer for less than fair market value." The Administrative Law Judge found that in accordance with 42 U.S.C. section 1396p(c)(2)(c); *See also Bilbrey v. Tennessee Department of Human Services*; *State of Tennessee Department of Human Services*; *division of appeals and hearings*; Docket number: MA 081101584; March 4, 2009.(Mrs. Bilbrey's representatives placed the funds in the pooled trust for her sole use and benefit to purchase at fair market value services not provided by the nursing home and did not transfer the funds to the pooled trust for the purpose of qualifying her for Medicaid coverage.) (Attachment D)

[22] *Ruby Beach v. State of Tennessee, Dep't of Human Services*, No. 09-2120-III (Tenn. Chancery Ct. 2010), p. 29 (Attachment E)

grantor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract."[23] When a trust is created, and a grantor places property into the trust, there is a contract "within the meaning of the contract clause of the Federal Constitution."[24] A Medicaid recipient or applicant receives full consideration when he/she receives something of value pursuant to a legally binding agreement (e.g., a contract, a bill of sale, a deed) that was in effect at the time of transfer. When a Medicaid applicant or recipient joins a pooled trust, a contractual relationship between the grantor and the trustee arises. The individual agrees to deposit his money subject to the terms and conditions and fees of the non-profit managing the trust. For consideration received, the non-profit agrees to conserve and distribute the funds solely for the individual's benefit pursuant to the distribution standard set by the trust. The joinder agreement is a contract between the individual and the pooled trust setting forth the rights and responsibilities of the parties and the fees for joining. An individual placing funds in a special needs pooled trust sub-account is receiving market-value consideration - ensuring that his or her present and future needs will be met, the funds will be protected, and those funds will be used for very particular and necessary expenses. Master trust agreements provide that assets in an individual's sub-account must be used for the individual's sole benefit during the individual's life time and that the trustee must make distributions to meet the beneficiary's supplemental needs, to promote her/his comfort and well-being, and to enhance her quality of life so long as

[23] John H. Langbien, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 627 (1995)("The management trust has brought forth a new type of trustee--the corporate fiduciary, a service provider for hire, hardly different in function from professionals who contract to supply services in industry, commerce, finance, law, accounting, and so forth").

[24] *Coolidge v. Long*, 282 U.S. 582, 595 (1931). *See also Underhill v. U.S. Trust Co.*, 13 S.W.2d 502, 505 (1929) (A voluntary deed of trust … "is a binding contract between the settlor and the trustee acting for the cestuis que trust, supported by a legal and valuable consideration, namely the benefits contemplated and resulting to the settlor and the beneficiaries from the creation of the trust.")

the distributions do not replace, reduce or substitute government benefits. [25] Beneficiaries of a pooled trust sub-account have a right to rely on the terms of the joinder agreement and *believe that* the trustee will expend funds in accordance with the terms of the master trust agreement.[26] Not only must the trustee abide by the terms of the master trust agreement, but the trustee also has a statutory fiduciary duty to manage and conserve the funds strictly pursuant to the terms of the trust. Consider obtaining an affidavit or testimony from the pooled trust administrator speaking to all of these issues such as that set forth in Exhibit F.

C***. The funds in the pooled trust sub-account will be used over Marnie's life expectancy.*** *Marnie* has a life expectancy of anywhere from 3.26 years.[27] In preparation for the hearing, CFPD prepared a Fair Market Value assessment showing that the assets in this trust will last less than three years.[28] The services identified in the assessment are services not covered by medical assistance and are needed to care for Marnie.

D. Burden of proof – agency failed to rebut applicant's showing of value – rejection of a per se rule. If your state imposes a penalty per se without considering whether or not your client received fair market value issue, you can still make a showing of fair market value at a hearing and argue that the penalty should not have been imposed. Two Minnesota courts[29] have rejected the state agency's reliance on a *per se* rule in the face of evidence of fair market value. In *Dzuik*

---

[25] *See e.g.* any pooled master trust agreement *and Peittersen v. Minnesota Dep't of Human Services*, Attachment C, at page 7 (Ms. Peittersen, a 73-year old disabled MA-LTC recipient placed funds received from a personal injury settlement into a pooled (d)(4)(C) trust. The county Medicaid agency imposed a period of ineligibility because she was over the age of 64 at the time of the transfer. Peittersen appealed and at the administrative hearing testified that she placed the assets in the trust so she would have funds available to "leave the nursing home, obtain an apartment, and live as independently as possible." *Id.* The trustee of the pooled trust told her that she would approve the use of trust funds to help her establish independence and the District Court held that she "rightfully believed that to be the case." *Id.* at 4. The court found that the Commissioner's order was arbitrary and capricious, because there was no factual finding as to whether or not the transfer was made for fair market value. *Id.* at p. 6.

[26] *Peittersen* Attachment C, at page 3.

[27] *See supra*, p. 1.

[28] See Assessment and Plan, Attachment G.

[29] Besides *Dzuik*, discussed in this subsection, the other was the *Peittersen*, discussed in the previous subsection respecting pooled trust sub-account obligations as contracts.

v. Minnesota Dep't of Human Services,[30] the Douglas County District Court in the initial appeal held that the decision of the agency was not supported by substantial evidence because the agency did not perform an analysis of whether Mr. Dziuk received adequate compensation when he placed assets into a pooled trust sub-account.[31] On remand for further proceedings on that factual question,[32] even absent any evidence regarding the lack of fair market value, the Commissioner ruled that a penalty should be imposed because Mr. Dziuk was over 64.[33] On the second appeal, the court reversed the Commissioner's decision imposing a penalty.[34] The court held that there was "not substantial evidence in the record to support the Minnesota Department of Human Services' conclusion that Appellant transferred funds for less than fair market value."[35]

Likewise, in Peittersen, in reversing the Commissioner's decision as arbitrary and capricious, the court held that without a factual finding that the transfer was made for less than fair market value, the commissioner's order is arbitrary and capricious."[36]

In *Bienke vs. Minnesota Dep't of Human Services*, the court found that the appellant would not have been penalized has she been under the age of 65[37] and stated that "the principle of the Fourteenth Amendment applies when a "law neither burdens a fundamental right nor targets a suspect class, a classification adopted by a law must bear some rational relation to a legitimate

---

[30] *Dzuik v. Minnesota Dep't of Human Services*, 21-CV-09-1074 (Minn. Dist. Ct. Douglas Co. Dec. 15, 2009).Attachment H.

[31] Dziuk, at 3. Mr. Dziuk had multiple sclerosis and requires complete care due to his multiple sclerosis but he is active mentally. At the hearing Mr. Dziuk presented evidence that he placed the last of his funds - $12,320 (after having spent hundreds of thousands of dollars on nursing home care) into the pooled trust sub-account so that it could be used for things not covered by MA-LTC to allow him to engage in the world beyond the nursing home such as "a telephone; telephone bill; a television; cable television bill; books; magazine and newspaper subscriptions; food outside the nursing home's food; handicap van transportation; clothing; haircuts; … a motorized wheelchair and maintenance; a manual wheelchair; hearing aids; donations,; CDs; and DVD.s."

[32] *Id.*

[33] 21-CV-09-1074 (Minn. Dist. Ct. Douglas Co. February 7, 2012). Attachment I.

[34] *Id.*

[35] *Id*

[36] *Peittersen*, at 6

[37] CV-14-271, p. 7 (Minn. Dist. Ct Blue Earth Co. June 24, 2014). Attachment J.

end."[38] The Court held "that the statutory provision relied upon to penalize appellant bears no relation to a legitimate end."[39]

I. CONCLUSION

The transfer provisions contained in 42 U.S.C § 1396p(c) do not apply to trusts established for the individual applicant or recipient of Medicaid benefits. Rather, the provisions contained in 42 U.S.C § 1396p(d)(3) and (4), *and only those provisions*, govern trusts established for the benefit of the individual applicant or recipient of Medicaid benefits. If, however, the transfer provisions are applied, individuals have a due process the right to show that fair market value was received when the pooled trust sub-account was funded. In those states, pooled trust administrators should develop a spending plan at the time the sub-account is funded and that should be submitted with the application for benefits or when the sub-account is reported to the state Medicaid agency. Remember, the federal law does not impose a penalty per se when an individual age 65 and older places funds in a pooled trust sub-account. This fair market value argument can be made in every case where the state imposes a period of ineligibility so that disabled individuals over the age of 65 may protect some funds to pay for those goods and services not covered by MA-LTC to enhance the quality of their lives.

[38] Id. quoting Romer v. Evans 517 U.S. 620, 631, 116 S. Ct. 1620 (1996).
[39] Id. at 9. The court also found her age to be wholly immaterial in assessing the cause and extent of her disabilities … [and] the only reason why her transfer is not exempt is because she is over the age of 65, the penalty bears no rational relation to any legitimate state interest.

§ 1396p (c)		§ 1396p (d)
Transfers		**Trusts**
(1)(A) If an institutionalized individual or spouse of such an individual disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in paragraph (C)(i) or (C)(ii).		(d)(1) For purposes of determining an individual's eligibility … subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.
(2) An individual is not ineligible for medical assistance if the assets:		(3)(B) In the case of an irrevocable trust –
(B)(i) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse,		(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income --
(B)(ii) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse,		(I) to or for the benefit of the individual, shall be considered income of the individual, and (II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and
(B)(iii) 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), or		(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.
(B)(iv) were transferred to a trust (including a trust described in subsection (d)(4)) established for the benefit of an individual under 65 years of age who is disabled.		(4) This subsection shall not apply to any of the following trusts: (A) Special Needs Trusts (B) Miller Trusts (C) Pooled Trusts

Department of Health & Human Services
Centers for Medicare & Medicaid Services
233 North Michigan Avenue, Suite 600
Chicago, Illinois 60601-5519

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

July, 2008

CHICAGO REGIONAL STATE LETTER NO.: 08-03

Subject: Pool Trusts

The purpose of this letter is to provide clarification on the application of transfer of assets penalty provision's for individuals age 65 and older who have established pool trusts.

A pooled trust is a trust that can be established for a disabled individual under the authority of section 1917(d)(4)(C) of the Social Security Act (the Act). A trust that meets the requirements of this section of the statute is exempt from being treated under the normal Medicaid trust rules in section 1917(d) of the Act. A pooled trust is run by a non-profit organization. The trust (or more accurately, a sub-account within the trust) is established for each individual beneficiary. All the beneficiary sub-accounts are pooled for investments and management purposes. Upon the death of the disabled individual, the balance remaining in the account is paid back to the State Medicaid agency in the amount equal to the medical assistance paid on behalf of the beneficiary. The statute also allows the trust to retain some portion of the balance remaining after the death of the beneficiary.

Although a pooled trust may be established for beneficiaries of any age, funds placed in a pooled trust established for an individual age 65 or older may be subject to penalty as a transfer of assets for less that fair market value. When a person places funds in a trust, the person gives up ownership of those funds. Since the individual generally does not receive anything of comparable value in return, placing funds in a trust is usually a transfer for less that fair market value. The statute does provide an exception to imposing a transfer penalty for funds that are placed in a trust established for a disabled individual. However, only trusts established for disabled individuals age 64 or younger are exempt from application of the transfer of assets penalty provisions(see section 1917(c)(2)(B)(iv) of the Act).

If States are allowing individuals age 65 or older to establish pooled trusts without applying the transfer of assets provisions, they are not in compliance with the statute. As explained above, federal statute requires the application of the transfer rules in this situation: it is not a decision for each State to make.

Please let us know if you have any questions regarding this policy. We are available to provide you with any assistance.

Sincerely,

Verlon Johnsen
Associate Regional Administrator
Division of Medicaid & Children's Health Operations

STATE OF MINNESOTA

COUNTY OF DAKOTA

DISTRICT COURT

FIRST JUDICIAL DISTRICT

Case Type: Other Civil
Appeals from Administrative Agencies

Court File No. 19HA-CV-11-5630

Dawn Peittersen,

Appellant,

vs.

Minnesota Department of Human Services & Dakota County Social Services,

Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AND JUDGMENT

The above-captioned matter came on for hearing on August 23, 2012, before the Honorable Mary J. Theisen, Judge of District Court. Laurie Hanson, Long, Reher, Hanson, P.A., appeared on behalf of Appellant Dawn Peittersen. Barry R. Greller, Assistant Minnesota Attorney General, appeared on behalf of Respondent Minnesota Department of Human Services. There was no appearance on behalf of Respondent Dakota County Social Services. The record closed on September 21, 2012, upon the parties' submission of proposed findings of fact and conclusions of law.

Having considered the arguments of the parties and reviewed the entire file and record of the proceedings before the Commissioner of Human Services, and being fully advised, the Court makes the following:

FINDINGS OF FACT

1. Appellant Dawn Peittersen ("Ms. Peittersen" or "Appellant") is a disabled 73-year-old woman who has resided at Augustana Care Center, a long-term care facility, since 2006.

She receives Medical Assistance ("MA") benefits to pay for her long-term care. She also receives Social Security benefits.

2. On January 19, 2011 Ms. Peittersen received a personal injury settlement payment in the amount of $54,904.48. Ms. Peittersen deposited the settlement proceeds into her bank account.

3. Ms. Peittersen thereafter reduced her assets with the intent of remaining eligible for MA. After payment of certain expenses, she paid a $1000.00 enrollment fee and deposited $36,498.69 into a "qualified pooled trust" sub-account at Lutheran Social Services ("LSS"), a nonprofit entity.

4. The sub-accounts of the qualified pooled trust are maintained by trustee LSS for each beneficiary of the pooled trust. The trust is irrevocable. Sub-accounts are established solely for the benefit of the disabled individual. Upon death of that person, the trust retains a 10% portion to be paid to the trust. The remainder is paid to the State up to the total amount of MA paid on behalf of the individual.

5. The trustee has sole discretion as to distribution of the qualified pooled trust funds. The trust agreement entered into between Ms. Peittersen and LSS provides:

> The Trustee will apply to or expend for the benefit of the Beneficiary such sum or sums from the income or principal of the Trust as the Trustee will determine, *in the Trustee's sole discretion*, to be necessary or advisable to provide for the supplemental care or supplemental needs of the Beneficiary. The Trustee will possess and exercise the *sole discretion and authority* to allocate all distributions between income and principal. Any income not distributed from a Sub-Account will be added to the principal of that Sub-Account. The Trustee is under no obligation to direct the expenditure of income or principal and *the Trustee will have the discretion to refuse to make any distributions.*

2010 Amended and Restated LSS Pooled Trust Agreement ("Agreement"), Agency Ex. 9, art. 5, ¶ 5.01, at p. 6 (emphasis added).

6. Ms. Peittersen placed the funds into the pooled trust with the hope and expectation that she could use the funds to "leave the nursing home, obtain an apartment, and live as independently as possible." Joinder Agreement for LSS Pooled Trust, p. 11. The LSS trustee told Ms. Peittersen that she would approve the use of trust funds to help her establish independence, and Ms. Peittersen rightfully believed that to be the case. It is unknown, however, when Ms. Peittersen will be able to live independently.

7. Pursuant to the trust contract, LSS has an obligation to pay for items or services for the sole benefit of the sub-account beneficiary as long as the items or services supplement and do not supplant government benefits, and as long as the expenditures promote the comfort and well-being of the beneficiary. A denial of a reasonable request meeting these criteria would breach the trust contract.

8. With the funds in the pooled trust, Ms. Peittersen has been able to purchase desired clothing and cosmetics. She also has funds available to pay for "telephone service, cable television, internet, transportation to restaurants, durable medical equipment not covered by Medical Assistance, books, CD's, DVD's, cosmetics, etc." October 12, 2011 Decision of State Agency on Appeal, p. 4 note 2. The record is silent as to the amounts expended or value of items purchased.

9. When Dakota County became aware of Ms. Peittersen's transfer of funds into the pooled trust, Dakota County determined that she would be subject to a transfer penalty. Dakota County reasoned that because Ms. Peittersen was over age 65 and receiving MA payment for long-term care services, the law required imposition of a transfer penalty.

10. Dakota County advised Ms. Peittersen's representative of this determination by memo dated February 24, 2011. Dakota County informed the representative that Ms. Peittersen

would be subject to a long-term care penalty of 6.79 months effective April 1, 2011, and that her long-term care services would not be paid during this period.

11. Ms. Peittersen appealed this determination, and a fair hearing was held before a Department of Human Services Judge on May 2, 2011. At the hearing, Dakota County clarified that the penalty period for the transfer to the pooled trust was 3.39 months for Ms. Peittersen and 3.39 months for her husband, who is also receiving long-term care services through MA.[1]

12. On May 31, 2011, Department of Human Services Judge Douglass C. Alvarado recommended reversal of the Dakota County decision, finding in part that as "it cannot be determined that the transfer [by Ms. Peittersen into the pooled trust] was for less than fair market value[]", that the decision of Dakota County to impose a transfer penalty of 3.39 months on Ms. Peittersen was incorrect. Recommendation of Judge Alvarado at ¶ 17 ("Alvarado Recommendation"). Judge Alvarado recommended reversal of the 3.39 penalty. *Id.* at p. 9.

13. Co-Chief Human Services Judge Inta M. Sellars did not adopt all of Judge Alvarado's recommendations. Instead, Judge Sellars concluded in part that because the transfer was made while Ms. Peittersen was over age 65, the transfer was improper and the 3.39 month penalty was properly imposed. The 3.39-month penalty was thus affirmed. It is unclear as to whether Judge Sellars adopted and incorporated Judge Alvarado's recommended conclusion on the issue of whether the transfer was made for fair market value. Order of Judge Sellars dated October 12, 2011. Judge Sellars' Order became the Order of the Commissioner of Human Services ("Commissioner's Order").

[1] The 3.39-month disqualification period for Ms. Peittersen is the only disqualification period at issue in this appeal.

14. Ms. Peittersen timely appealed the Commissioner's Order to this court on October 25, 2011.

CONCLUSIONS OF LAW

1. This action is before the court for review of the Commissioner's Order pursuant to Minn. Stat. § 14.69 (2010). Ms. Peittersen argues that the Commissioner's Order is not supported by substantial evidence in that there was no finding by Judge Sellars that she did not receive fair market value for the monies transferred into the pooled trust. Therefore, Ms. Peittersen argues that the Commissioner's Order is arbitrary and capricious and should be reversed.

2. The parties agree that the LSS joint trust at issue in this case is a "qualified pooled trust" for purposes of 42 U.S.C. § 1396p(d)(4)(C), and that Ms. Peittersen is a disabled person as defined by 42 U.S.C. 1832c(a)(3). The parties also agree that Ms. Peittersen placed the settlement proceeds into the qualified pooled trust with the objective of remaining eligible for MA.

3. With certain exceptions not at issue here, transfers of assets to a qualified trust by a person age 65 or greater are generally subject to a transfer penalty for Medicaid eligibility purposes. "If an institutionalized individual . . . disposes of assets *for less than fair market value* on or after the look-back date [here 60 months] . . .the individual is ineligible for medical assistance. . . ." 42 U.S.C. 1396p(c)(1)(A).

4. Minnesota law prohibits "an institutionalized person" over age 65 from giving away, selling, or disposing of assets "for less than fair market value" on or after the 60-month look-back date when done "for the purpose of establishing or maintaining medical assistance eligibility." Minn. Stat. § 256B.0595, subd. 1(b). These prohibited transfers

specifically include transfers into a qualified pooled trust by a person age 65 or older. Id. at subd. 1(k).

5. The issue here is therefore whether the transfer of monies by Ms. Peittersen into the qualified pooled trust was an unauthorized transfer because it was made for less than fair market value. If it was for less than fair market value, the 3.39 month penalty was correctly imposed. If it was made for fair market value, the penalty was not correctly imposed.

6. The Commissioner's Order is unclear as to whether it contains a finding or conclusion that the transfer was made for fair market value. In the Commissioner's Order, Judge Sellars specifically rejected paragraphs 15 – 18 of Judge Alvarado's recommendation "to the extent the judge concludes that the pooled trust is not an available asset for purposes of determining [Ms. Peittersen's] medical assistance eligibility." Commissioner's Order, "Amended Conclusions of Law" preamble (page inserted between pages 10 and 11 of the Commissioner's Order). Paragraph 17 of Judge Alvarado's recommendation contained a finding that there had not been a showing that the transfer was not made for fair market value. Alvarado Recommendation ¶ 17. It is unclear to this Court whether Judge Sellars intended to reject that finding in the final order, or whether that finding remains in the final order.

7. It appears from the Commissioner's Order, however, that the conclusion was made that because the transfer was made when Ms. Peittersen was over age 65, it was *per se* an improper asset transfer. As noted herein, this Court concludes that the transfer would be prohibited only if the transfer was made for less than fair market value. Therefore, without a finding that the transfer was made for less than fair market value, the

Commissioner's Order is arbitrary and capricious because a necessary finding is omitted. If the Commissioner's Order is properly read to include Judge Alvarado's recommended conclusion that "it cannot be determined that the transfer was for less than fair market value," then the Commissioner's Order should be reversed as arbitrary and capricious because the Order would be contrary to the findings and conclusions. In either event, the Order should be reversed.

8. The Court has thoroughly reviewed the record in this case and all filings. As to the issue of fair market value, the Court defers to Judge Alvarado's factual findings and agrees with and incorporates herein his legal conclusion. As found by Judge Alvarado:

> The articles of the amended pooled trust agreement provide that the assets in [Ms. Peittersen's] sub-account can and must be used to meet [Ms. Peittersen's] supplemental needs to promote her comfort and well-being. Distributions are for her sole benefit to enhance the quality of her life so long as they do not replace, reduce or substitute government assistance. Inasmuch as the value of assets in [Ms. Peittersen's] LSS pooled trust sub-account had an equal value of the assets transferred into the account, and the corpus of the trust as well as the income on the corpus may only be used to benefit [her], *it cannot be determined that the transfer was for less than fair market value.*
>
> Alvarado Recommendation, ¶ 17 (emphasis added).

9. It has not been shown that Ms. Peittersen's transfer of the settlement proceeds into the joint pooled trust sub-account was made for less than fair market value.[2] The Commissioner's Order is therefore arbitrary and capricious and not supported by substantial evidence. It should be reversed.

---

[2] Respondent urges this Court to give deference to an April 2008 letter from the Centers for Medicare and Medicaid Services ("CMS"), the division responsible for administering Medicaid at the federal level. In that letter, CMS stated in part that "placing funds in a trust is usually a transfer for less than fair market value." As recently held by the 8th Circuit Court of Appeals, however, while according the CMS letter due respect, a district court "should not [defer] to the CMS letter." *Center for Special Needs Trust Administration v. Olson,* 676 F.3d 688, 701 n. 4 (8th Cir. 2012). This Court therefore does not defer to the conclusions contained in the CMS letter.

ORDER

1. Appellant Ms. Peittersen's requested relief is **GRANTED.** The Commissioner's Order is **REVERSED** and Dakota County's determination of the ineligibility period of 3.39 months is **REVERSED.**

IT IS SO ORDERED. LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT

10/2/12
Dated

Mary J. Theisen
Judge of District Court

JUDGMENT

I HEREBY CERTIFY THAT THE ABOVE ORDER CONSTITUTES THE JUDGMENT OF THE COURT.

CAROLYN M. KENN, COURT ADMINISTRATOR
BY: _____ DEPUTY
DATED: 10/2/12 (SEAL)

Affidavit of James McGill

Medical Assistance Appeal for Walter White, Docket

State of Minnesota)
) ss.
County of Ramsey)

James McGill, upon being first duly sworn on oath, deposes as says:

1. My name is James McGill. I am the director of the LSS pooled trust, operated by Lutheran Social Service of Minnesota (LSS). My office is located at St. Paul, MN.

2. Lutheran Social Service is Minnesota's largest non-profit social service organization. We have a staff of about 2,300, serving about 100,000 people in all 87 counties in Minnesota. We serve children and families, people with disabilities, and older adults. We work in the areas of adoption, credit counseling, guardianship and conservatorships, mental health counseling, refugee services, housing, etc. Another area we are active in is pooled trusts.

3. A pooled special needs trust is a trust where subaccounts are established for persons with disabilities. Pooled trusts are operated by non-profit organizations such as Lutheran Social Service. The accounts are funded with money from the persons with disabilities. The money may come from a personal injury award, an inheritance, a retirement account, etc.

4. Lutheran Social Service operates a pooled special needs trust and a pooled supplemental needs trust. Between the two, we have about 280 subaccounts. As director of the pooled trust, I am responsible for the overall administration of all pooled trust sub-accounts.

5. The subaccounts of the pooled special needs trust are for clients of ours who meet the Social Security definition of being "disabled." Each person signs a Joinder Agreement that provides the obligations of each party.

6. The LSS Pooled Trust was established to fill an identified gap in services in the disability community in the state of Minnesota. Further, administering a pooled trust to preserve assets of disabled individuals to provide funds to supplement government benefits is an excellent way to further the LSS Guardian/Conservator Services' Mission *to preserve the integrity, independence and wellbeing of vulnerable adults in the least restrictive manner possible.*

7. LSS has a contractual obligation to pay for items or services for the sole benefit of sub-account beneficiaries as long as the expenditure promotes the comfort and well-being of the beneficiaries. Id. Further, it is LSS's position that if a beneficiary requests a distribution that is reasonable and meets this criteria, a denial would be a breach of contract and would be in bad faith.

8. The Lutheran Social Service of Minnesota Board of Directors would demand a change in procedure if it determined that the Trustees were not allowing expenditures that met the above criteria.

9. Lutheran Social Service views its discretion to be limited by the above criteria and by the spendthrift clause.

10. On or about December 23, 2014, we entered into a Joinder Agreement with Walter White. (Exhibit 3). We received the following checks which have been deposited in Mr. White's subaccount:

    a. A check dated December 24, 2014 from Mr. White in the amount of $1,000 for the enrollment fee;

    b. A check dated December 23, 2014 from Mr. White's attorney in the amount of $46,910.69;

    c. A check dated December 24, 2014 from Mr. White in the amount of $979.54

    d. A check dated December 24, 2014 from Mr. White in the amount of $1,520.

    The total deposited in the pooled trust sub-account, including the enrollment fee, was $50,410.23 (Exhibits 5, 6, and 9).

11. Mr. White resides in a skilled nursing facility, the cost of which is paid for by Medical Assistance. While on Medical Assistance, he may keep only $97 of his income each month as a personal needs allowance. The balance of his monthly income must be paid to the nursing home. In accordance with the terms of the pooled trust and the joinder agreement, funds in Mr. White's pooled trust subaccount will be used to pay for goods and services for him to enhance the quality of his life – which he cannot purchase with his $97 personal needs allowance and which are not covered by Medical Assistance.

12. In Schedule B of the Joinder Agreement, Mr. White indicated he wants us to provide a television set, recliner, clothes, and extra blankets. In addition, because Mr. White has a brain injury, it is necessary that other services are provided to him to ensure his health, safety, and overall wellbeing. For instance, he has no family in Minnesota. Thus, a geriatric care manager must be hired to manage his care and to communicate with his attorney-in-fact, Skyler White, who lives in Seattle, Washington. Someone outside the nursing home must monitor his care. Further, funds in Mr. White's pooled trust subaccount will be used to pay for care otherwise not covered by Medical Assistance, including vision, hearing, podiatry and dental care. Lutheran Social Service will also pay for companion services and other services in compliance with his plan of care.

13. The fair market value assessment included with this affidavit outlines the yearly ongoing expenditures of Mr. White's pooled trust subaccount. It is my belief that the trust money will be easily spent for Walter's benefit over the course of six (6) to eight (8) years, as reflected in the assessment.

14. Since the commencement of the subaccount, we have paid for goods and services for Mr. White. When Lutheran Social Service enters into a Joinder Agreement with a beneficiary, we fully intend to pay for goods and services for the beneficiary's benefit. In fact, we are legally bound to do so. We fully intend to continue to pay for goods and services as long as there are funds remaining in the subaccount.

Dated:_____ _____

James McGill

Subscribed and sworn to before me
this _____ day of May, 2015,
by James McGill

_____
Notary Public

Colorado Fund for People with Disabilities
Assessment and Plan

Date: September 8, 2011

Trust No. 690

Beneficiary: [redacted]

Mailing Address: c/of Porter Place
[redacted]
Denver, CO 80210

Home Address: c/of Porter Place
1001 E. Yale Ave., Apt. 322
Denver, CO 80210

Phone: (303) 980-1114

D.O.B: [redacted]/1916 **Life Expectancy:** 3.26

SS#: [redacted]

Benefits: Medicaid; SSA

Medicaid #: [redacted]

Initial Deposit: $34,240.00

Next of Kin: [redacted]

Background Information: [redacted] joins the trust with funds from her late husband's life insurance settlement. I met with [redacted] at Porter Place, her Assisted Living Facility, her son, [redacted], joined us via phone. [redacted] was born in Oklahoma, she married her husband, [redacted], just a couple of months before the start of WWII. [redacted] served in the war for 4 years. [redacted] and [redacted] were both part of large farm families. They went on to have four children: [redacted]. After [redacted]'s service in the war, he held a job at Chevron. This position moved the family from Utah to Wyoming, and then to Colorado.

Housing: In May of 2011, both [redacted] and [redacted] were approved for Medicaid. They moved into Porter Place in early June 2011. Theo moved into a Nursing Home less than a week later, he died within a couple of days after that of heart failure. [redacted] remained at Porter Place. She has an individual room and reports that she likes it very much. It is well furnished, including a new TV. [redacted] mentioned the possibility of purchasing [redacted] a nicer Sleep Number bed; she currently has an older twin bed.

Medical: About a year ago, [redacted] broke both wrists. She was in rehabilitation for 6 weeks. [redacted] and his wife came out to Colorado from Illinois for 11 months to help his parents during this time. [redacted] has also had

both hips replaced. She has a diagnosis of Nueropathy, Cognitive Impairment, Hypertension, Osteoporosis, Insomnia, Edema, and Reflux. [redacted] presents a very healthy woman, and she is very sharp minded. There are no current pressing health issues.

Further, [redacted] receives TLC. They assist [redacted] with all her health appointments and transportation to/from appointments. She anticipates new glasses in the next couple of weeks since she has an optometry visit scheduled.

Mobility: There are no mobility issues. [redacted] uses no adaptive equipment.

Dental: There are no concerns in this area. [redacted] still has all of her teeth and has a standard dental exam and cleaning appointment scheduled this month.

Social: [redacted] enjoys shopping, watching TV, walking, and activities within Porter Place. [redacted] attends church service within the facility. When [redacted] and [redacted] were initially connected with TLC, they received in-home services. One of their companions, [redacted], has continued to visit [redacted] and spend time with her. [redacted] and [redacted] feel that [redacted] is an excellent companion and would like to enlist her services formally with funds from the trust. [redacted] has nursing experience and will be able to transport [redacted] on outings.

Education: [redacted] has a High School degree and attended a couple years of college, although she did not graduate.

Employment: Over the years, [redacted] would work occasionally as a substitute teacher for grade school. [redacted] also reports that while [redacted] was at war, she held a job at Safeway for four years. [redacted]'s recalled that [redacted] was primarily a stay-at-home mom.

Transportation: Porter Place provides most transportation. [redacted] has reserved Wednesdays as her medical appointment day, and thus leaves the facility with Porter Place transportation.

End of Life Plans: [redacted] has a pre-need plan in place; it has been paid in full. She will be buried next to her husband in Fort Logan.

Summary: [redacted] deferred to [redacted] to answer most of my questions while she listened. [redacted] was extremely informed on [redacted]'s history and her current needs. He handles the majority of his mother's affairs—in regards to both her health and finances. Before and after the formal meeting, I visited with [redacted]. She is still very independent but knows when to defer to her son on certain matters. She speaks very highly of Michael; he will be the primary contact for issues regarding the trust. [redacted] is unable to travel so we discussed an annual visit for [redacted] to visit [redacted].

One Time Expenditures:

CFPD Joinder Fee	$ 684.80	
CFPD Set Up Fee	$ 250.00	
Sleep Number Twin Bed	$1,000.00	
Annual Visits from Michael (3 visits $1,500.00/visit)	$4,500.00	
Total, One Time Expenditures:		**$6, 434.40**

Ongoing Annual Expenditures:

CFPD Case Management Fees (based on 1.5 hrs/month $65/hour)	$1,170.00
Companionship Services (4 hours/week at $24/hour)	$4,992.00
Clothing and Personal Needs Items ($150/month)	$1,800.00
Hair/Nail Care ($60/month)	$ 720.00
Cable TV Service ($50/month)	$ 600.00
Renter's Insurance (annual)	$ 150.00
Total Annual Expenditures	**$9,432.00**

After all one time expenditures have been completed, the balance on [redacted]'s account will be $27,806.00. At the $9,432 annual rate of spending, [redacted]'s trust will be exhausted in just under three years, ahead of her life expectancy of 3.26 years.

Written By: [redacted] **Date:** 9.27.2011

Reviewed: M. Brand Digitally signed by Megan DN: cn=Megan, o=CFPD, ou, email=mbrand@cfpdtrust.org, c=US Date: 2011.10.11 09:02:47 -06'00' **Date:**

STATE OF MINNESOTA

COUNTY OF DOUGLAS

DISTRICT COURT

SEVENTH JUDICIAL DISTRICT

David Dziuk, by his attorney-in-fact,
Claudia O'Donnell,

Appellant,

vs.

Minnesota Department of Human Services, and
Douglas County Social Services,

Respondents.

Court File No. 21-CV-09-1074

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT, AND JUDGMENT

The above-entitled matter comes before the Honorable Ann L. Carrott at the Douglas County Courthouse in Alexandria, Minnesota, on the Appellant's appeal of the Commissioner of Human Services' Decision of State Agency on Remand from District Court. The parties have not requested a hearing.

Based on the memorandums, the record of the proceedings below, and all of the files and records herein, the Court now makes the following

FINDINGS OF FACT

1. This matter comes before the Court on appeal from the agency's decision following remand.
2. In its earlier decision, the Court held that "[t]he Minnesota Department of Human Services properly applied 42 U.S.C. section 1396p(c) to the transfer of funds by Appellant

to a qualified pooled trust." (Findings of Fact, Conclusions of Law, Order for J. & J., conclusion para. 1, Dec. 15, 2009.)

3. However, the Court went on to hold that "[t]here is not substantial evidence in the record to support the Minnesota Department of Human Services' conclusion that Appellant transferred funds for less than fair market value." (Id. at conclusion para. 2.)
4. The Court then remanded for further proceedings on the factual question of whether or not the Appellant transferred funds for less than fair market value.
5. On remand, neither party introduced any additional evidence, the Respondent argued that the issue could be decided as a matter of law, and the administrative law judge concluded as a matter of law that the Respondent had shown that the Appellant transferred funds for less than fair market value.

CONCLUSIONS OF LAW

1. There is not substantial evidence in the record to support the Minnesota Department of Human Services' conclusion that Appellant transferred funds for less than fair market value.

ORDER FOR JUDGMENT

1. The Appellant's requested relief is GRANTED. The Minnesota Department of Human Services' decision is REVERSED and Douglas County Social Services' determination that the Appellant is subject to an ineligibility period for medical assistance long-term care of 2.69 months is REVERSED.
2. The attached Memorandum of Law is incorporated by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY.

It is so ORDERED this 7th day of February, 2012.

Hon. Ann L. Carrott
Judge of District Court

COURT SEAL

JUDGMENT

The above Order for Judgment is hereby adopted as the Judgment on the file herein.

Dated this 7th day of February, 2012.

Douglas County Court Administrator
By: Dawn Schemm - Deputy

STATE OF MINNESOTA

COUNTY OF DOUGLAS

DISTRICT COURT

SEVENTH JUDICIAL DISTRICT

David Dziuk, by his attorney-in-fact,
Claudia O'Donnell,

Appellant,

vs.

Minnesota Department of Human Services, and
Douglas County Social Services,

Respondents.

Court File No. 21-CV-09-1074

MEMORANDUM OF LAW

Because this matter was returned to the Administrative Law Judge on remand from this Court, the proceedings on remand were constrained by the law of the case. See generally Mattson v. Underwriters at Lloyd's of London, 414 N.W.2d 717, 719-720 (Minn. 1987). Under this doctrine as generally recited, when the Court of Appeals has ruled on a legal issue and remanded for further proceedings, the trial court may not permit the issue to be relitigated, but may address issues not decided by the Court of Appeals. Id. However, the law of the case has a broader meaning, in that the once an issue is considered and adjudicated by *any* court, that issue should not be reconsidered by that court or by any lower court. State v. Dahlin, 753 N.W.2d 300, 305 n.7 (Minn. 2008).

This Court specifically held that the Respondents had not offered substantial evidence on the question of whether or not the Appellant had received fair market value. (Findings of Fact,

Conclusions of Law, Order for J. & J., conclusion para. 1, Dec. 15, 2009.) This Court specifically held that the burden was on the Respondent to offer such evidence. (Memo. of Law, p. 6, Dec. 15, 2009.) This Court specifically remanded this matter back to the Administrative Law Judge to allow the Respondents an opportunity to offer such evidence.

If the Respondents disagreed with the Court's actions on the first appeal, then their remedy was to appeal the Court's Judgment of December 15, 2009, within 60 days of the date it was entered. Minn. R. Civ. App. P. 104.01, subd. 1 (2009); Minn. Stat. § 256.045, subd. 9 (2009).

The Respondents did not appeal the Court's decision. The Respondents did not offer any additional evidence on remand as the Court had directed. The Respondents instead attempted to have the Administrative Law Judge contradict this Court's conclusions of law, which the Administrative Law Judge cannot do. Therefore, the Respondents have again failed to offer substantial evidence on the question of whether or not the Appellant had received fair market value, and have failed to meet the burden of proof necessary for their decision to be affirmed.

For these reasons, the Court holds that the Appellant's requested relief is GRANTED. The Minnesota Department of Human Services' decision is REVERSED and Douglas County Social Services' determination that the appellant's is subject to an ineligibility period for medical assistance long-term care of 2.69 months is likewise REVERSED.

A.L.C.

STATE OF MINNESOTA
COUNTY OF BLUE EARTH

DISTRICT COURT
FIFTH JUDICIAL DISTRICT
File No. CV-14-271

Lee Ann Beinke,

Appellant,

vs.

State of Minnesota Department of Human Services, and Blue Earth County Human Services Department,

Respondents.

ORDER
(Administrative Docket No. 147298)

PREFACE

This matter came on for hearing before the Court on the 29th day of April, 2014, at the Blue Earth County District Court, Mankato, Minnesota. Appellant appeared and was represented by Robert H. Chelsey, Attorney at Law, Mankato, Minnesota. Aaron Winter, assistant Minnesota Attorney General, appeared on behalf of Respondent Minnesota Department of Human Services (DHS). Mark Lindahl, assistant Blue Earth County Attorney, appeared on behalf of Respondent Blue Earth County Human Services (BECHS). The matter was brought on by Appellant's motion to reverse the Minnesota Human Services Judge's January 8, 2014 decision to impose a penalty on Appellant's eligibility to receive Medical Assistance payments. The Court took the matter under advisement. Based upon the testimony and exhibits received at the hearing, written submissions by counsel, and the Court's independent review of the applicable statutes and case law, the Court now makes the following:

ORDER

1. The Appellant's Motion to Reverse is hereby GRANTED.

2. The Minnesota Human Services Judge's decision to impose a 22.63 month penalty on Appellant's eligibility for Medical Assistance payments is REVERSED.

2. The attached Memorandum is to be considered part of this Order.

Dated 6-24-14

BY THE COURT

George I. Harrelson
Judge of District Court

MEMORANDUM

Appellant, in her Motion to Reverse, appeals a decision by the Minnesota Human Services Judge's (HS Judge) imposing a 22.63 month penalty on Appellant's eligibility to receive Medical Assistance (MA) payments. In her Motion, Appellant claims that the DHS and BECHS are judicially and collaterally estopped from imposing a penalty on her MA eligibility, that the Commissioner's decision that Appellant did not receive fair market value (FMV) for her assets in question, and that she did in fact receive FMV for said assets. Because the Court finds (1) that the Commissioner's decision regarding FMV was not supported by substantial evidence, and (2) the statutory provision upon which the Commissioner relies is unconstitutional as applied to Appellant, the Court hereby reverses the Commissioner's decision to impose a penalty upon Appellant.[1]

FACTS

The undisputed facts are as follows: Appellant is a resident at Pathstone Living, an assisted living facility located in Mankato, Minnesota. She is 72 years old. In 1978, she had her left hand amputated as a result of a work place accident. Up until 2012, she had been living at home by herself and was able to take care of herself. In 2012, she permanently injured her right hand in a washing machine accident at home. As a result of that accident, she only has use of two and a half fingers on her right hand. For the most part, she is wheelchair bound, but she can walk short distances with a specialized walker.

As a result of her lack of working hands, Appellant cannot dress herself, bathe herself, or prepare meals for herself. She also has difficulty toileting herself. After the accident in 2012, Appellant could no longer live independently. As a result, she moved into Pathstone Living.

[1] Because the Commissioner's decision must be reversed on these grounds, the Court need not address the issue of judicial estoppel or collateral estoppel, and will not do so in this Memorandum.

When her assets were exhausted, she applied for and was determined eligible to receive MA, as well as long term care services provided through Respondent BECHS by a program called Elderly Waiver.

In 2012, Appellant brought a worker's compensation claim for benefits relating back to the 1978 workplace accident. Respondent DHS was among the parties to this claim. After several months of litigation, a settlement was reached. Appellant received a gross settlement of $150,000. The interveners, including Respondent DHS, received payments over and above the $150,000 Appellant received, all as part of the same agreement. The parties agreed that, after a deduction for attorney's fees and purchasing some furnishings for her apartment at the assisted living facility, Appellant would transfer the remainder to a subaccount of a Lutheran Social Services pooled trust.

Lutheran Social Services (LSS) operates a pooled trust for disabled persons. LSS maintains a subaccount for each person who contributes funds to the pooled trust. Under the Jointer Agreement, the trust principal is used for things requested by the beneficiary's representative to enhance the beneficiary's quality of life. This takes the form of purchasing things that MA will not provide, such as paying for a private room in a nursing home, dental care not deemed medically necessary by MA, or extra baths not deemed medically necessary by MA. According to the terms of the Joinder Agreement, when a beneficiary dies, any assets remaining in the subaccount go back to the State of Minnesota to the extent that the State has paid MA benefits. The trust satisfies all requirements of 42 U.S.C. §1396p(c)(2)(B)(iv) and Minn. Stat. §256B.0595, Subd. 4(a)(6), other than with respect to Appellant's age.

In this case, the pooled trust pays for a larger room at Pathstone than what Appellant's Elderly Waiver benefits would pay for. The difference is $629.00 per month. The larger unit

contains a larger bathroom. The larger bathroom accommodates Appellant's specialized walker. As a result, Appellant can often go to the bathroom without an attendant. The larger apartment gives her a feeling of more privacy, greater self-worth, and more independence. Appellant testified that her quality of life is now 100% better than when she was in a smaller unit.

In September of 2013, Appellant disclosed the transfer of funds into the pooled trust to Respondent BECHS, who sent a request to Respondent DHS, asking for an opinion on the transfer to the pooled trust. DHS responded that, since Appellant was over the age of 64, a transfer to a pooled trust was not an exempt transfer, and that she could no longer qualify for MA payments without the imposition of a penalty. BECHS then imposed a 22.63 month penalty on Appellant, making her ineligible for her Elderly Waiver long term care benefits through the county for a period of 22.63 months.

Appellant appealed BECHS's decision to DHS. A hearing was held by teleconference. Appellant testified to the above at that hearing. Several affidavits were also submitted at the hearing, including one from LSS, attesting to the fact that it, as trustee, is contractually bound to pay out things requested by Appellant, as beneficiary, through her representative. BECHS introduced no evidence regarding the issue of whether Appellant received fair market value for her worker's compensation settlement proceeds when she transferred them into the pooled trust. After the hearing, a Human Services Judge issued a decision affirming BECH's decision to impose a penalty.

ANALYSIS

Appellant seeks reversal of the Human Services Judge's decision to impose a 22.63 month penalty on her eligibility for long term care benefits. The decision is reviewable by this Court under Minn. Stat. §256.045, Subd. 8. As such, the scope of review is governed by Minn.

Stat. §14.69. *Zahler v. Minn. Dept. of Human Services*, 624 N.W.2d 297, 301 (Minn.2001). Accordingly, the Court may reverse the decision if:

> the substantial rights of the petitioners may have been prejudiced because of the administrative finding, inferences, conclusion, or decisions are: (a) in violation of constitutional provisions; or (b) in excess of the statutory authority or jurisdiction of the agency; or (c) made upon unlawful procedure; or (d) affected by other error of law; or (e) unsupported by substantial evidence in view of the entire record as submitted; or (f) arbitrary and capricious.

Minn. Stat. §14.69. Questions of law are reviewed de novo. *Wynkoop v. Carpenter*, 574 N.W.2d 422, 425 (Minn.1998). Questions of fact are reviewed using the substantial evidence test. Minn. Stat. §14.69(e); *Johnson v. Minn. Dept. of human Services*, 565 N.W.2d 453, 457 (Minn.App.1997).

Substantial evidence under the test is defined as: (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) evidence considered in its entirety. *Minn. Ctr. For Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn.2002), citing *Cable Communications Bd. v. Nor-West Communications Partnership*, 356 N.W.2d 658, 668 (Minn.1984).

I. Transfer of Appellant's Assets Into a Pooled Trust

Under both 42 U.S.C. 1396p and Minn. Stat. §256B.0595, transfers of assets for less than fair market value can subject a recipient of MA or long term care benefits to a penalty. Fair market value for purposes of these provisions is "the price at which a willing seller and a willing buyer will trade, both having a reasonable knowledge of the facts." *Klapmeier v. Telecheck Intern., Inc.*, 482 F.2d 247, 252 (8th Cir.1973), citing *Douglas Hotel Co. v. Comm'r of Int. Revenue*, 190 F.2d 766, 772 (8th Cir.), cert denied, 342 U.S. 893, 72 S.Ct. 200, 96 L. Ed. 669 (1951). While transfers of assets into a pooled trust of this kind are considered exempt transfers

for disabled persons generally, Appellant's transfer is not exempt because she is over the age of 64. 42 U.S.C. §1396p(c)(2)(B)(iv); Minn. Stat. §256B.0595, Subd. 4(a)(6). As such, a FMV analysis applies to Appellant's transfer under these provisions.

The Human Services Judge concluded that Appellant had not received fair market value for her assets. Respondent offered no evidence in support of a finding that Appellant did not receive FMV. Generally, regarding trusts, a beneficiary has a vested equitable interest in the trust assets. *Reinecke v. Smith*, 289 U.S. 172, 174-75, 53 S.Ct. 570 (1933); *U.S. v. O'Shaughnessy*, 517 N.W.2d 574, 577 (Minn.1994)[2]; Uniform Trust Code §103(3)(A); Am.Jur. Trusts §240. Here, when Appellant transferred her assets into the pooled trust, she vested in herself an equitable interest in the trust assets, the value of those assets equaling roughly the value of Appellant's interest. As noted in its Affidavit, LSS, as trustee, is obligated to pay out trust assets upon Appellant's reasonable request in order to enhance her quality of life, and LSS has already done so on more than one occasion. Given this, the Court concludes that Appellant received FMV for her assets when she transferred them into the pooled trust. The Court further concludes that there was not substantial evidence upon which to base a finding that Appellant did not receive FMV.

Respondent grossly understates the value that Appellant received when she transferred her assets into the trust. According to Respondent, Appellant did not receive any value whatsoever at the moment the transfer was made.[3] The Court has already concluded above that

---

[2] Although the Court in *O'Shaughnessy* held that the beneficiary's interest in the trust in question amounted to a "mere expectancy," the case stands for the general principle that beneficiaries have an immediate, vested equitable interest in the trust assets. The reason the Court limited the nature of the beneficiary's interest in *O'Shaughnessy* is because there they were dealing with a purely discretionary trust. The pooled trust in this case is not a purely discretionary trust – in fact, LSS, as trustee must distribute the trust assets to Appellant upon reasonable requests made by Appellant, through her representative. So, although the result of *O'Shaugnessy* is distinguishable from this case, the general rule remains the same – the beneficiary of a trust has a vested equitable interest in the trust assets.

[3] Respondent urges the Court to conduct the FMV analysis by looking only at what Appellant received on the day of the transfer. *See In re Pooled Advocate Trust*, 813 N.W.2d 130, 147 (S.D.2012).

Appellant did in fact receive value for her assets when she received a vested equitable interest in the trust assets. The trust in question is not, as Respondent claims, a purely discretionary trust. LSS is obligated to comply with Appellant's reasonable requests for distribution of assets, potentially all the way up to the amount transferred. Respondent further argues that, even if the Court looks at all of the value Appellant has received up until this point, she has at best received some value (i.e. the value of her large apartment, specialized walker, and other amenities and services purchased from trust assets), but not fair market value. Appellant has indeed already received some value through distribution of trust assets, but this is not the only value Appellant has received. She has also received the value of an equitable interest in the remaining trust assets, as well as the value of LSS, as trustee and fiduciary, managing and investing the assets for her benefit.

II. Equal Protection

The Court may also reverse the decision of the Human Services Judge if the decision is in violation of constitutional provisions (see above). It is well established that the Fourteenth Amendment promises "that no person shall be denied equal protection of the laws..." *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620 (1996). Under this principle, even where a law neither burdens a fundamental right nor targets a suspect class, a classification adopted by a law must bear some rational relation to a legitimate end. *Id.* at 632. Here, Respondents have penalized Appellant pursuant to 42 U.S.C. 1396p and Minn. Stat. §256B.0595, under a theory that she transferred her assets for less than FMV. As noted above, Respondents could not have penalized Appellant under this theory had she been under the age of 65.

The Court concludes that the statutory provision relied upon to penalize Appellant bears no relation to a legitimate end in this case.[4] Appellant receives MA benefits, as well as long-term care benefits through the County, in large part due to her inability to properly care for herself. Her inability to care for herself derives from a work-related accident and subsequent accident at home, leaving her with no left hand and only limited use of her right hand. Her age is wholly immaterial in assessing the cause and extent of her disabilities. The pooled trust into which Appellant transferred her assets conforms in every respect to trusts that are exempt under 64. 42 U.S.C. §1396p(c)(2)(B)(iv) and Minn. Stat. §256B.0595, Subd. 4(a)(6). If Appellant were under the age of 65, her transfer of assets would be exempt. In fact, the only reason why her transfer is not exempt is because she is over the age of 65. Thus, in this case, the penalty bears no rational relation to any legitimate state interest. Although the reason for creating an exemption in 42 U.S.C. 1396p and Minn. Stat. §256B.0595 may afford disabled persons needed protections while at the same time preventing misuse of MA and similar services by the elderly, in this case it denies Appellant protections afforded to all other disabled persons simply because of her age. Accordingly, 42 U.S.C. 1396p and Minn. Stat. §256B.0595 are unconstitutional as applied to Appellant.

CONCLUSION

The decision to impose a penalty upon Appellant must be reversed under both Minn. Stat. §14.69(a) and (c). First, the finding below – that Appellant did not receive FMV – is not only erroneous, but also unsupported by evidence. Notwithstanding the above, 42 U.S.C. 1396p and Minn. Stat. §256B.0595 treat Appellant differently than other similarly situated disabled persons for no other reason than her age. They therefore create an impermissible classification – one

[4] Without addressing the question of whether 42 U.S.C. 1396p and Minn. Stat. §256B.0595 are facially unconstitutional, the scope of the Court's Fourteenth Amendment analysis is limited to the constitutionality of 42 U.S.C. 1396p and Minn. Stat. §256B.0595 as applied to Appellant.

which has no rational relation to any legitimate governmental interest – and therefore cannot serve as a basis for penalizing Appellant. The decision to impose a penalty must therefore be, and the same hereby is, reversed.

Dated 6-24-14

BY THE COURT

George I. Harrelson
Judge of District Court

DEC 15 2009

OF MINNESOTA DEC 15 2009 IN DISTRICT COURT

COUNTY OF DOUGLAS Court Administrator SEVENTH JUDICIAL DISTRICT

Deputy

David Dziuk, by his attorney-in-fact, Claudia Dziuk-O'Donnell,
Appellant,

v.

Minnesota Department of Human Services and Douglas County Social Services,
Respondents.

Court File No. 21-CV-09-1074

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT, AND JUDGMENT

This matter came on for a hearing on October 14, 2009, before the Honorable Ann L. Carrott, at the Douglas County Courthouse in Alexandria, Minnesota. Attorney Laurie Hanson appeared with and on behalf of Appellant. Assistant Attorney General Patricia Sonnenberg appeared on behalf of the Minnesota Commissioner of the Department of Human Services.

Based on all of the files and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. This appeal is governed by Minnesota Statute section 256.045, subdivisions 7 and 8 (2009). The scope of this Court's review is governed by Minnesota Statute section 14.69 (2009).
2. The procedural history is as follows:
    a. October 30, 2008 – Douglas County sent Appellant written notice indicating that Appellant was ineligible for a period under Medical Assistance Long Term Care because it had determined that the $12,320 Appellant had deposited in a Minnesota Special Needs Pooled Trust for the benefit of Appellant in August 2008 along with a $500 administrative fee was an uncompensated transfer.

b. November 26, 2008 – Appellant filed an appeal to the Minnesota Department of Human Services (hereafter "DHS").

c. January 6, 2009 – The Department Human Services Judge held a hearing regarding Appellant's first appeal.

d. February 25, 2009 – The Human Services Judge issued her recommended order denying Appellant's requested relief which was subsequently adopted as the Order of the Commissioner of Human Services on February 27, 2009.

e. March 30, 2009 – Appellant filed a Request for Reconsideration.

f. April 1, 2009 – The Commissioner of DHS denied Appellant's Request for Reconsideration.

g. April 30, 2009 – Appellant timely filed notice of appeal with this Court.

h. August 19, 2009 – Appellant filed his memorandum of law.

i. September 11, 2009 – Respondent filed its responsive memorandum of law.

j. September 17, 2009 – Appellant filed his reply memorandum of law.

k. October 14, 2009 – The Court held a hearing.

3. Claudia Dziuk-O'Donnell is Appellant's daughter and his attorney-in-fact.

4. Appellant is an 83-year-old man with multiple sclerosis. Although he requires complete physical care due to the multiple sclerosis, he is still active mentally.

5. Appellant is living in a nursing home which he was paying for with his own funds. Since his funds were dissipating, his daughter, Ms. Dziuk-O'Donnell, filed an application for Medical Assistance Long Term Care benefits.

6. In August 2008, Ms. Dziuk-O'Donnell, as power of attorney for her father, transferred $12,320 of Appellant's money from Bremer Bank and deposited it into a Minnesota Special Needs Pooled Trust managed by Guardian and Protective

Services, Inc., a non-profit corporation. Ms. Dziuk-O'Donnell also paid $500 of Appellant's money as an administration fee to Guardian and Protective Services, Inc. to enter into the pooled trust.

7. The parties do not dispute that the pooled trust is a qualified pooled trust which has the following characteristics:

    a. The trust is irrevocable.

    b. Disbursements from the trust are at the discretion of the trustee, Guardian and Protective Services, Inc.

    c. Guardian and Protective Services, Inc., a non-profit association, established and manages the trust.

    d. A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts. These separate accounts are called "sub-accounts" in the trust.

    e. A sub-account was established solely for the benefit of Appellant, who is disabled, by Appellant through Ms. Dziuk-O'Donnell, his attorney-in-fact.

    f. To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

8. Appellant transferred money into the pooled trust account so it could be used for needs which are in addition to Appellant's normal care needs, including things such as: a telephone; telephone bill; a television; cable television bill; books; magazine and newspaper subscriptions; food outside of the nursing home's food; handicap van transportation; clothing; haircuts; medical insurance premiums of $800 per month; a

motorized wheelchair and maintenance; a manual wheelchair; hearing aids; donations; CDs; and DVDs.

9. Appellant receives social security disability payments and was determined to be disabled by the Social Security Administration in 1973.

10. If the transfer of assets penalty provision applies, the penalty period of ineligibility is 2.69 months.

CONCLUSIONS OF LAW

1. The Minnesota Department of Human Services properly applied 42 U.S.C. section 1396p(c) to the transfer of funds by Appellant to a qualified pooled trust.

2. There is not substantial evidence in the record to support the Minnesota Department of Human Services' conclusion that Appellant transferred funds for less than fair market value.

ORDER

1. Appellant's requested relief is **DENIED**. The Minnesota Department of Human Services' Decision is **AFFIRMED in part** and **REMANDED in part**.

2. The Memorandum of Law below is incorporated by reference.

It is so ORDERED this 15th day of December, 2009.

Hon. Ann L. Carrott
Judge of District Court

LET JUDGMENT BE ENTERED ACCORDINGLY.

COURT SEAL

JUDGMENT

The above Order is hereby adopted as the Judgment on file herein.

WITNESS, the Honorable Ann L. Carrott, this 15th day of December, 2009.

BY THE COURT:

Rhonda Bot

COURT SEAL

Court Administrator
by Janice Boston, Deputy

MEMORANDUM OF LAW

The issue before the Court is whether the transfer of Appellant's funds into a qualified pooled trust account is subject to the transfer of assets provisions in 42 U.S.C. §1396p(c).

1. Scope and Standard of Review

The scope of the Court's review is set forth in Minnesota Statute section 14.69 which states:

> In a judicial review under sections 14.63 to 14.68, the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:
>
> (a) in violation of constitutional provisions; or
> (b) in excess of the statutory authority or jurisdiction of the agency; or
> (c) made upon unlawful procedure; or
> (d) affected by other error of law; or
> (e) unsupported by substantial evidence in view of the entire record as submitted; or
> (f) arbitrary or capricious.

Minn. Stat. §14.69. Appellant argues that this Court should reverse the decision of the Commissioner of Human Services pursuant to sections 14.69(c) (the decision was made upon an unlawful procedure), 14.69(d) (the decision was affected by an error of law), 14.69(e) (the decision was unsupported by substantial evidence in view of the entire record as submitted), and 14.69(f) (the decision was arbitrary and capricious).

The standard of review in this case is de novo since it involves the interpretation of a statute which is a question of law. Wynkoop v. Carpenter, 574 N.W.2d 422, 425 (Minn. 1998). Any factual issues are reviewed using the substantial evidence test. Minn. Stat. §14.69(e). The substantial evidence test reflects the substantial judicial deference to the fact-finding processes of an administrative agency. Quinn Distributing Co. v. Quast Transfer, Inc., 288 Minn. 442, 448,

181 N.W.2d 696, 699 (Minn. 1970). "A decision is supported by substantial evidence when it is supported by (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." Minnesota Ctr. for Envtl. Advocacy v. Minnesota Pollution Control Agency, 644 N.W.2d 457, 464 (Minn. 2002) (citation omitted). Under the substantial evidence test, the reviewing court is to evaluate the evidence relied upon by the agency in view of the entire record as submitted. Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship, 356 N.W.2d 658, 668 (Minn. 1984). Where more than one inference may be drawn from the evidence, or where the record contains conflicting evidence supporting more than one conclusion, the reviewing court should uphold the agency's decision. Pomrenke v. Comm'r of Commerce, 677 N.W.2d 85, 94 (Minn. Ct. App. 2004), rev. denied May 26, 2004; CUP Foods, Inc. v. City of Minneapolis, 633 N.W.2d 557, 562 (Minn. Ct. App. 2001), rev. denied November 13, 2001.

In order to determine the legislature's intent, the principal method is "to rely on the plain meaning of the statute." State v. Thompson, 754 N.W.2d 352, 255 (Minn. 2008). "Every law shall be construed, if possible, to give effect to all its provisions." Minn. Stat. §645.16. When the words of a statute are inexplicit, the legislative intention may be ascertained by considering, among other things: "the occasion and necessity for the law; . . . the mischief to be remedied; . . . the object to be attained; . . . the consequences of a particular interpretation; . . . and; the legislative and administrative interpretations of the statute." Id.

2. Medicaid Background

Congress enacted Medicaid as Title XIX of the Social Security Act in 1965 to ensure medical care, through public funding, to individuals who do not have the resources to cover

essential medical services. In re Estate of Barg, 752 N.W.2d 52, 58 (Minn. 2008) (citing Martin ex rel. Hoff v. City of Rochester, 642 N.W.2d 1, 9 (Minn. 2002)). Medicaid was intended to be the payor of last resort. Martin, 642 N.W.2d at 9 (citing H.R. Conf. Report No. 99-453, at 542 (1985)). The Federal Government and "participating states" jointly fund Medicaid. Barg, 752 N.W.2d at 58 (citing Harris v. McRae, 448 U.S. 297, 308 (1980)). Participating states are able to receive federal payments after enacting legislation and rules which are incorporated into their state medical assistance plans and are approved by the U.S. Secretary of Health and Human Services. 42 U.S.C. §1396a(a)-(b) (2000 & Supp. III 2003); 42 U.S.C. §1396 (2000). Each state administers its own program within the federal requirements, and at the federal level, the Centers for Medicare and Medicaid Services (hereafter "CMS") administer the program and approve state plans. Barg, 752 N.W.2d at 58-59 (citing Martin, 642 N.W.2d at 9). One of the requirements imposed on state plans is that they must comply with the provisions of 42 U.S.C. section 1396p with respect to transfers of assets and treatment of certain trusts. 42 U.S.C. §1396a(a)(18).

A person must meet certain qualifications to receive Medicaid. Barg, 752 N.W.2d at 59. If the assets of a Medicaid applicant exceed the qualifying threshold, he or she must "spend down" assets until he or she is at or below the qualifying threshold. Id. "If a potential Medicaid recipient transfers assets below fair market value within a certain period of time before eligibility, the recipient is deemed ineligible for benefits for a time period mandated by statute." Id. (citing 42 U.S.C. §1396p(c)). "This provision prevents people who are not needy from becoming eligible for Medicaid by transferring their assets away." Barg, 752 N.W.2d at 59.

In 1986, Congress amended the Medicaid Act to enact 42 U.S.C. section 1396a(k) which had the purpose of closing "a loophole that had allowed individuals who were not otherwise

eligible for public assistance to shield their assets in trusts in order to receive Medicaid." Ronney v. Dept. of Soc. Services, 210 Mich. App. 312, 318, 532 N.W.2d 910, 913-914 (1995). Congress amended the Medicaid Act again in 1993 with the Omnibus Budget Reconciliation Act ("OBRA") of 1993. The 1993 amendments repealed section 1396a(k) and replaced it with section 1396p, which broadened the types of trusts that could be considered to preclude applicants from becoming eligible for Medicaid. 42 U.S.C. §1396p. The purpose of OBRA 1993 was to effect reductions in the cost of the Medicare program in an effort to repair an "ailing economy." H.R. Rep. No. 103-111, at 3, *as reprinted in* 1993 U.S.C.C.A.N. 378, 381.

3. Statutes at Issue

a. 42 U.S.C. §1396p(c)

Subsection (c) of 42 U.S.C. section 1396p governs transfers of assets. In paragraph (1) of subsection (c), it states that the State plan must provide that if an institutionalized individual disposes of assets for less than fair market value on or after the look-back date, the individual is ineligible for specified medical assistance services for a specified time period. 42 U.S.C. §1396p(c)(1)(A). The look-back date in Appellant's case would be 60 months before the first date on which he was both an institutionalized individual and applied for medical assistance under the Minnesota Medicaid plan. 42 U.S.C. §1396p(c)(1)(B)(i) & (ii). Subsection (c) also provides exceptions when the look-back period would not apply:

> An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that
>
> (B) the assets –
>
> (i) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse,
>
> (ii) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse

(iii) were transferred to, or to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II), or

(iv) *were transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1382c(a)(3) of this title);*

42 U.S.C. §1396p(c)(2)(B) (emphasis added).

b. Minnesota Statute section 256B.0595 (2008)

Minnesota Statute section 256B.0595 (2008) governs transfer of assets. If the transfer of assets provisions in the section apply, Appellant would be subject to a 60 month look-back period. Minn. Stat. § 256B.0595, subds. 1(b) and 2(c) (2008). The statute has a similar exemption for disabled persons under the age of 65 as does the Federal statute:

> An institutionalized person who has made, or whose spouse has made a transfer prohibited by subdivision 1, is not ineligible for long-term care services if one of the following conditions applies:
>
> . . .
>
> (6) for transfers occurring after August 10, 1993, the assets were transferred by the person or person's spouse:
>
> (i) into a trust established for the sole benefit of a son or daughter of any age who is blind or disabled as defined by the Supplemental Security Income program; or
>
> (ii) *into a trust established for the sole benefit of an individual who is under 65 years of age who is disabled as defined by the Supplemental Security Income program.*

Minn. Stat. §256B.0595, subd. 4(6) (2008) (emphasis added).

c. 42 U.S.C. §1396p(d)

Subsection (d) of 42 U.S.C. section 1396p governs how the trust amounts are treated. Paragraph (1) states that the rules specified in paragraph (3), subject to paragraph (4), shall apply to a trust established by an individual for purposes of determining an individual's eligibility for, or amount of, benefits under a state plan under the subchapter. 42 U.S.C. §1396p(d)(1). Paragraph (3)(B) states the rules regarding eligibility for Medicaid when considering irrevocable trusts. 42 U.S.C §1396p(d)(3)(B). Paragraph (4) describes certain trusts, including irrevocable trusts, to which subsection (d) shall not be applied. 42 U.S.C. §1396p(d)(4). It states:

> *this* subsection shall not apply to:
>
> . . .
>
> (C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:
>
> (i) The trust is established and managed by a non-profit association.
>
> (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
>
> (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.
>
> (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

42 U.S.C. §1396p(d)(4)(C) (emphasis added). This essentially states that a qualifying pooled trust is exempt from the provisions in subsection (d). The parties do not dispute and the Court agrees that the trust at issue is a qualified pooled trust.

d. Minnesota Statute section 256B.056 (2008)

Minnesota Statute section 256B.056 subdivision 3b(b) (2008) governs the treatment of trusts. Minn. Stat. §256B.056, subdivision 3b(b) (2008). According to the statute, trusts established after August 10, 1993 are treated according to section 13611(b) of OBRA 1993. Id. Section 1396p(d) was enacted by section 13611(b) of OBRA 1993 to govern the treatment of trusts. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §13611(b), 107 Stat. 312, 625 (codified in 42 U.S.C. §1396p(d)). Therefore, the treatment of trusts in Minnesota is governed by 42 U.S.C. section 1396p(d). Minn. Stat. §256B.056 (2008).

4. Application of the Federal and State transfer of assets provisions

a. Application of section 1396p(d)

In this case, Douglas County correctly applied 42 U.S.C. section 1396p(d) as directed by Minnesota Statute section 256B.056 (2008) when considering how to treat Appellant's application for Medical Assistance. The Court finds that the trust in which Appellant deposited his assets was a qualified pooled trust because it meets the requirements of section 1396p(d)(4)(C). Since it is a qualified pooled trust, subsection (d) does not apply. 42 U.S.C. §1396p(d)(4)(C). Although subsection (d)(4)(C) states that subsection (d) does not apply to a qualified pooled trust, it never states that section 1396(c) does not apply to the qualified pooled trust. Id. Therefore, Douglas County was not precluded from applying section 1396(c) to the trust for which Appellant was a beneficiary.

Appellant argues that since section 1396(d)(3) does not say that a transfer of funds into a pooled trust is a "transfer," that any analysis under the section 1396(c) transfers of assets provisions is improper. (Oct. 14, 2009 Hearing.) However, the only authority Appellant provides to indicate that subsection (c) should not apply is HealthQuest #6046. HealthQuests are issued by an Agency financial worker, MinnesotaCare representative, or tribal eligibility worker. (See

HealthQuests #9227 and 9250.) They provide case-specific guidance and are not to be construed as legal advice. Id.

The wording of the statute compels the conclusion that the two subsections are not to be read and analyzed in a vacuum, since the exemption listed in 42 U.S.C. section 1396p(c)(2)(B)(iv) explicitly applies to trusts described in subsection (d)(4) (which describes qualifying pooled trusts, among others). In addition, CMS issued a memorandum in April 2008 which stated that a trust established for the benefit of a disabled individual over the age of 65 may be subject to penalty as a transfer or assets for less than fair market value. CMS also issued a letter in July 2008 which indicated that the transfer of asset penalties listed in subsection (c) apply to a transfer of funds into a pooled trust. These documents from CMS were issued before Appellant had transferred the funds into the account. The CMS April 2008 memorandum and the July 2008 letter are administrative interpretations of the statute which may be considered when interpreting the legislative intent of the statute. Minn. Stat. § 645.16(8) (2009). Although the HealthQuest #6046 supports Appellant's position, all other HealthQuests contained in the record[1] and the CMS April 2008 memorandum and July 2008 letter combined with the wording of the statute itself indicates that Douglas County was not limited to only applying section 1396p(d) and that the transfer of assets provisions in section 1396p(c) apply in this case.

[1] The information from the HealthQuests submitted into the record is as follows: (1) HealthQuest #5093 dated July 11, 2006 states: "You need to evaluate whether an improper transfer was made when the applicant transferred the proceeds from the sale of her life estate into the pooled trust." (2) HealthQuest #5909 dated November 22, 2006 states: "If a client qualifies for [long term care] services . . . you may need to evaluate whether an improper transfer was made when the applicant transferred funds into the trust." (3) HealthQuest #8793 dated July 18, 2008 states: "Placing an asset into a pooled trust for an individual age 65 and over is considered an uncompensated transfer . . . If the proceeds from the sale of this client's home are put into a pooled trust do the following: . . . determine a transfer penalty for the uncompensated transfer." (4) HealthQuest #8773 dated July 22, 2008 states: "[T]he placement of any assets into the pooled special needs trust for a person age 65 or older [is considered] to be an uncompensated transfer." (5) HealthQuest #9227 dated October 2008 states: "A transfer penalty for an uncompensated transfer begins the first month the client is requesting and is eligible to receive payment of [long term care] services if the transfer occurred on or after 2/8/06 and the client is requesting [medical assistance] payment of [long term care] services on or after July 1, 2006." (6) HealthQuest #9250 dated October 2008 states: "[E]ven though a pooled special needs trust can be established for a disabled person 65 or older, any assets placed in the trust by that disabled person would be considered an uncompensated transfer."

b. Application of section 1396p(c)

To be eligible for medical assistance without any look-back penalty, Appellant must have disposed of his assets for at least fair market value before the beginning of the 60 month look-back period. 42 U.S.C. §1396p(c)(1); Minn. Stat. § 256B.0595, subds. 1(b) and 2(c) (2008). Douglas County found that Appellant was eligible for medical assistance, but that due to his disposal of assets for less than fair market value after the look-back date, he was subject to a 2.69 month penalty during which he would not receive certain benefits from medical assistance.

Section 1396p(c)(2)(B) creates an exception when the penalty listed in section 1396p(c)(1) would not apply. 42 U.S.C. §1396p(c)(2)(B). If assets are transferred to a trust established solely for the benefit of a disabled individual under 65 years of age, the penalty in section 1396(c)(1) does not apply. 42 U.S.C. §1396p(c)(2)(B)(iv). Appellant contends that this penalty does not apply. (Oct. 14, 2009 Hearing.) Appellant's theory is that section 1396p(c)(2)(B)(iv) only applies to trusts that are created to benefit a third party. Id. Appellant bases his contention on the language in section 1396p(c)(2)(B)(iv), which reads "an" individual instead of "the" individual. (Id.)

In the case where the words of a statute are inexplicit, the legislative intention may be ascertained by considering, among other things: (1) the occasion for the law; (2) the circumstances under which it was enacted; (3) the mischief to be remedied and the object to be attained; (4) the consequences of a particular interpretation; and (5) the legislative and administrative interpretations of the statute. Minn. Stat. §645.16 (2009).

i. Occasion for the Law

The occasion for the amendments to Medicaid in 1986 was to close "a loophole that had allowed individuals who were not otherwise eligible for public assistance to shield their assets in

trusts in order to receive Medicaid." Ronney v. Dept. of Soc. Services, 210 Mich. App. at 318, 532 N.W.2d at 913-914 (1995). The 1993 OBRA further tightened Medicaid eligibility requirements in order to reduce Medicaid spending. H.R. Rep. No. 103-111, at 3, *as reprinted in* 1993 U.S.C.C.A.N. at 381.

Appellant urges the Court to interpret the statutes in a manner that would preclude the application of subsection (c) which contains the transfer of assets provisions and penalties. Such a provision has the effect of reducing the number of individuals to whom the penalty provisions would apply while at the same time increasing the amount Medicaid will spend. Such an interpretation runs contrary to the occasion for the law which was to *reduce* Medicaid spending. See Id. Conversely, the interpretation of the statute which applies the transfer of assets penalty provisions to specified individuals who fund a qualified pooled trust supports the occasion for the law.

ii. Circumstances Under Which it was Enacted

The Medicaid amendments at issue in this case were also enacted when the federal government was attempting to adjust the federal budget to remedy economic hardship. Id. The Court's interpretation of the statute harmonizes with the circumstances under which the statute was enacted.

iii. Mischief to be Remedied and Object to be Attained

Medicaid sought to ensure medical care, through public funding, to individuals who do not have the resources to cover essential medical services through public funding. Barg, 752 N.W.2d at 58 (citation omitted). Medicaid was intended to be the payor of last resort. Martin, 642 N.W.2d at 9 (citing H.R. Conf. Report No. 99-453, at 542 (1985)). The Court's interpretation of the statute conforms with the purpose of the statute which is to ensure that

Medicaid remains the payor of last resort and that it is available for individuals who do not have the resources to cover essential medical services. See Barg, 752 N.W.2d at 58 (citation omitted).

iv. Consequences of a Particular Interpretation

The Court has determined that subsection (c)(2)(B)(iv) applies to any individual, including both an individual who created a self-settled trust, such as Appellant, and also to an individual creating a trust for a third-party beneficiary – as long as the disabled individual creating the trust is under 65 years of age. Appellant's argument for why subsection (c) does not apply in this case is that if Congress would have wanted to include an individual creating a self-settled trust, it would have written subsection (c)(2)(B)(iv) to read "the" individual instead of "an" individual. However, the consequence of Appellant's interpretation is that if Congress were to have written the statute to read "the" individual in subsection (c)(2)(B)(iv), it would have completely eliminated the inclusion of *any* trusts that would be for third parties. The Court is not persuaded that Congress intended such a narrow reading of the statute. Instead, the Court is persuaded that the precise wording of subsection (c)(2)(B)(iv) to read "an" individual meant that *both* individuals who were the creators and the beneficiaries of trusts as well as individuals who were third party beneficiaries were to be included within the subsection.

v. Legislative and Administrative Interpretations

The CMS is the federal agency charged with administering the Medicaid program. 42 U.S.C. §1396a. The CMS issues a state Medicaid Manual to guide the states in administering Medicaid laws. In 1994 CMS revised its Medicaid Manual to update the Manual with the 1993 OBRA amendments to Medicaid. The 1994 revision to the Manual indicated in section 3259.7 that transfer penalties may apply to a trust established for the benefit of a disabled person over the age of 65. In addition, as previously noted, CMS issued a memorandum in April 2008 and a

letter in July 2008 regarding pooled trusts. The April 2008 memorandum indicated that "[a]lthough a pooled trust may be established for beneficiaries of any age, funds placed in a pooled trust established for an individual age 65 or older may be subject to penalty as a transfer of assets for less than fair market value." (CMS April 2008 memo, ¶ 3.) The memorandum went on to state that "only trusts established for a disabled individual age 64 or younger are exempt from application of the transfer of assets penalty provisions (see section 1917(c)(2)(B)(iv) of the Act)." Id. The CMS July 2008 letter indicated that the transfer of asset penalties listed in subsection (c) apply to a transfer of funds into a pooled trust.

The Court considers the CMS April 2008 memorandum and July 2008 letter to be administrative interpretations of the statute, and has determined that the CMS April 2008 memorandum and July 2008 letter correspond with all other documentation presented by CMS and all other HealthQuests, except for HealthQuest #6046. (See footnote 1, p. 12.) HealthQuest #6046 is the only outlier from the CMS information and all of the HealthQuests before and after HealthQuest #6046[2]. HealthQuests are used as guidance whereas information from CMS is considered to be an administrative interpretation. Consequently the Court has determined that HealthQuest #6046 was an anomaly and therefore is not persuasive as to the issue before the Court.

The Court also determines that the Commissioner of the Minnesota Department of Human Services did not change any prior rule when it issued its Manual Letter 17 which clarified the addition to the manual on pooled trusts. An agency is not deemed to have promulgated a new rule if its interpretation merely restates an existing policy, is consistent with the plain meaning of the rule, or is consistent with the regulation it implements. Nor-West Cable

[2] HealthQuest #6046 dated December 2006 states: "There is no age criteria for a pooled trust. There is no improper transfer if the pooled trust meets the [statutory criteria for a qualified pooled trust]."

Commc'ns P'ship, 356 N.W.2d at 667. The manual letter merely restates the existing policy and the Court finds that it is also consistent within the plain meaning of the rule and the regulation it implements.

5. Fair Market Value of the Assets Transferred

Since the Court has concluded that the transfer of assets provisions in subsection (c) apply, the Court must also find that the record contained substantial evidence that Appellant transferred his assets for less than fair market value before it can also apply the 2.69 month look-back penalty. 42 U.S.C. §1396p(c)(1)(A) & (B). The Court finds that there is not substantial evidence to support the conclusion regarding the fair market value of the assets. Marge Pasche, on behalf of Douglas County admitted at the hearing on January 6, 2009, that Douglas County did not perform an analysis of whether Appellant received adequate compensation when he placed his assets into the pooled trust. Although some HealthQuests suggest that this situation may be one where an uncompensated transfer is involved (see footnote 1 p. 12), HealthQuests are case-specific and therefore, this individual case should be analyzed to determine whether Appellant received fair market value for the assets he placed into the qualified pooled trust.

Respondent's argument—that Appellant has not received adequate value of the assets based on the fact that there has been no indication that money from the trust has paid for anything on behalf of Appellant thus far—is misplaced since the analysis must focus on whether, *at the time Appellant applied for Medical Assistance*, Appellant received less than fair market value for his assets transferred into the pooled trust. 42 U.S.C.§1396p(c)(1). Therefore the Court remands to determine whether Appellants assets were transferred for less than their fair market value at the time he applied for Medical Assistance.

6. Conclusion

The Court concludes that the Commissioner's decision to apply the transfer of assets provisions contained in section 1396p(c) is proper, was neither arbitrary and capricious nor based on an unlawful procedure or an error of law. However, the Court finds that there is not substantial evidence to determine whether Appellant received fair market value for the assets transferred and therefore the decision to apply the transfer of assets penalty was in error.

The decision to apply the transfer of assets provisions in subsection (c) is affirmed. This case is remanded to determine whether, at the time Appellant applied for Medicaid, he had transferred the assets into the pooled trust for less than fair-market value. Consequently, the Commissioner of Human Services' Decision is affirmed in part and remanded in part.

A.L.C.

Too Old for a Pooled SNT? – Think Again!"

Funding Pooled Trust Subaccounts for Beneficiaries Age 65 and Older – 2015 Update

Megan Brand, Exec. Dir. CFPD-CO Fund for People with Disabilities
Laurie Hanson, Esq, Long, Reher and Hanson, PA

Meet Marnie

- Marnie set up her CFPD pooled trust sub-account with $34,240 just shy of her 95th birthday.
- At that time she was living in an Independent Living Apartment of an Assisted Living Facility.
- The funds were from her husband's life insurance.
- BEFORE Marnie joined the trust, the CFPD case manager went out and met with Marnie and her son to assess her and determine if she could spend the $34,240 in her actuarial life expectancy of 3.26 years.

Marnie, cont.

- Marnie and her son and the CFPD Case Manager determined the funds could be used for the following:
  - A Sleep Number bed
  - Annual visits from her family (Marnie was not able to travel)
  - Companionship services (especially important after just losing her husband)
  - Clothing and personal needs items (Shopping was Marnie's FAVORITE pastime)
  - Hair/nail care
  - Cable TV (watching TV was one of Marnie's beloved activities)
  - Renter's insurance

Marnie, cont.

- Three and one half years later, Marnie transitioned into the Memory Care Unit of the Assisted Living and increased her one-on-one companionship services.
- This final expense closed her trust in early 2015 after it was completely spent down.
- Marnie died in June, 2015. In a follow up survey, her son noted: "Engaging CFPD in 2011 was a positive choice in managing my mother's financial assets after my father passed in June of that year. The fund was able to supplement her lifestyle, giving her an enjoyable quality of life at Porter Place [Assisted Living]. When her health problems became an issue, we were able to use the remaining funds to assist in caregiving services. We have had a very positive experience with CFPD and our case manager."

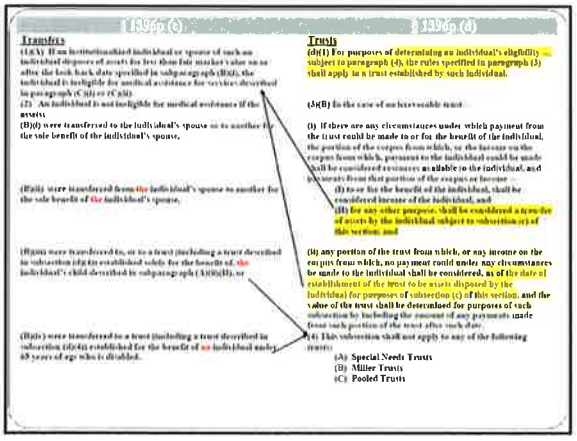
History

Historical Treatment of Transfers into the Pooled Trust for Individuals age 65 and older ("transfers")

- Omnibus Reconciliation Act of 1993—Congress sought to stop the process of divestment of assets into irrevocable trusts by wealthy individuals trying to qualify for Medicaid.
  - d4A (individual) trusts are limited to those 64 and younger
  - d4C (pooled) **trusts were permitted for individuals any age.**

But those transfer rules get in the way...

- Section 1396p(c) establishes the general rules for transfers.
  - Section 1396p(c)(2)(B) sets forth the exceptions to the general rules. Section 1396p(c)(2)(B)(iii) and (iv) sets forth the exceptions for certain trusts.
- This section does **NOT** say that transfers into PTSA by individuals age 64 and older should be penalized … only that they are exempt.
- Conclusion: Must do a fair market analysis.
  - Section 1396p(c)(2)(C) "a satisfactory showing is made to the State in accordance with regulations promulgated by the Secretary) that (i) the individual intended to dispose of the assets either at **fair market value**, or for other valuable consideration…



The infamous 2008/2009 CMS Letter

Although a pooled trust may be established for beneficiaries of any age, funds placed in a pooled trust established for an individual age 65 or older ***may*** be subject to penalty as a transfer of assets for less than fair market value. When a person places funds in a trust, the person gives up ownership of those funds. ***Since the individual generally does not receive anything of comparable value in return, placing funds in a trust is usually a transfer for less than fair market value.*** The statute does provide an exception to imposing a transfer penalty for funds that are placed in a trust established for a disabled individual. However, only trusts established for disabled individuals age 64 or younger are exempt from application of the transfer of assets penalty provisions (see section 1917(c)(2)B(iv) of the Act.)

If States are allowing individuals age 65 or older to establish pooled trusts ***without applying the transfer of assets provisions,*** they are not in compliance with the statute. (Emphasis added)

Chicago Regional Letter, July, 2008 (Attachment D)

What is Fair Market Value?

- §416.1246 defines Fair market value as "Fair market value is equal to the current market value of a resource at the time of transfer or contract of sale, if earlier."
- Four ways to prove Fair Market Value:
  - No value is lost when a pooled trust is established.
  - Contractual Obligation of the Transfer Agreement
  - Spending Plan/Assessment of use over life expectancy
  - Beneficiary/MA Recipient has burden of proof to show if Fair Market Value was received. BUT, the Agency must refute that it does not exist.

Fair Market Value—no value lost

- No value is lost when legal title is exchanged for equitable title. Beneficiary does not divest themselves of the asset—he/she becomes an equitable owner.
  - Sole Benefit—no one else can benefit from the trust.
  - See POMS: SI01110.515C.2
  - "People with Disabilities, Age 65 and Over, Can Establish a Self-Settled Pooled Special Needs Trust That Protects Their Medicaid Benefits" Beltran, Thomas E. (2009)
- In *Beinke vs. Minnesota Dep't of Human Services*, CV-14-271 (Minn. Dist. Ct Blue Earth Co. June 24, 2014), a 72-year old disabled individual placed funds received from a workers compensation settlement into a pooled (d)(4)(c) trust. The court, on appeal, held that "when Appellant transferred her assets into the pooled trust, she vested in herself an equitable interest in the trust assets … and received FMV for her assets when she transferred them into the pooled trust."

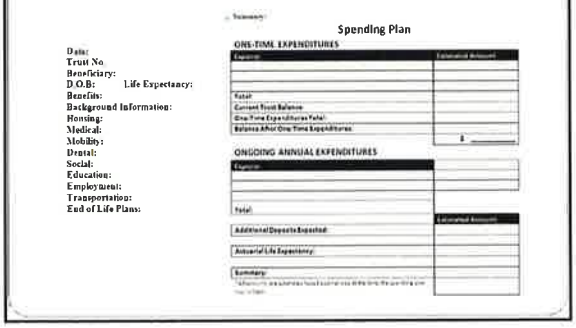
Fair Market Value-Contractual Obligation

- When a trust is created, and a grantor places property into the trust, there is a contract "within the meaning of the contract clause of the Federal Constitution."
  - *Coolidge v. Long*, 282 U.S. 582, 595 (1931). *See also Underhill v. U.S. Trust Co.*, 13 S.W.2d 502, 505 (1929) (A voluntary deed of trust …"is a binding contract between the settlor and the trustee acting for the cestuis que trust, supported by a legal and valuable consideration, namely the benefits contemplated and resulting to the settlor and the beneficiaries from the creation of the trust.")

Fair Market Value -- Spending Plan over life expectancy

- Unique spending plan based on the person's:
  - age,
  - disability,
  - life expectancy, (Either Social Security or Medicaid's table)
  - needs, desires, (You must meet with the individual and/or reps)
  - government benefits and (each waiver may have different benefits)
  - amount placed into the trust.

Fair Market Value -- Spending Plan over life expectancy



Spending Plan

Date:
Trust No.
Beneficiary:
D.O.B: Life Expectancy:
Benefits:
Background Information:
Housing:
Medical:
Mobility:
Dental:
Social:
Education:
Employment:
Transportation:
End of Life Plans:

ONE-TIME EXPENDITURES

Expense	Estimated Amount
Total:	
Current Trust Balance	
One-Time Expenditures Total:	
Balance After One-Time Expenditures:	$

ONGOING ANNUAL EXPENDITURES

Expense	
Total:	

	Estimated Amount
Additional Deposits Expected:	
Actuarial Life Expectancy:	
Summary:	

Fair Market Value -- Spending Plan over life expectancy

- This deflates the argument of the 95 year old millionaire placing all of their money in the pooled trust to become eligible for Medicaid.
- Connecticut utilizes spending plans for those in the community and is beginning to use them for those in Nursing Facilities. State of CT: Informational Bulletin 09-02 (2009):

> First, if the individual transfers less than $311.14 monthly into the pooled trust, there is no penalty. The $311.14 amount, which will be revised each July, represents the average cost for one day's stay incurred by a private pay resident at an LTCF. Because we do not impose a penalty of less than one day, we do not consider a transfer of less than $311.14 to have been made in order to qualify for Medicaid.
>
> Second, if the individual transfers or assigns $311.14 or more monthly into the pooled trust, he or she must expend the excess in its entirety within six months to avoid a penalty. The individual must indicate how he or she will use the funds. He or she must have a definite plan, which must be approved by the department, and must receive fair value for those funds. Supervisors can approve such plans. The Adult Support Team is available for guidance if it is needed. For example, a W01 applicant who needs the excess to pay for property taxes every six months may assign or transfer income or assets into a pooled trust in an amount sufficient to pay for the taxes.

Fair Market Value Spending Plan over life expectancy

- Colorado was using these plans successfully from 2006-2012. CO is now in litigation and is being supported by the NAELA Foundation

NAELA — Leading the Way in Special Needs and Elder Law

For Immediate Release
July 16, 2015
Contact: Abby Matteson, Communications Associate
703-942-5711 #230

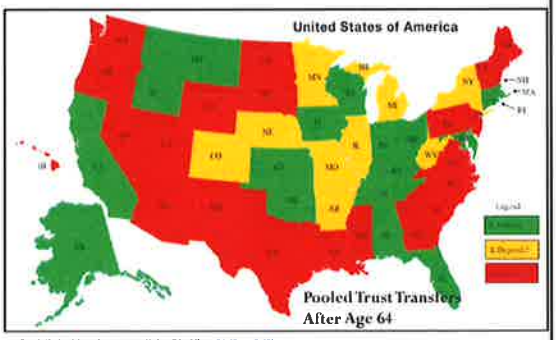
NAELA Foundation Awards Grant to Colorado Fund for People with Disabilities (CFPD)

Washington, D.C. — The NAELA Foundation awarded $7,500 and 10 hours of pro bono work provided by the NAELA Litigation Committee to the Colorado Fund for People with Disabilities (CFPD). The grant will support litigation to confirm that individuals age 65 and older can establish and fund a pooled trust without penalty.

Fair Market Value-MA Recipient has burden of Proof, but Agency must refute

- If your state imposes a penalty per se without considering the fair market value issue—you can argue at hearing that the beneficiary received fair market value.
  - In *Dziuk v. Minnesota Dep't of Human Services*, the Douglas County District Court in the initial appeal held that the decision of the agency was not supported by substantial evidence because the agency did not perform an analysis of whether Mr. Dziuk received adequate compensation when he placed assets into a pooled trust sub-account. *Dziuk v. Minnesota Dep't of Human Services*, 21-CV-09-1074 (Minn. Dist. Ct. Douglas Co. Dec. 15, 2009) Attachment H
  - Mr. Dziuk had multiple sclerosis and requires complete care due to his multiple sclerosis but he is active mentally. At the hearing Mr. Dziuk presented evidence that he placed the last of his funds - $12, 320 (after having spent hundreds of thousands of dollars on nursing home care) into the pooled trust sub-account so that it could be used for things not covered by MA-LTC to allow him to engage in the world beyond the nursing home such as "a telephone; telephone bill; a television; cable television bill; books; magazine and newspaper subscriptions; food outside the nursing home's food; handicap van transportation; clothing; haircuts; ..... a motorized wheelchair and maintenance; a manual wheelchair; hearing aids; donations,; CDs; and DVD s."

State Trends and Review of the Survey



Report with acknowledgment that survey prepared by Long, Kahn & Hansen, P.A., Minneapolis, MN
Updated August 16, 2015 www.mnelderlaw.com

State Trends and Review of the Survey

As of August 16, 2015:

- 20 states allow transfers without penalty,
- 22 states penalize transfers,

State Trends and Review of the Survey

- 8 states have variations or are unknown:
  - CO-used to use a spending plan; this is in litigation.
  - MN-impose a penalty unless fair market value is shown.
  - NY-No transfer penalty for "Community" Medicaid Services but transfer penalty for purposes of "institutional" Medicaid eligibility.
  - IL-penalty unless the public guardian is establishing the trust.
  - MI-litigating fair market value issue
  - AR and NE-unknown
  - MO-mixed-imposes penalty for NF services but not for some 1915 waiver services.

Where to go from here?

- NAELA is working with CMS to get clarification of the 2008/2009 memo. NAELA wrote a white paper (Laurie Hanson was one of the authors) arguing an individual age 65 or older should NOT be penalized for transferring funds into a pooled trust.
- We encourage you to allow people to set up and fund a pooled trust in your state if you are one of the "penalizes" states. Then, we encourage you to litigate/advocate for your beneficiaries—it's about equal protection under the law!
  - Cost and Who pays?
  - Transfers to other states

Questions:

Megan Brand, Exec Dir.

cfpd

Laurie Hanson, Attorney

LONG | REBER | HANSON

PRE-CONFERENCE:
Pooled Trust Intensive

Wednesday, October 14, 2015
Breakout Session 1

1:00 P.M. – 1:50 P.M.

Setting Expectations and Communicating with Special Needs Beneficiaries

Presenter:
Dr. Kathy Piechura-Coure
Professor of Education & Research Faculty,
Nina B. Hollis Institute of Educational Reform
Stetson University
Deland, FL

- Materials
- PowerPoint

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

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

Setting Expectations and Communicating with Special Needs Beneficiaries

Kathy Piechura-Couture, Ph.D.

Professor of Education Stetson University

In the 1970s and 1980s, approximately 1 out of every 2,000 children was diagnosed with autism. Today, the Center for Disease Control and Prevention estimates that one in 68 children in the United States have been identified as being on the autism spectrum (cdc.gov). With the rising number of individuals identified with autism and the educational strides made by many individuals identified with autism, more and more people are interacting with individuals with autism in the normal workplace. Interacting with and supporting individuals with autism requires a different skill set than those used with "normal" clients.

Prior to 2013 the Diagnostic and Statistical Manual of Mental Disorders (DSM IV-TR) had several different labels for autistic type behavior. There were separate categories for Autism, Asperger's Disorder, Pervasive Developmental Disorder—Not Otherwise Specified, Rett's Disorder, and Childhood Disintegrative Disorder (Woods et al., Treating clients with Asperger's syndrome and autism). While all similar in that they involve impairments in social skills and language, each was given a different medical billing code. In 2013, the DSM-5 consolidated all different types of autism under one umbrella—Autism Spectrum Disorder (ASD). The reason for this change was that researchers found that these separate diagnoses were not consistently applied across different clinics and treatment centers, and it was believed that a single umbrella would improve the diagnosis of ASD without limiting the sensitivity of the criteria, or substantially changing the number of children being diagnosed (dsm5.org). As far as treatment criteria, clients

served today all fall somewhere on the autism spectrum and terms such as Asperger's and PDD are no longer used. With this in mind, this paper will cover some of the more common characteristics of persons on the Autism spectrum and positive supports that can be used while working with someone on the spectrum.

People with ASD tend to have communication deficits. They many times have difficulty responding appropriately in conversations. For example, if interested in one aspect of a conversation he/she may only talk about that aspect. In the popular movie Rain Man Dustin Hoffman's character Raymond loves Judge Wapner and The People's Court and relates much of what he thinks and sees to that show. Although the movie depicts autism as a disorder for person with high intelligence, this typically makes up less the 3% of the ASD population and 28% are found to have average intelligence, leaving 69% of persons on the autism spectrum in the below average range of intelligence (Charman et al., Pubmed.gov). Regardless of the client's intellectual abilities, communication both verbal and non-verbal is often difficult. Most individuals on the spectrum misread facial expressions and have difficulty reading body language. Just this week while in a meeting a young college student who is identified as having autism walked into my office unannounced. One of my colleagues gave him the, you don't belong here; you're interrupting look. The student just continued with his question oblivious that his behavior was inappropriate. I politely informed him that we were in a meeting and that he could have his question answered by the

secretary in the main office. He abruptly turned around and walked out. There were no apologies. It wasn't that he was being rude, he just could not read from our body language that it was not a good time to interrupt our meeting. As Steven Summer, an adult diagnosed on the spectrum states,

> Please don't get offended by our communication style. We tend to be frank, honest and matter of fact. Some people may interpret this as blunt or rude. We don't intend to offend you by not sugar coating the things that we say. We don't intend to be rude. Please don't get defensive or assume that we are attacking you. Remember that communicating is hard for us. Don't make negative assumptions. Too often we get corrected or attacked by someone who fails to give us some slack and the benefit of the doubt. (autismum.com)

In addition to not being able to read social cues, most clients with autism will not be able to read between the lines or derive meaning from legalize. They tend to see the world as black or white. The grey world of the legal profession is impossible to comprehend. Communication with someone on the spectrum needs to be clear and concise. It needs to be free of idioms and written in simple language. You should not talk down to the client, but need to understand that nuances of language are difficult and it has nothing to do with the client's intelligence but rather his/her disability.

Clients on the autism spectrum typically need a lot of structure. Changes in schedules or timelines can cause extreme stress to the client and may result in physical or verbal tantrums. These tantrums are frightening to the client and anyone present. Meeting the client at the same time each week and in the same physical setting can reduce stress. Clients with ASD also need

to be kept on a specific timeline. If given an open timeframe they may perseverate on a topic for an extended time period. When starting a meeting, it would be helpful to say we have 10 minutes to discuss x, y, and z and set a timer as a visual reminder. Considering lawyers charge by the hour, it is necessary to keep the client within a reasonable time limit. If the conversation strays, it is appropriate to remind the client that they are off topic and give a verbal and visual reminder of the time constraint. Some have found that giving the client a written form to fill out prior to the meeting provides a good structure for what is to be discussed in the meeting. If you need the client to be in a trial setting or more public forum you may have to model and teach appropriate verbal and non-verbal responses. Remember you must be clear and concise in what you do and do not want the client to do. Do not suggest that he/she do something. If you want him/her to do it—say, "I need you to do _____ by _____". He/She will not be able to figure out what to do if not told in concise and direct language. Keeping schedules and appointments is also very important when dealing with a client on the spectrum. As stated above, structure is important, so if you might be running late from court do not schedule a client with ASD near that time. If you do he/she will be standing in front of your administrative assistant demanding to see you because he/she had an appointment at 1 o'clock and it is now 1 o'clock—and will continue to say that until you arrive.

Another common characteristic of persons with ASD is that they are highly sensitive to changes in their environment and many times experience sensory overload. A room that is somewhat loud to you may be unbearably loud to a person on the spectrum. If your office is loud, try and find a quiet room or space to meet with the client. If you are having a meeting with a client hold all calls and ask not to be disturbed. This will create a quiet and calm environment.

Many persons with ASD also have difficulty with florescent lights. Florescent lights flicker and persons on the spectrum can actually see the flicker and it creates a strobe effect. This can be very distracting and many persons with ASD can become agitated when there is sensory overload. Using incandescent lights or natural lights is preferable. Others with autism use tactile sensations for self-stimulation and as an escape for sensory overload. Flapping of hands, rocking, or inappropriate fixation on objects is a common characteristic. Sometimes these behaviors make the person seem odd to others, therefore it is advisable to replace inappropriate self-stimulating objects with more appropriate objects. For example, if a client has to appear in court and you would like them not to rock or hand flap, providing a stress ball or tactile pad is a more appropriate alternative. If a client is agitated or a stressful environment is unavoidable, some research suggests that weighted vests or blankets can be effective. Temple Grandin, who holds a PhD in animal behavior and is on the spectrum herself, believes that the weighted vests calm the nervous system and make them feel calmer, however, this

research is equivocal. She has used them herself and also has a squeeze machine that applies deep pressure. This machine is what allowed her to achieve her academic success (templegrandin.com). She also ascribes to a "sensory diet", which suggests that every twenty minutes the client be allowed a sensory break. This could include removal to a quiet place or being allowed to do a self-stimulating behavior for a set period of time. However, in general, avoidance of sensory overload is advisable.

When meeting with the client there are a few other things to keep in mind. Eye contact most likely will not occur. Eye contact is difficult and the effort it takes to sustain eye contact will take away from the clients' ability to focus on the conversation. Remember one-on-one communication is difficult and requires a lot of energy. Yet, this same client may do fine speaking to large groups. In addition, hugging or touching of the client should be avoided. Many individuals with autism describe touching or hugging as claustrophobic. Although both eye contact and physical touch (hand shaking, pat on the back) are normal types of non-verbal behavior they are difficult for a person with autism. Not expecting eye contact and avoiding physical contact will put the client at ease.

Lastly, persons with autism are as unique and different as any other person. These guides and suggestions are just that—suggestions. What will work for one, may not necessarily work for another. It is best, if possible, to ask the person or his/her caregiver for suggestions. If asking the person with autism what supports he/she may need, be patient it may take awhile for him

or her to formulate the answer. Caregivers often can be of help, because they typically have discovered what works best for the client. As Steven Summer wrote:

> Please keep in mind that we most likely have been rejected, excluded, ridiculed or bullied in the past. If we seem anxious or insecure this may be due to living in a world that misunderstands us and is often hostile to us. We have to work hard to reach out to others. Please work at reaching back to us with understanding and kindness. If we feel that you are ignoring us we will feel bad about that. We may persist in asking for feedback from you. Please be reassuring and clearly express your support for us.
> — (autismum.com)

References

American Psychiatric Publishing. "Autism Spectrum Disorder (ASD)" 2013 *http://www.dsm5.org/Documents/Autism%20Spectrum%20Disorder%20Fact%20Sheet.pdf*. Accessed September 16, 2015.

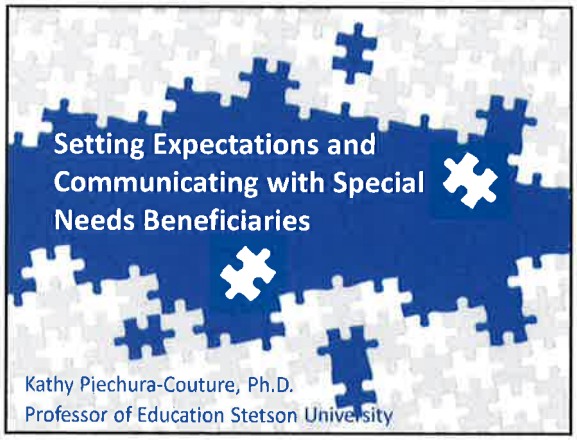
Center for Disease Control. "Autism Spectrum Disorder (ASD): Data and Statistics", August 2015, *http://www.cdc.gov/ncbddd/autism/data.html*. Accessed September 10, 2015.

Charman et al. "IQ in children with autism spectrum disorders: data from the Special Needs and Autism Project (SNAP)". *Psychol Med.* 2011 Mar; 41(3): 619-27. doi: 10.1017/S0033291710000991.

Grandin, Temple "Sensory therapies and autism", 2012, *http://www.templegrandin.com/*. Accessed September 18, 2015.

Summer. "10-tips-on-how-to-communicatewith-autistic-people" *http://autismum.com/2012/05/07/10-tips-on-how-to-communicate-with-autistic-people/*. Accessed September 13, 2015.

Woods et al. "Treating clients with Asperger's syndrome and autism" *Child and Adolescent Psychiatry and Mental Health* 2013, 7:32 *http://www.capmh.com/content/7/1/32*. Accessed September 14, 2015.



Autism Spectrum

Common names for Autism

- Asperger's syndrome
- High functioning Autism
- Pervasive Developmental Disability (PDD)
- PDD-NOS (Pervasive Developmental Disability-Not Otherwise Specified)
- Rett's Disorder

DSM-5

People with ASD tend to have communication deficits,

- responding inappropriately in conversations
- misreading nonverbal interactions-social cues
- difficulty building friendships appropriate to their age

People with ASD may be

- overly dependent on routines
- highly sensitive to changes in their environment
- intensely focused on inappropriate items.

Things to consider

- Provide clear, written instructions.
  - Words are typically taken very literally
  - Use clear and simple language
  - Legalize maybe confusing and may agitate the client
  - Outline what you want the client to do or need from the client.
  - Avoid spoken directions

Things to consider

- Provide structure.
  - Appoint times
  - Provide time limits and directions for when and where feedback should be given
  - Remind client what those timelines are
  - Meet in the same place or orient the client to a space prior
  - Have a contact person or structured form for response
  - Teach appropriate verbal and non verbal responses (be blunt)

Heightened senses

- Persons on the ASD spectrum may:
  - Have problems with loud noises
  - Become upset in crowded areas
  - React to florescent lights
  - Need to touch things
  - Not like to be touched

Ways to reduce the stress

- Hold meetings in a quiet area of the office
- Hold calls and interruptions during client time
- Ask judge to tape the client if upset in large crowds
- Use weighted vest if presence is required
- Turn off florescent lights and use incandescent light or natural light
- Provide stress balls or tactile pads
- Do not hug or physically touch the client
- Do not expect eye contact

Steven Summers an adult with ASD states:

"Please don't speak down to us. Treat us as equals. We may sound flat or have an unusual tone to our voice. We may not speak with our voice at all. We may need to type our words. Please be patient with us. It may take Us awhile to formulate our answers."

-Autismum

PRE-CONFERENCE:
Pooled Trust Intensive

Wednesday, October 14, 2015
Breakout Session 1

1:55 P.M. – 2:45 P.M.

The Power of the Petition: A Trustee's Role in Protective Proceedings

Presenter:
Megan Brand
Executive Director
Colorado Fund for People with Disabilities
Denver, CO

- Materials
- PowerPoint

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

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

The Power of the Petition: A Trustee's Role in Protective Proceedings

Megan Brand, Executive Director, CFPD-Colorado Fund for People with Disabilities

Research assistance provided by Tamara Schweinsberg, Candidate for Juris Doctor

I. Introduction

Consider Jacob:

Jacob was paraplegic due to jumping off of a roof into a snowbank when he was in his early twenties. A few years later he was injured in a fire when he was unable to escape the building due to faulty fire escapes. He settled a personal injury case and funded d4A disability trust[1]. The trustee decided to purchase a home for him and made it accessible. He was a college student at the time and fairly responsible. Due to his young age, the house was deeded to him outright to avoid a Medicaid estate claim if he should have an untimely death. He also had a roommate and while the roommate lived with him, he was fairly stable. He had caregivers coming into his home through the Home and Community Based Services Waiver.

The trustee was aware of him growing and using medicinal marijuana. He began with a permit and this was at the time that medicinal marijuana was legal in Colorado. After he had owned the home for about four years, the trustee became aware of several red flags. Jacob began missing appointments with his trustee case manager. He started making requests for very large purchases from a wholesale store. His Representative Payee, his mother, asked the trustee to pay his energy bill (allowable due to his SSDI income and HCBS Medicaid benefit) and it was quadrupled from what it had been previously. His water bill was also high.

After learning from Jacob's mother that he had five homeless people living with him and had several incidents of theft in his home, including his prescription painkillers, the trustee consulted with an attorney and petitioned for an Emergency Special Conservator (limited in time and scope) of the home and vehicle. The court also appointed an attorney for Jacob. Jacob's mother was not willing to be the petitioner, but did testify at the hearing. She was labeled an enabler by most involved, including the judge and later hired her own counsel to object to the conservatorship. While initially supportive, she waffled throughout the process.

To make a long (and drawn out over many months) story short, the Conservator found a huge and illegal marijuana grow operation in Jacob's home and he had unsafely rewired and changed pipes in his home. Jacob was a known entity to the local Drug Enforcement Unit and is still facing criminal charges. One person was found dead in his home (during the process) and another was heating the home with a space heater in his garage (remember he had been a victim of a fire). The home was eventually sold and the proceeds were returned to the trust. The Conservator asked for a guardian for Jacob and after a neuropsychological exam showing drug use, damages from drug use and underlying Mental Illness caused incapacity, a guardian was appointed for Jacob. He began living in an assisted living facility but has declined mentally and physically and is now living in a nursing facility. Given the facts of Jacob's situation, if the trustee had ignored the red flags and done nothing or waited on the mother to do something, the home would have been wasted and, not to be overly dramatic, Jacob would likely be dead.

II. Guardianship and Alternatives

[1] 42 USC § 1396p(d)(4)(A)

Before exploring if the Pooled Trust Trustee should petition for guardian or conservator for an individual, it is important to establish the definitions and roles of each of the court appointments as well as the alternatives to guardianship. The Uniform Guardianship and Protective Proceedings Act of 1997/1998 [2] (UGPPA) was developed and written by a committee of the National Conference of Commissioners on Uniform State Laws. It was approved and recommended for enactment in all of the states at the Annual Conference in 1997. The Act, in its Prefatory note, states "A guardian or a conservator should be appointed only if there are no other lesser restrictive alternatives that will meet the respondent's needs. The Act encourages the use of alternatives to guardianship or conservatorship and views the appointment of a guardian or a conservator as a last resort." Further, "courts are directed to tailor the guardianship or conservatorship to fit the needs of the incapacitated person and only remove those rights that the incapacitated person no longer can exercise or manage." In addition, per National Guardianship Association website: "Guardianship, also referred to as conservatorship, is a legal process, utilized when a person can no longer make or communicate safe or sound decisions about his/her person and/or property or has become susceptible to fraud or undue influence. Because establishing a guardianship may remove considerable rights from an individual, it should only be considered after alternatives to guardianship have proven ineffective or are unavailable." [3]

It is important to note that, as of June 2012, only five states, the District of Columbia and the U.S. Virgin Islands have adopted UGPPA in full. That said, many of the state laws covering guardianship proceedings are substantially similar and follow the intent of UGPPA. Further, the Uniform Adult Guardianship and Protected Proceedings Jurisdiction Act (UAGPPJA) addresses

---

[2] Uniform Guardianship and Protective Proceedings Act of the National Conference of Commissioners on Uniform State Laws July 25-August 1, 1997, Hyatt Regency, Sacramento, California. (1997). San Rafael, CA.

[3] http://www.guardianship.org/what_is_guardianship.htm

guardianship proceedings across state lines and has been approved in 32 states as of June, 2012. [4] [5]

a. Guardianship of the Person

UGPPA defines guardian as "…a person who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or spouse, or by the court. The term incudes a limited, emergency and temporary substitute guardian but not a guardian ad litem." Further "an individual or a person interested in the individual's welfare may petition for a determination of incapacity, in whole or in part, and for the appointment of a limited or unlimited guardian for the individual."

It is important to note that the guardianship proceedings require a finding of incapacity. That determination of incapacity varies by state. In Colorado, the state of residence of the author, this incapacity is typically determined by the court after a review of medical evidence (often a finding of incapacity by the treating physician), a court visitor visiting with the person who would be under guardianship and a court hearing. If the case was contested by any party, a court may order a neuropsychological exam. By contrast, in Florida, each finding of incapacity is done by a committee, which is comprised of three professionals, typically a social worker, a psychologist and a psychiatrist. Finally, about 50% of states have provisions for a trial by jury for guardianship and finding of

[4] Basics. (n.d.). http://eldersandcourts.org/guardianship/guardianship-basics/state-laws.aspx
[5] Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. (2007) , from http://www.uniformlaws.org/Act.aspx?title

incapacity, but in Kentucky a jury ruling in the determination of capacity is mandatory.[6]

b. Guardianship of the Estate/Conservator

UGPPA defines a Conservator as "…a person who is appointed by a court to manage the estate of a protected person. The term includes a limited conservator." Further, a court may appoint a conservator for "any individual…who is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions, even with the use of appropriate technological assistance…and the individual has property that will be wasted or dissipated unless management is provided…"

It is important to note here that the finding of incapacity is not required in conservatorships. In fact, in a recent Appellate court decision in Colorado, the court ruled that Medical Evidence of Incompetency is not required under the Conservatorship Statute. (After he sent almost $500,000 to anonymous offshore bank accounts, Mr. Neher's son petitioned for conservator for him and the court approved it. No medical evidence was included in the petition.)[7]

c. Guardian Ad Litem

"A guardian ad litem is a unique type of guardian in a relationship that has been created by a court order only for the duration of a legal action. Courts appoint these special representatives for infants, minors, and mentally incompetent persons, all of whom generally need help protecting their rights in

[6] A Brief Report on Guardianship Decisions: The Use of Juries and Medical Evaluations and Documentation. (2004). Retrieved September 7, 2015.

[7] 2015 COA 103. No. 13CA1710. *In the Interest of Neher v. Neher.*

court. Such court-appointed guardians figure in divorces, child neglect and abuse cases, paternity suits, contested inheritances, and so forth, and are usually attorneys".[8]

d. Durable Power of Attorney

An individual who has appropriate capacity at the time of establishment may execute a Durable Power of Attorney (DPOA). The DPOA is "to manage some or all of the principal's financial affairs. By definition, a DPOA survives the incapacity of the principal."[9]

e. Advance directive for health care (HCD)

"A HCD may be a written document or oral statement that can both describe a person's wishes, preferences, and directions concerning health care, and name an agent or agents who may make decisions for the principal in the event of her inability to do so."[10]

f. Family/Significant Other/Friend acting in best interest

A person can often be supported in their decision making by a family member, spouse, significant other, or friend. When statutory privacy measures or complex legal and medical systems get in the way of natural methods, then guardianship is sometimes warranted.

g. Representative Payee

[8] http://legal-dictionary.thefreedictionary.com/Guardian+Ad+Litem
[9] Dayton, A. (2014). *Comparative perspectives on adult guardianship*. Carolina Academic Press.

[10] Dayton, A. (2014). *Comparative perspectives on adult guardianship*. Carolina Academic Press.

A Representative Payee (Rep Payee) can be appointed by the Social Security Administration for an individual who is not able to manage their own Social Security benefit. It is important to note that the appointment of a Rep Payee is not a finding of incapacity. Further, it is fairly easy for an individual to change Rep Payees or ask for their doctor to reverse their initial medical finding for the need for a Rep Payee.

h. Trust

A trust can be utilized in place of a conservatorship and is often more acceptable than both conservatorships and DPOAs. As administrators of Pooled Trusts are aware, a trustee does not have the same authority as a guardian or conservator and is sometimes limited when certain needs arise. Ex: a Trustee cannot apply for Social Security benefits on behalf of the trust beneficiary, but a guardian/conservator could do so, even without cooperation from the beneficiary.

> Consider Sherri:
>
> A third party pooled trust was established via court order for Sherri after the initial trustee determined it was uneconomical to retain as an individual account (form a testamentary trust). The trust had about $90,000 and the previous trustee had been sending her $3,000/month with little knowledge of her government benefits (it turns out she is on Medicaid Expansion which does have an income limit) or her monthly expenses. Their relationship with her had never been good and had deteriorated to the point of constant harassment and letter writing on behalf of Sherri.
>
> The 3rd Party Pooled Trust Trustee immediately experienced the threats and harassment in the form of police reports of theft, letter writing to the Board President and calls to the trustee's property manager to report our "suspicious activity". After consultation with the board of director's committee, the trustee sought counsel and decided to petition the court for a Special Conservator for the limited purpose of applying for SSI and/or SSDI and to determine the resources and income of Sherri. About a month after the Special Conservator was appointed, the trustee asked for an Emergency appointment of a GAL for Sherri due to her escalated calls to various police departments and other threatening behavior.

i. Guardianship limited in time or scope

i. Limited Guardianship

The National Arc states in their Position Statement on Guardianship the need for less intrusive alternatives to guardianship for people with Intellectual and Developmental Disabilities, specifically guardianship that is limited in scope.[11] By way of example, Susan may be completely capable of choosing and carrying out her vocation and applicable training and residence, but she may have deficits in the area of medical decision making and may benefit from a guardianship limited to medical decision making only.

ii. Limited Conservator

An example of a limited conservatorship that would be of interest to the Pooled Trust Trustee would be for a limited conservatorship for a vehicle for the benefit of a minor trust beneficiary.

Consider Sebastian:

> Sebastian is 9 years old. He has an injury from birth and his pooled trust was established with funds from a personal injury settlement. He uses a wheelchair and is learning to use a motorized wheelchair for greater independence. His parents have asked for the trust to purchase a wheelchair accessible van for $60,000 to transport him to/from school, therapy and other after school activities. The trustee agrees to the van purchase for Sebastian's benefit. Due to liability the van will not be held in trust. The trustee approves the van with the contingency of it being held in a limited conservatorship with

[11] Position Statement: Guardianship. (2009). http://www.thearc.org/who-we-are/position-statements/rights/guardianship

the parents serving as the conservators. This ensures the van is for Sebastian's sole benefit since he is a minor child.

iii. Single Transaction Conservator

This conservatorship is limited both in time and in scope. A pooled trust trustee may often see a single transaction conservator appointed for the settlement of a personal injury case and funding and establishment of the pooled trust on behalf of the person with a disability.

III. When a trustee recognizes a guardian/conservator needs to be appointed

a. Guardianship of the Person

UGPPA identifies that "(a) An individual or a person interested in the individual's welfare may petition for a determination of incapacity, in whole or in part, and for the appointment of a limited or unlimited guardian for the individual. (b) The petition must set forth the petitioner's name, residence, current address, if different, relationship to the respondent, and interest in the appointment and…(7) the reason why guardianship is necessary, including a brief description of the nature and extent of the respondent's alleged incapacity."[12]

Three things should be noted here in relation to the petition for guardianship of the person. First of all, the definition of "a person interested in the individual's welfare" may be further defined (or restricted) in each state's statute. The trustee should begin by thoroughly reviewing the guardianship statute in the state of residence for the beneficiary to determine if they are, in fact, an

[12] Uniform Guardianship and Protective Proceedings Act of the National Conference of Commissioners on Uniform State Laws July 25-August 1, 1997, Hyatt Regency, Sacramento, California. (1997). San Rafael, CA.

"interested party". Secondly, the petition for guardianship should be considered alongside a concern for the individual's health or safety being at risk due to an action or inaction of the beneficiary. Finally, while a trustee may not be obligated to petition for guardian under the "interested persons" in the state statute, the trustee may be subject to the laws governing mandated reporters of a vulnerable or at risk adult in the state of residence. At the very least, the trustee most often has the obligation of a report to Adult Protective Services when the health or safety of a beneficiary is at risk.

b. Guardianship of the Estate/Conservatorship

UGPPA identifies "Upon petition and after notice and hearing, the court may appoint a limited or unlimited conservator or make any other protective order provided in this [article] in relation to the estate and affairs of…(2) any individual, including a minor, if the court determines that, for reasons other than age: (A) by clear and convincing evidence, the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions, even with the use of appropriate technological assistance, or because the individual is missing, detained or unable to return to the United States, and (B) by a preponderance of the evidence, the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health and welfare

of the individual or of individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money."[13]

It should be noted here that the Act is silent on who the petitioner can be. One can easily draw the conclusion that the interested persons are similar to those in guardianship proceedings and that the trustee has the same obligations in a conservatorship as in a guardianship. Remember Jacob in the introduction. The protective proceedings began with a petition for a special conservatorship for the home. Because the trustee had purchased the home, he/she was well aware of the value of the asset that was being wasted or dissipated.

IV. Considerations of the Trustee

When a Pooled Trust Trustee is determining whether or not to petition the court for guardianship or conservatorship, the following considerations should be made. First and foremost, the Pooled Trust should rely on the input and deliberation among the staff and board committee to discuss the costs and benefits of involving the trustee in guardianship proceedings. It is important to have a multidisciplinary committee for many reasons, but especially when exploring guardianship and the alternatives to guardianship.

a. Cost and ability of the trust to pay

Pooled Trust sub-accounts are often limited in size and may not be able to afford the cost of the protective proceedings. In many jurisdictions, court appointed attorneys and guardians ad litem can be paid for by the state system, but this should not be an assumption by the trustee, especially if the trustee is the

[13] Uniform Guardianship and Protective Proceedings Act of the National Conference of Commissioners on Uniform State Laws July 25-August 1, 1997, Hyatt Regency, Sacramento, California. (1997). San Rafael, CA.

petitioner and makes the court aware of a trust sub-account. Further, there may be cost compensation statutes in the state which have limitations on fees and require court approval for fees involved in these proceedings and the trustee needs to be aware of this potential court oversight.

In addition to the costs of the petition, there may be costs associated with the guardianship unless there is a family member or public guardianship program in the state of residence. These factors must all be considered when determining whether or not to petition. Finally, the trustee must remember that, unless reversed by the court, the guardianship is for life and the costs of paying for guardianship can be substantial.

Consider Luke:

Luke was adjudicated incapacitated and the local Adult Protective Services (APS) was serving as his guardian. The guardian established a first party pooled trust for him with an $8,000 back payment in Social Security benefits. At some point, APS decided to resign as his guardian. However, Luke had been adjudicated incapacitated and APS did not recommend a successor guardian and the court did not appoint one. Luke had a significant brain injury with severe behaviors and has been in and out of jail. The Pooled Trust Trustee asked for the appointment of a Guardian Ad Litem for the following:

- Investigate the present circumstances
- Provide recommendations to the court regarding if Luke is in need of a guardian
- If he does need a guardian, conduct research to identify and recommend potential guardians.

Two and a half years later Luke still has a GAL. Luke has been in and out of jail and returns to an Assisted Living Facility in between times. The adjudication of incapacity has not changed. APS has an open and active case but they are unwilling to serve as Luke's guardian. Since the funds in the pooled trust are now under $2,000, which leaves no money to privately pay for a guardian and Colorado does not have a Public Guardianship Program, the GAL has not been able to find a guardian to serve.

b. Finding a family member or professional to serve

The UGPPA[14] requires that in the case of guardianship, family member guardians are given priority. That is, of course, assuming there is a family member willing and able to serve as guardian. Most seasoned Pooled Trust Trustees are very familiar with professional guardians in their locale due to their work with many beneficiaries who may be under guardianship. Other resources for professional guardians are through the National Guardianship Association and their state affiliates.[15]

c. Does your state have a public administrator and/or public guardianship program?

There are a variety of Public Guardianship models throughout the states. Most of the models are within a social service agency of the state, while some are county systems and others are court systems.[16] Just because these state models exist does not mean that they are fully funded or accessible to the entire state. [17] Having a fully funded public guardianship program may influence the Pooled Trust Trustee to petition the court for the real reason of health or safety instead of hesitating due to the cost to the trust, the beneficiary themselves or the estate.

d. Does the trustee petition or could it be someone else?

Once you've decided that *something* needs to be done the next hurdle is to decide what will be done and who will do it. It is important to consult with an attorney who is well versed in both trusts and guardianship/conservatorship proceedings. If you have a situation in which the beneficiary will not object to the

[14] Uniform Guardianship and Protective Proceedings Act of the National Conference of Commissioners on Uniform State Laws July 25-August 1, 1997, Hyatt Regency, Sacramento, California. (1997). San Rafael, CA.
[15] http://www.guardianship.org/
[16] Teaster, P. (2007). Public Guardianship After 25 Years: In the best interests of Incapacitated people? *Available at* http://www.americanbar.org/content/dam/aba/migrated/aging/docs/Guard_report_Exec_Summ.authcheckdam.pdf

[17] Teaster, P. et al (2010), Public Guardianship in the Best Interests of Incapacitated People?

guardianship and/or conservatorship and there will not be any conflict, then it is an easier decision to consider. Once there is any possibility of conflict, the outcome will likely be different. If there are other interested parties[18] (family members, residential providers, Adult Protect Services, neighbors) who can petition instead of the trustee, this will likely be the better outcome. If this is not the case, these alternatives can be explored.

1. Trustee or trustee's counsel is the "ghost" petitioner (case manager or attorney drafts the petition or provides background to APS or other entity and that party agrees to file.)
2. Involve Adult Protective Services and ask them to petition or petition jointly.
3. Petition the court for instruction and request a GAL.
    a. This is probably one of the best tools in the trustee toolbox concerning guardianship/conservatorship proceedings. It takes the trustee out of the position of being the petitioner and being in a potentially adversarial position with the beneficiary while still addressing the concerns or needs for the beneficiary.
    b. Use of a GAL immediately begs the question of how a GAL is appointed. We know from the definition of GAL that a GAL is only appointed when there is a legal proceeding already in place. If there has never been a

[18] Enter interested parties from UGPPA

guardianship or conservatorship proceeding, how do you go about getting a GAL Appointed? Consider petitioning the court for which the trust is under jurisdiction for instruction in re: to your problem (Inability to communicate with your beneficiary, etc.) and ask for a GAL to be appointed to address a particular issue. The scenario, below, illustrates this tool.

Consider Annabelle:

Annabelle joined the pooled trust when she liquidated her 401K to become eligible for SSI. She had been recently homeless and found housing through the services of the local mental health center. At the time of joinder she was actively receiving services from the Mental Health Center. The Pooled SNT Trustee purchased her a car, a computer and other electronic equipment.

Annabelle began to display signs of delusions. She brought materials to the trustee's office in which she changed the name of one of the staff members and reorganized the Organizational Chart. This correspondence was sexual in nature and offensive to staff.

Annabelle then began writing emails to high ranking Colorado officials and copying the trustee. Some people included were the Denver Better Business Bureau, the Lieutenant Governor, the Department of Medicaid, and Professors at a University where she had studied, and on and on. During this same time, the Pooled Trust Case Manager learned from the Mental Health Center that Annabelle was facing homelessness since she refused to complete the necessary redetermination paperwork for her subsidized housing. With input from the trustee's board of directors and counsel, trustee decided to petition the court (the Probate Court which has jurisdiction of the trustee—NOT the court of residence for the beneficiary) for instruction and to ask for a Guardian Ad Litem. In addition to asking for relief from the court in regard to communication with the beneficiary, the trustee also asked, specifically, for the Guardian Ad Litem to do the following:

(i) determine whether Beneficiary is subject to any immediate risk, including a risk of homelessness;

(ii) determine if Beneficiary is in fact "incapacitated;" and,

(iii) recommend the proper course of action going forward with respect to administration of Beneficiary's account.

The court order for the guardian ad litem with the above powers was granted. The GAL then gathered medical evidence and immediately contacted the housing authority. During this time the beneficiary was incarcerated for impersonation and theft. The GAL then recommended an emergency guardian for the individual in the jurisdiction where the beneficiary resided. The GAL had to be transferred to that court at that time. A few months later a conservator was also appointed for the beneficiary and the guardianship was made permanent.

> Because of these appointments the individual's belongings (most of which were purchased with trust funds) were secured and the beneficiary had a decision maker (guardian) to help her with placement when she was discharged. The guardian and conservator also helped her to reestablish both Social Security and Housing benefits.

e. Does this action put you in an adversarial position with your beneficiary?

Deciding to petition for guardian or conservator for a trust beneficiary definitely puts the trustee in a potentially conflicted position. These protective proceedings, if ordered by the court, put a restriction on the individual's rights and they must not be considered lightly. As was stated in the introduction, alternatives to guardianship and conservatorship must always be explored and considered. Then, if the proceedings must continue, a trustee should do everything in their power to involve someone else in the petitioning. However, at the end of the day, when the trustee is faced with a situation where a person's health or safety is at risk and/or assets are going to be wasted or dissipated, the trustee has a fiduciary duty and obligation to proceed.

f. When do you need to bring in counsel?

Anytime guardianship/conservatorship is being considered, an attorney should be consulted. A Board committee comprised of an attorney(s) practicing in this area along with other multidisciplinary members is critical in examining all options, including the alternatives. Use of cross discipline members of a board committee can be very helpful in doing a values check, exploring alternatives and reviewing the legal implications. For example the pooled trust committee of the non-profit for which the author is employed is comprised of three attorneys, two professional fiduciaries, a non-profit director, a university professional, a licensed clinical social worker and a medical doctor. Two of

these members are also persons affected by disability. The committee's approach is multi-dimensional and they ask questions and consider several different factors than the staff would contemplate on their own.

g. Could you be criticized for taking this action for some and not for all?

This is certainly a concern that needs to be considered. It is the fiduciary duty of the trustee to have a pulse on the needs of the trust beneficiary. Being a pooled trust trustee and managing funds for hundreds or even thousands of beneficiaries does not excuse the trustee from its fiduciary duty. In 2012, In the Matter of the Accounting by JP MORGAN CHASE BANK, N.A., and H.J.P., as Co–Trustees of the Mark C.H. Discretionary Trust of 1995, v. Marie H., Grantor. Dec. 31, 2012.[19], the judge

V. Summary

Deciding when or if the trustee should be involved in protective proceedings is not an easy decision or one that can be made lightly. As a trustee, so often the decisions made are ones when liabilities must be weighed. It really comes down to the trustee asking "What happens if I do this? And what happens if I don't do this?" Finally, the best interest of the person with a disability, the beneficiary, must be the trustee's first and foremost concern. If the trustee is not able to make that determination due to lack of information or relationship with the beneficiary, it is advisable to involve other people in the person's life and potentially the court through the least restrictive means.

[19] In the Matter of the Accounting by JP MORGAN CHASE BANK, N.A., and H.J.P., as Co–Trustees of the Mark C.H. Discretionary Trust of 1995, v. Marie H., Grantor. Dec. 31, 2012. Available at

The Power of the Petition: A Trustee's Role in Protective Proceedings

Megan Brand, Executive Director
CFPD-Colorado Fund for People with Disabilities

Today's Outline

- Guardianship and Alternatives
- When a trustee recognizes a guardian/conservator needs to be appointed
- Issues faced by Trustee/Considerations
- What would you do?
- Summary

Poll the Audience

I am:

1. A law student
2. An Executive Director or Staff member of a pooled trust
3. A Board Member of a Pooled Trust
4. An Attorney practicing in SNTs/Guardianship/Conservatorships
5. I'm not really sure why I'm here but St. Pete Beach sure is a great destination for a conference.

Consider Jacob

- Jacob is a paraplegic due to a jump off a roof onto a snowbank when he was in his early 20s.
- He was later burned in a fire and set up a d4A trust with the PI Settlement proceeds.
- Trustee bought a house for him and deeded it to him outright to avoid Medicaid Estate Recovery.
- He was stable for quite some time, in college, had a roommate, received HCBS Waiver in his home.
- Then came the red flags—missed appointments, requests for $700 from Costco, $400 energy bills (quadruple what they had been)

Jacob, continued

- Trustee case manager called Jacob's mother (who was also Rep Payee) and leaned Jacob had five homeless individuals living with him.
- These "roommates" had stolen from him and used a space heater to heat their garage living quarters.
- Trustee consults with board committee and then counsel and petitions for a conservator of the home.
- Conservator appointed. LARGE marijuana grow operation and meth lab in home. One person found dad
- Conservator evicts "roommates"

Jacob, cont.

- Jacob's conservator eventually petitions for a neuropsychological exam and a guardian.
- Jacob's home is then sold and proceeds returned to the trust.
- Jacob is now living an a Skilled Nursing Facility.
- He still faces criminal charges.
- His mother was in/out of being supportive during the process and labeled by all (even the judge) as an enabler.
- Trustee was named Rep Payee by the judge.
- **Not to be overly dramatic, but without the action of the trustee, Jacob would likely be dead.**

How does that make you feel?

1. Been there, done that. Movin' on.
2. That's never happened to me, but now I have Megan to thank for this happening to one of our trust beneficiaries as soon as I get back to the office.
3. Something similar happened but we would have never taken that course of action.
4. I think I'd rather be on the beach.

Guardianship and Alternatives

- UGPPA 1997/1998
  - Uniform Guardianship & Protective Proceedings Act
  - Has been adopted in full by 5 states, D.C. and Virgin Islands
  - Many states have substantially similar laws
- UGPPJA 2012
  - Uniform Adult Guardianship &Protective Proceedings Jurisdiction Act
  - Guardianship across state lines
  - Approved in 32 states
- Your state statutes

UGPPA is...

1. United Guardianship Protect People Act
2. Understanding Guardianship Properly for People Affected
3. Uniform Guardianship and Protective Proceedings Act
4. Umpa-lumpa Gangsta Ping Pong Act

Guardianship and Alternatives

- Guardianship of the Person
- Guardianship of the Estate/Conservator
- Guardian Ad Litem
- Durable Power of Attorney
- Advance directive for health care (HCD)
- Family/Significant Other/Friend acting in best interest
- Representative Payee
- Trust
- Limited Guardianship
- Limited Conservatorship
- Single Action Conservator

A few good things to know about Guardianships/Conservatorships

- States determine capacity and need for guardianship/conservatorship differently.
  - Several states allow for jury trial for guardianship proceedings
  - In Kentucky, it's MANDATORY
  - In Florida, a committee of three, typically a Social Worker, Psychologist and Psychiatrist determine incapacity.
  - A finding of Incapacity and submission of Medical Evidence is not required for Conservatorships
    - 2015 COA 103, No. 13CA1710, *In the Interest of Neher v. Neher*.

Quick Quiz

Which of these is NOT correct?

1. A trust is an alternative to guardianship.
2. Megan's friend Kerry says Conservator just like the rest of us.
3. Guardianship of the Estate/Conservatorship is not always a finding of incapacity.
4. In Kentucky, every finding of incapacity/guardianship appointment is done by a jury trial.

When a Trustee Recognizes a Guardian/Conservator Needs to be Appointed

- Guardianship of the Person
  - According to UGPPA, "an individual or a person interested in the individual's welfare may petition." (Check your state regs)
  - Petition must present evidence of incapacity
  - Is Health or Safety of the individual at risk due to their action or inaction related to health/safety?
    - This is not a requirement of all guardianship petitions but it is a good measure for trustees considering petitioning

When a Trustee Recognizes a Guardian/Conservator Needs to be Appointed, Cont.

- Guardianship of the Estate/Conservatorship
  - UGPPA states "by clear or convincing evidence, the individual is unable to manage property or business affairs because of an inability to receive and evaluate information or make decisions, even with the use of appropriate technical assistance..." and "...has property that will be wasted or dissipated unless management is provided..."
  - Finding of Incapacity is NOT required with Conservatorships. *In the Interest of Neher v. Neher (2015 COA 103. No. 13CA1710)* Appellate court decision in Colorado court ruled Medical Evidence of Incapacity is not required.

Considerations of the Trustee

- Cost and ability of the trust to pay
  - Pooled Trusts most often have limited funds
  - Court Appointed Attorneys and Guardians Ad Litem may or may not be "state paid"
  - Cost Compensation Statute or other regulations re: cost (and approval of costs) in your state?
  - Who will serve as guardian?
    - Family member
    - Volunteer/friend
    - Public Guardian
    - Professional (paid) Guardian
    - Adult Protective Services
  - Consider creating a network counsel and professionals to serve your beneficiaries at a reduced fee

Considerations of the Trustee

- Finding a family member or professional to serve
  - UGPPA gives priority to family members serving as guardian.
  - Pooled Trust Trustees interact with and pay a number of professional guardians which creates a natural network
  - National Guardianship Association and their state affiliates

Considerations of the Trustee

- Does your state have a public administrator and/or public guardianship program?

1. Yes
2. No
3. We're working on it....
4. I have no clue.

Considerations of the Trustee

- Does the trustee petition or could it be someone else?
  - Trustee is "ghost petitioner"--Trust Admin or Case Manager drafts the petition for family or APS or another entity to file as the Petitioner
  - Involve Adult Protective Services
    - If warranted, an APS report should be made. In many states, trustees are mandated reporters.
    - This option could reduce cost to the Pooled Trust Beneficiary.
  - Petition the court for instruction and request a Guardian Ad Litem.
    - This is probably the best tool for the trustee to consider as it limits the opposition/contested case.
    - If there is no court action open, request a GAL in the jurisdiction of the trustee.
    - The GAL can then investigate, get medical records and petition for guardian or conservator if warranted.
    - Reduces the liability of trustee in very contentious circ.

Considerations of the Trustee

- Does this action put you in an adversarial position with your beneficiary?
  - Anytime there is a potential for a contested proceeding, you risk being in an adversarial
  - Alternatives to Guardianship and Alternatives to who petitions should be considered by the trustee.
  - Guardianships/Conservatorships can be limited in scope and can be reversed through the court process

Considerations of the Trustee

- When do you need to bring in counsel?
  - It is important to have counsel (specifically trained in Elder Law) on your staff or board committee.
  - As soon as you decide to enter protective proceedings it is advisable to bring in counsel.
  - Having an attorney "of counsel" to the organization is very helpful for bringing in counsel on an emergency basis.
  - Consider developing professional network of attorneys willing to bill at a reduced rate for your beneficiaries. Be prepared to have several counsel on hand for potential conflicts.

Considerations of the Trustee

- Could you be criticized for taking this action for some and not for all?
  - This is certainly a concern that needs to be considered.
  - Being a pooled trust trustee for hundreds or even thousands does not excuse the trustee from it's fiduciary duty.
  - Incorporate trust reviews to assess current and ongoing needs of beneficiaries.
  - Remember JP Morgan Chase Bank, N.A. and H.J.P as Co-Trustees of the Mark C.H. Discretionary Trust
    - Judge criticized trustees for not assessing the needs of Mark, an SNT Beneficiary and using the trust to enhance his quality of life.

What happens if you do nothing?


Special Needs Answers

Questions & Answers

Special Needs Trustee Must Repay Trust for Failing to Seek Public Benefits

In a recent New York case, an institutional trustee has been ordered to pay back a special

In Evanow v. El Jewish Education/Research (NY Sup Ct Kings Cty No 28863/1996 June

as the result of a personal injury

http://specialneedsanswers.com/special-needs-trustee-must-repay-trust-for-failing-to-seek-public-benefits-1398

Olivia

- Olivia has an Intellectual/Developmental Disability
- Her mom was appointed as her guardian and set up the her pooled trust with a back-payment in Social Security.
- Olivia's residential provider makes a request that could be considered third party benefit. Olivia's trust case manager notes she has a guardian.
- When you ask the residential provider how the guardian feels about the request you learn that Olivia's mom is now in a nursing home and is not acting as her guardian anymore.
- The residential provider is working from a "letter" in which Olivia is acting for herself (not a court letter)

Olivia---What would you do?

1. Call the residential provider and educate them about the guardianship proceedings.
2. Accept the residential provider's letter and ask Olivia how she feels about the request.
3. Call Adult Protective Services.
4. Petition the court for a GAL (in the court where the letters were issued) to look into the issue of adjudication of incapacity and successor guardian.
5. Use one of my lifelines: Phone a friend/Ask the Audience

Sebastian

- Sebastian is 9 years old.
- He was injured at birth and his trust was set up following a Personal Injury Settlement.
- He uses a motorized wheelchair which does not easily transfer into/out of his parent's current vehicle.
- His parents have requested a $60,000 wheelchair accessible vehicle and the trustee has decided to approve it.
- His parents are very responsible and have always taken good care of Sebastian and been respectful of your role as trustee.

Sebastian---What would you do?

- Purchase the van for him and take lots of pictures to share this joyous occasion with your board and staff.
- Tell the parents that you will approve the van with the contingency of them petitioning for a limited conservatorship for the van.
- Petition the court for a conservator for Sebastian including the van and his SSI benefits.
- Purchase the van but hold title to it within the pooled trust.

Sherri

- A 3rd Party pooled trust was established for Sherri via court order after the initial trustee of the testamentary trust determined it to be uneconomical to retain. (Sherri had also become very difficult to work with).
- The trust had about $90,000 in it and the previous trustee sent her $3,000/month --no questions asked.
- Upon becoming trustee you learn she has Medicaid Expansion through the Affordable Care Act (which has an income limit). You also learn she does not have any monthly income. She is 56 years old and upon information and belief, has a major mental illness.
- Sherri immediately starts letter writing, accuses you of theft (grand larceny to be exact), writes letters to your Board President and makes calls to your Property Manager. She also calls the police about your Grand Larceny.
- Despite several attempts in writing and via phone for a meeting to discuss the trust, her benefits, etc., Sherri refuses to meet with you or cooperate in any way.

SHERRI—WHAT WOULD YOU DO?

1. Call Adult Protective Services and report her unwillingness to meet with you and erratic behavior.
2. Consult with your board and counsel and petition for a Special Conservator for the Purpose of exploring SSI/SSDI eligibility and determining assets and income.
3. Petition for a Guardian for Sherri.
1. Resign as her trustee—life's too short.

LUKE

- Luke was adjudicated incapacitated and the local Adult Protective Services (APS) unit was serving as his guardian at the time his pooled trust was established.
- His trust was set up with ~$8000 and after several years was just under $2,000.
- Luke had a significant brain injury with severe behaviors.
- Luke had assaulted hospital and residential staff and was in and out of the hospital.
- You learn, almost in passing, that APS has resigned as guardian but still have an active case for him through APS. A successor guardian was never appointed.

LUKE---- WHAT WOULD YOU DO?

1. Call the Adult Protective Services Supervisor and demand that they continue to serve as Luke's guardian. After all, that is their duty.
2. Ask for a GAL to be appointed in the court of jurisdiction to evaluate the situation and determine if Luke needs a guardian.
3. Start a new petition for guardian.
1. APS isn't doing their job but this is NMP—Not My Problem.

Annabelle

- Annabelle joins the trust when she liquidates her 401k to be eligible for SSI.
- She has a diagnosed mental illness, receives services from the mental health agency and has a housing voucher.
- She becomes increasingly difficult to work with and begins displaying delusions in which she changes her name, changes the name of her trust case manager and sends your staff an org chart that has been rewritten.
- Her case manager learns that Annabelle has not complied with her recertification for her housing voucher, risks homelessness and is no longer receiving mental health services.
- Annabelle begins writing emails to top ranking government officials, including the lieutenant governor, local better business bureau and the state Medicaid office.

Annabelle—What would you do?

1. Consult with your board and counsel and petition for an Emergency Guardian and Conservator.
2. Call the Police and report the false accusations your beneficiary is making against you.
3. Consult with your board and counsel and petition for a Guardian Ad Litem in the Probate Court of your trust's jurisdiction (not the residence of the beneficiary).
4. I don't know. Isn't it time for a cocktail yet?

In Summary

- Guardianship/Conservatorship proceedings cannot be considered lightly.
- Utilize a multidisciplinary approach to decision making.
- ALWAYS consider the alternatives.

- If all else fails, weigh your options:
  - What happens if I _____?
  - What happens if I don't _____?

FIND ME HERE

Megan Brand
Executive Director

cfpd

CFPD - Colorado Fund for People with Disabilities

PRE-CONFERENCE:

Pooled Trust Intensive

Wednesday, October 14, 2015
Breakout Session 1

1:55 P.M. – 2:45 P.M.

Software Accounting Systems and PSNTs

Presenter:
Barb Helm
Executive Director, ARCare, Inc
Overland Park, KS

Steven E. Hitchcock
Attorney at Law, Special Needs Lawyers PA
Clearwater, FL

Kerry Tedford-Coles
Exeutive Director, PLAN of CT
Hartford, CT

- Materials
- PowerPoint

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

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

Selecting Pooled Trust Software

Making the right decision for the organization

Barb Helm, Steve Hitchcock, Kerry Tedford-Coles

10/14/2015

Introduction

Choosing the right accounting software is an immense undertaking for any business. The internet provides many tools to assist in the process of finding new software, but because the Pooled Trust is such a small niche in the trust community it can be quite an arduous experience. The search process for pooled trust providers is a greater undertaking in the sense that the software must provide features that other organizations or trust companies may not need, at a cost that is affordable for a non-profit entity.

For many it begins, choosing the one you can afford, but as the trust/organization grows, coupled with the ever-changing technology landscape, a careful analytical process must be put in place to make the right decision.

Beginning the Search Process

A small non-profit typically does not have an IT Department that can help with such decisions, and the decision makers in the pooled trust organization may not consider themselves tech savvy. Software is expensive, so having a checklist of questions to ask before there is a demonstration will be helpful in the search for the appropriate product. This is true for the first time purchase or a change to a new program. Business News Daily suggests some of the following[1]:

1. ***Is your software a good fit for this industry?*** As Special Needs Pooled Trusts are a small piece of the trust industry, and many are administered differently, there is no exact fit. Asking the vendor this question directly should be the first step. The more the software

[1] www.businessnewsdaily.com/7542-choosing-accounting-software.html

developer understands the needs of the organization, the better they can honestly answer this question.

2. ***Can you customize it to fit our needs?*** This may be especially important for a pooled trust organization. Being able to create the right reports will be essential in choosing the right software. Reports will be needed for tax reporting, accountings, and trust reviews.
3. ***How many employees can your software accommodate?*** There may be nothing worse than not having enough "seats" and having to ask employees to log out of the system so others may access the data. Multiple user access will be important as the organization grows. This is also a good time to question if they charge per seat or a flat fee for all.
4. ***How many clients can your software accommodate?*** If this is a long term software solution it is essential to know if the system can handle an ever growing account load. Does it have a way to place the clients in an inactive status when the pooled funds are depleted or the beneficiary dies? How does the organization presently handle this?
5. ***How is the data backed up? How quickly can we access information after an event?*** The back-up process may be different with a new software company. They could be managing the data for you in a cloud or it is maintained on the organization's server. An organization's disaster recovery plan should also maintain this information.
6. ***What security measures are in place to keep the data secure?*** If the software company is maintaining the data there must be strong security measures in place. The system may hold birthdates, social security numbers and other sensitive information.
7. ***What type of tech support do you provide?*** This is especially important because of the high needs of the population served. For example, it could be a real disaster if the system is suddenly unable to process checks.

8. ***What is the total cost?*** If the organization's budget is very specific number for software it becomes a waste of time for both the vendor and the organization to speak with a sales representative regarding a product that is much more expensive. Add on costs should also be questioned regarding customization, features, storage fees, and annual fees. Ask how the fees are calculated. The annual fee is typically a percentage of the purchase price (common practice is 12-18%) and includes updates. Many software companies will negotiate the purchase price because of the years of annual maintenance fees they will be receiving. Remember, the annual maintenance fee is most likely going to be based on the current listing price, not on the negotiated purchase price.

Reviewing the Product

After the initial questions are answered the next step would be to ask for a product demonstration. The salesperson will typically have a presentation ready. This can easily be done via a web meeting or in person. Prior to the presentation the software company representative will typically get some background information about the organization, what will be needed and how the present product is being used. This will help them personalize the presentation and also know which add-ons/upgrades you may need. The demonstration is the time to evaluate the details and how it relates to the business practices of the organization.

1. ***Can it provide the accounting tasks needed for the organization?*** The software may need to calculate market changes, provide reports for courts etc. Not every software can perform these duties, so know what the organization will absolutely need to ask the right questions.

2. ***Is it user friendly?*** This software system has to be easy for everyone, but especially the trust administrators and financial staff. It should be simple to navigate-including easy access to account balances, beneficiary information, and check approval.
3. ***Are there strong controls in place?*** An organization managing large sums of money will need to have a software product that can provide solid controls. A restricted distribution process should be in place so that only certain users can approve checks. This can include an ability to allow access to be turned on for a secondary staff member when the main staff person is out. There should also be restricted access for running the checks. Many software programs will allow for automatic check signing at printing. This may be most wisely utilized with a limit on the individual checks. This should coordinate with a carefully considered policy. A second signature line may also be included for checks written over a certain amount and can include a notation of *all checks over _____ dollars requires 2 signatures*. This is a gentle reminder to the vendor and the bank.
4. ***What kind of reports can it produce?*** Having strong reporting is essential for good controls, proper reporting and accounting. The software should be able to print reports for check runs that provide information on the staff entering and approving. This will provide data for auditors reviewing client files. An organization will also rely on solid reports to provide important information to the beneficiaries, entitlement agencies and tax preparers. If the organization uses an outside tax preparer they should be asked as to how they would most like the tax information presented to them. This may not only include the type of distributions made and earnings/losses, but possibly new beneficiaries and accounts that have closed over the past year. Tax time is stressful, so the easier it is to create a mass report the better for everyone involved.

Another report consideration is reporting to the beneficiary and entitlement agencies. What does your local SSA, Social Services, HUD etc. office require? Being able to provide an accurate yet minimal report to each agency can help move applicant approval processes along.

Accountings to courts and designated agents can also be made simpler with good reports. Some software companies will be able to create a report to mimic and import what the local courts require, but minimally an organization will want a product that can run a report that differentiates between distribution type and vendor. This can be especially helpful in reporting to the state after the death of a beneficiary.

Overall, good reporting should be a major deciding factor in choosing the software product. A software company may be able to build these reports for you or have additional modules that can provide it. This is another time to ask honest questions about cost as additional modules or report building time can quickly add up.

5. ***What will the statements look like?*** Providing statements to the beneficiary or their designated agent is required. Again, the software company may be able to make adjustments, but this is the time to view what a statement will look like. Many clients can misinterpret information, so it is necessary that it is importing the right information. The process should be simple to print. This is also a good time to discuss the availability of online account access so beneficiaries can view their account online.
6. ***What type of data does it maintain?*** It should be questioned if this is a financial/accounting software only or if it can also provide some basic database services. Can client information such as disability, funding date, etc. be stored here? Can it maintain addresses and run letters? Does it store important documents like the joinder

agreement and other legal documentation? Running multiple systems can be a cause for mistakes, so if the software can also provide good client data it may be what is best for the organization.

7. ***Can it store extensive notes?*** This is an area that is essential in maintaining the best records. Keeping good notes where other staff can find them helps better support the beneficiaries. It is also helpful in the unfortunate event of litigation. Keeping notes on conversations can provide information that has been forgotten or distorted by time. Many software products will provide an area for notes, but beware of small spaces that are built for one time entries regarding a specific item.
8. ***Does it provide alarms?*** An alarm system is another added bonus so to avoid running multiple software programs. Although not necessary, having a place that stores important dates can be very helpful. This can be either in report form or an actual alarm setting. Consider dates for annual trust reviews, accounting to courts and other important dates. Having those all in one place can be extremely helpful.
9. ***What happens when an account closes?*** Working with an older population and smaller sums can provide a high turn-over rate of accounts. Is there simply a box to check to remove the beneficiary from regular reporting, but allows it to be easy to find if questioned? This may be more important in states that allow income trusts as the volume of accounts opening and closing can become daunting.
10. ***How often are updates done?*** This will provide an estimate of how active the company is in improving their product, but also how often to expect downtime. They should be asked what kind of notice they provide for updates. A company that does not provide

notice may cause confusion in the office if key elements are suddenly not working properly.

11. ***How quickly does the company fix issues?*** As a Pooled Trust organization is working with people who are relying on the funds to be distributed, the turnaround time must be discussed. Some companies may fix these issues on a schedule while others are fixed on an as needed basis. This may be the best reason to ask for references so other users can be contacted about what occurred when the software was not working properly.
12. ***How long will installation take and what issues may come up?*** There are fewer undertakings in an organization more intimidating than initiating a new software. The implementation process can be full of hurdles, especially when translating so much information. It should be considered suspicious if a company states that a transition should be simple. Issues of translation should come up and be expected. The pooled trust organization needs to be concerned with how the software company is going to handle it based on past experience.
13. ***What type of training does the software company offer when transitioning to their product?*** Transitioning to a new software program can be an overwhelming process, especially for an established pooled trust program. Proper training will make the transition easier. Ask the company if they provide hands on assistance and training to staff on use of the new product. Will they only train one pooled trust staff member with the expectation that that person will in turn train the entire staff? This is also a time to discuss how many training hours are included with the purchase price. A contract should state specifically when additional hours will be billed and at what rate.

14. ***Does the software company offer help with the importing of data***? If the data import is included the cost of the software this can save the organization from a large IT cost. This will be one of the greater hurdles in the process as the data being imported could be years of highly important information. This can also have an effect on the way the next statement appears which can quickly become an anxiety driver for the beneficiaries.

15. ***What happens in 5 years?*** Will the organization outgrow this software? Is this a company that is also growing? Knowing the trajectory of the software company is essential in the stability of the pooled trust. If the future looks grim for the software provider the software can become obsolete, but there should also be concern if they are quickly growing as the personalized assistance may also go away. The benefit to a growing software company is that the pooled trust organization can grow with them and benefit from new modules, updates etc. which may mean the organization will not have to purchase new software for some time.

16. ***May I speak to others using the product?*** In the ideal world another pooled trust organization will be using the software. This will allow for an honest conversation about what is working and what is not working. As many organizations are run differently, just because the software works well for one group does not make it a perfect fit for another, this is also true the other way around. One should not eliminate software based solely on the appropriateness for another organization.

Software available to Pooled Trusts Today

The following is for informational purposes only and not to be seen as an endorsement of any of the products.

A recent survey was conducted of the Pooled Trust organizations that are members of the Pooled Trust Google Group regarding the software they presently use. Many organizations have developed their own software to use within their organizations. Some have reported that the self-development has included using Access and Sequel programs. The following software programs and their features have been reported by various Pooled Trust staff using the systems.

Abacus

Abacus is a law practice software package that incorporates not only client database management but also trust accounting. The trust accounting is primarily an attorney trust account program, which works well for a pooled trust with one operating account and multiple beneficiaries. Checks are written from one account and allocated to a beneficiaries sub account. No over-drafting or comingling (drawing funds from one sub-account to cover another) is allowed by the system. There is the opportunity to open multiple operating accounts within the system for investments or for multiple trusts (pooled or standalone) the system allocates interest earned across all beneficiaries linked to an account using monthly average daily balance as the allocation factor. A pooled trust organization reported that they have used Abacus for about 7 years and it has been more than adequate to meet their needs, with in-house check writing. There is no ability to interface with banks for either downloading statements directly to the system or for check writing.

Accufund

Accufund is a software company that provides accounting products to non-profit and government agencies. They have adapted their accounting system to support individual accounts for trusts or representative payee clients. It offers a specific representative payee software that can easily be translated for use in the Pooled Trust.

The product offers customization, strong controls/segregation of duty and database entry for client information. Customization includes user defined categories and fields to track residency, personal information and more. Reports can also be tailored for summaries needed. It provides automatic generation and posting of fees to each individual account. Accounts payable provides payment by check or EFT. It also allows for entry of repeating bills so recurring bills, like rent, can be processed automatically without monthly entry. Documents can also be scanned into the system for easy review.

Addvantage- Sungard

The Addvantage software provided by Sungard was reported to allow for unitization of the pooled funds, including fees being charged on the subaccount level. It provides a multi-level approval process, allowing for segregation of entry and approval. Distributions from sub accounts can be transacted by ACH, Wire, or checks. Checks can be printed in-house along with the ability to enter recurring and/or future payments.

Various levels of reporting is available; either at the sub account level or master pool account level. Statements for each sub account can be generated for any time period, either by mail or via web interface.

AIM-Advocacy Information Management- BFA Software

AIM is a software originally intended for guardians, conservators and representative payees that provides customization for both personal and financial data. The software offers account segregation within a master checking account, automated check processing that includes printing checks and the envelope, an ability to track non-cash assets, and create and manage client budgets.

The system provides various reporting capabilities. This includes taxes, compliance, beneficiary visit schedules and automated court forms. The software was built on IBM Lotus Notes platform to offer levels of security

ARC of Indiana Pooled Trust Software- SIM2K

ARC of Indiana created their own software to manage their Pooled Trust. The product offers the advantage of being created specifically for use by a Pooled Trust.

The software provides the ability to post market changes and fees to each individual account. The check approval process delivers the capability to view past bills that have been paid for the individual to verify proper payment and a real time account balance. It also provides a clear warning if the balance will go negative if the disbursement is made. Warnings can also be posted to individual accounts so they will appear when the individual account is logged into. This is helpful for mandates about spending, individuals that are not allowed to have information about the account and other restrictions. The system also provides residency information, addresses/information for agencies and people associated with the beneficiary and additional

fields to be defined as needed. This software can be used with QuickBooks. The software allows controls to be put into place so authority is provided at different levels.

Charlotte –Sungard

Charlotte is a bank trust accounting system which offers many features that a bank would utilize. They include portfolio management, securities processing, performance reporting, regulatory compliance and pricing of securities. It also provides flexible reporting by setting up specific reporting groups. The system is fully integrated for proper tax reporting and recurring bills can be set up to be paid on a specific date. Software support is available during normal business hours.

EMS- Estate Management Systems- SEM Applications

EMS is a software program that is designed for fiduciary and guardian services. For the case management focused organization this software provides an intake checklist to ensure all documentation has been submitted. This system application also allows for tracking of tasks completed by staff. Beneficiary data is stored in tabs and note sections are also available to document correspondence. Reports can be run to target subgroups; including running a report on those over 65 and those on SSI. Automatic payments can be scheduled in the system along with warnings for spending. There is customization available for this software to accommodate the needs of the organization and can be used with QuickBooks. User rights are set within the system for controls including check approval and check printing. EMS is preferably a web based program with security measures in place and expandable framework for unlimited growth.

Trust Desk- FIS Global

Trust Desk is reported as a possible solution for Pooled Trust use. The software is a fiduciary, trust, investment and custody wealth management platform. Their website states that it provides client communication tools, efficient processing, fully integrated portfolio management and performance measurement tools.[2]

TrustNet- HWA International Inc.

HWA has been in the Trust Accounting business since 1977, but in the last 5 years have focused on providing an accounting system that many Pooled Trusts are utilizing. HWA offers two products currently being used by Pooled Trusts: TrustNet, a full trust accounting system and TAMS, a modified system which is useful for Pooled Trust organizations with under $10 MM in assets. Both programs offer specialized accounting for Pooled Cash Funds, Pooled Invested Funds that include cash, and Pooled Mutual Funds. The system has the capability of displaying what each beneficiary owns within the pool. The system also allows accounts with individual securities, both traditional (like stocks and bonds), and non-traditional (like real estate). The Pooled Fund Allocation module allocates income earned by the pool and assesses fees to each beneficiary.

The software also provides an imaging folder so you can see scanned documents for each beneficiary's account without leaving the system. Client Notes, a useful feature contains the time, date and author's initials. There is no limit to the number of notes that can be retained, reviewed and printed. Contact information is easily visible for everyone tied to the account. The check writing feature includes the ability to write single checks and/or generate recurring payments. Reports can be customized to meet the needs of the Pooled Trust organization

[2] www.fisglobal.com/Canada/products-wealthmanagment-trustdesk

including tax reporting features for getting information to the tax preparer in the best required format. TrustNet Support reps are available by phone, email, instant message and online chat.

Moving Forward

Choosing the right software for an organization is critical. Because of the cost involved, purchasing a software without an exhaustive search process could lead to a pricey mistake for a non-profit business. Utilizing the suggested steps and personally reviewing the products that have been tested and used by other Pooled Trust organizations can better assist in this search process. Each organization works differently, but this information should allow for both new pooled trust entities or established programs searching for software help find the product best suited for their organization.

Selecting Pooled Trust Software

Making the right decision for the organization

Presented by
Barb Helm, LBSW, Executive Director, Arcare, Inc.
Steve Hitchcock, Co-Trustee, Guardian Pooled Trust
Kerry Tedford-Coles, Executive Director, PLAN of CT

Problem

Selecting the appropriate accounting software is no easy task!

Keys to Unlock the Right Solution

- Niche application
- Affordability
- Evolving technology

Starting the Search

Questions for Your Checklist

- ☑ Is the software a good fit for the organization?
- ☑ Can it be customized to fit specific needs?
- ☑ How many employees can it accommodate?
- ☑ How many clients can it accommodate?
- ☑ How is the data backed up? How quickly can it be retrieved?
- ☑ What measures are in place for data security?
- ☑ What type of tech support is provided?
- ☑ What is the total cost of ownership?

Reviewing the Product

Questions for Consideration

- ☑ Can it provide the accounting tasks needed?
- ☑ Is it user friendly?
- ☑ Are there strong controls in place?
- ☑ What kinds of reports can it produce?
- ☑ What will the statements look like?
- ☑ What type of data does it maintain?
- ☑ Can it store extensive notes?
- ☑ Does it provide alarms?
- ☑ What happens when an account closes?

Reviewing the Product

Questions Continued

- ☑ How often are updates done?
- ☑ How quickly does the provider address issues?
- ☑ How long will installation take? What issues may arise during this process?
- ☑ What type of training does the provider offer for the transition?
- ☑ Does the provider offer help with importing data?
- ☑ What happens in 5 years?
- ☑ Can you speak with others using the product?

Software Available Today

- Pooled Trust Administrators Google Group recently surveyed (https://groups.google.com/forum/#!forum/psnt)
- Findings indicate many are developing internal solutions using Microsoft Access and SQL Server
- Others reported on are as follows

Abacus Data Systems

Law practice software that incorporates client database management with trust accounting

Benefits:

- Works well for a pooled trust with one operating account and multiple beneficiaries
- No overdrafting or comingling allowed
- Allocates interest using monthly average daily balance

Drawbacks:

- Lacks ability to interface with banks for downloading statements directly to the system or writing checks

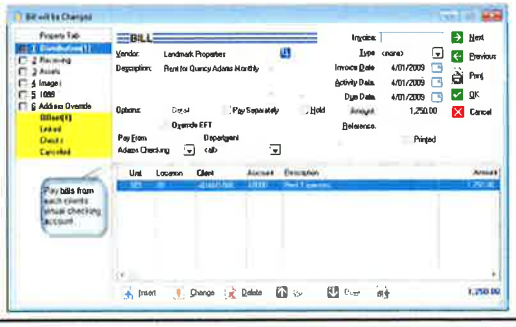
Accufund

Accounting products for non-profit and government agencies, adapted for trusts or representative payees

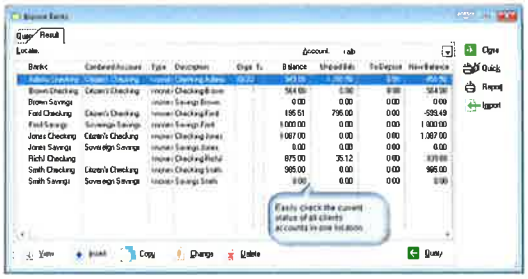
Benefits:

- Offers customization, strong controls/segregation of duty and database entry for client information
- Ability to tailor reports
- Accounts payable by check or EFT
- Automation of fee posting and recurring data entry

Bill Pay Screenshot



Account Status Screenshot



AddVantage by SunGard

SUNGARD

A real-time, browser-based solution for asset management and trust accounting

Benefits:

- Allows for unitization of the pooled funds, including fees, being charged on the subaccount level
- Distributions from sub accounts transacted by ACH, wire or checks
- Offers various levels of reporting
- Client statements can be generated for any time period via hard copy or online

AIM by BFA Software

Provides customization for both personal and financial data intended for guardians, conservators and representative payees

Benefits:

- Built on IBM Lotus Notes platform to offer varying levels of security
- Offers account segregation within a master checking account
- Reporting capabilities include taxes, compliance, beneficiary visit schedules and automated court forms
- Automated check processing and budget management available

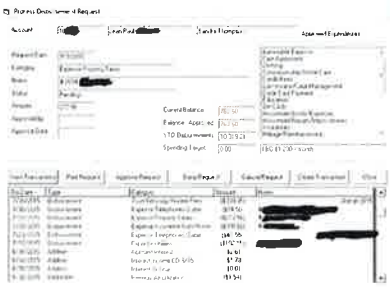
ARC of Indiana by SIM2K

Specifically created for use by a pooled trust and can be integrated with QuickBooks

Benefits:

- Posts market changes and fees to individual accounts
- Easy access to previously paid bills and current account balance
- Warnings that help enforce spending mandates
- Various user level controls to define access
- Detailed information tracking for individuals and agencies associated with a specific client

Disbursement Screenshot



Charlotte by SunGard

SUNGARD

For independent banks and trust companies that provides portfolio management, securities processing, performance reporting and regulatory compliance

Benefits:

- Provides flexible reporting by setting up specific reporting groups
- Fully integrated for proper tax reporting and auto-pay of recurring bills
- Support available during standard business hours

EMS by SEM Applications

A software program designed for fiduciary and guardian services

Benefits:

- Provides an intake checklist to ensure all documentation has been submitted
- Reporting available for subgroups including SSI and those 65+
- Payment automation and spending warnings available
- Various user level controls to define access
- Web based and can be integrated with QuickBooks

Trust Desk by FIS Global

A fiduciary, trust, investment and custody wealth management platform

Benefits:

- Provides client communication tools, efficient processing, fully integrated portfolio management and performance measurement tools

Drawbacks:

- Not much information available on the software to fully review

TrustNet by HWA International, Inc.

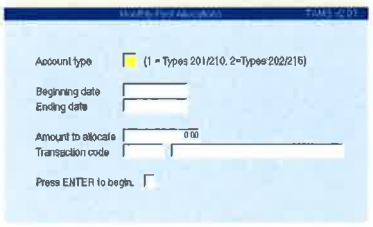
In trust accounting since 1977 with focus on pooled trusts solutions in last five years

Benefits:

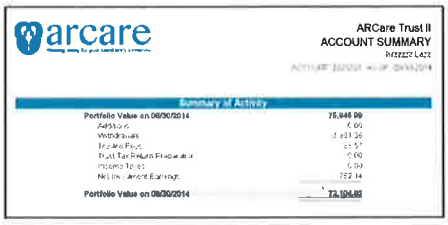
- Full version or TAMS, a modified system useful for Pooled Trust organizations with under $10MM in assets
- Specialized for Pooled Cash Funds, Pooled Invested Funds that include cash, and Pooled Mutual Funds
- Pooled Fund Allocation module allocates income earned by the pool and assesses fees to each beneficiary
- Stores scanned documents, client notes and contact details
- Offers customizable reports and extensive support

Menu Screenshot

Allocations Screenshot



Reporting Screenshot



In Summary

Choosing the right software for your organization is critical!

Using the information provided in this presentation coupled with an exhaustive search process is recommended for pooled trusts considering a software purchase.

Questions?

PRE-CONFERENCE:
Pooled Trust Intensive

Wednesday, October 14, 2015
Breakout Session 3

3:00 P.M. – 3:50 P.M.

The Risks, Decisions and Processes for PSNTs: How PSNT Administrators Need to Educate Their Directors

Presenter:
Ron M. Landsman
Attorney at Law, Ron M. Landsman, PA
Rockville, MD

- Materials

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

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

RON M. LANDSMAN, P.A.
COUNSELOR AND ATTORNEY-AT-LAW
200-A MONROE STREET, SUITE 110
ROCKVILLE, MARYLAND 20850-4421
240-403-4300 • (FAX) 240-403-4301
rml@ronmlandsman.com

RON M. LANDSMAN*
FELLOW, NATIONAL ACADEMY OF ELDER LAW ATTORNEYS
ERIN ADELE MAHONY†
MAY-LIS MANLEY*
COUNSEL

FREDERICK COUNTY OFFICE
115 W. PATRICK STREET
FREDERICK, MARYLAND 21701-5513
TEL. 240-285-9299

* ALSO ADMITTED TO THE DISTRICT OF COLUMBIA BAR
† ALSO ADMITTED TO THE LOUISIANA STATE BAR

OK, I'M A POOLED TRUST DIRECTOR, NOW WHAT DO I DO?

Things to Discuss and Think About

Ron Landsman and friends

I. GENERAL PRINCIPAL - WE ARE "GOOD GUYS" AND BAD PUBLICITY CAN BE FATAL.

Compare Acorn (Association of Community Organizations for Reform Now), Planned Parenthood, British Petroleum, and Volkswagen

Areas of Concern.

A. **Internal Complaint Systems and Keeping Beneficiaries Happy - and beneficiary issues**
   1. Responsiveness
   2. Fees
   3. Distributions

B. **The press** - like local "consumer advocate" TV segments

C. **The local court**

D. **Listservs and the Internet**

II. THE BROADER MANDATE

A. **Do Board Members Get It?** The culture of SNTs – appropriate fund-raising activities

B. **Scope of services – What Duty if Any to Attend to Beneficiary's Needs** – See Item I above

PRE-CONFERENCE:

Pooled Trust Intensive

Wednesday, October 14, 2015
Breakout Session 3

3:00 P.M. – 3:50 P.M.

The ABLE Act: From Federal Regulations to your State Legislature

Presenter:
John Ariale
Attorney at Law
Senior Government Relations Consultant
Becker & Poliakoff
Washington DC

- Materials
- PowerPoint

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

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

BECKER & POLIAKOFF

Legal and Business Strategists

The ABLE Act: From Federal Regulations to your State Legislature

John M. Ariale
Attorney and Senior Government Relations Consultant
Becker & Poliakoff
1275 K Street, NW
Suite 850
Washington, D.C. 20005
jariale@bplegal.com
202-236-4835

Table of Contents

Legislative History

Last year, during my presentation at this conference, we discussed the future of The ABLE Act since the regular session of the 113th Congress had ended without any action on the legislation. During that presentation, I explained the plausibility of a "lame duck session" strategy that had been prepared for the ABLE Act and examined why a coalition of supporters believed it was a viable alternative for passage of the Stephen Beck Jr. Achieving a Better Life Experience (ABLE) Act.

As you know, our lame duck strategy worked and the Stephen Beck Jr. Achieving a Better Life Experience (ABLE) Act was signed into law on December 19, 2014. As a principal drafter of this legislation on behalf of Congressman Ander Crenshaw, reaching this milestone was of course something that we had hoped for, but at times doubted. The realities of political battles, year-end must pass legislation, and demands for floor time were always a threat to our cause. However, together with advocates from Autism Speaks, the National Down Syndrome Society, families, and self-advocates for the legislation, we amassed an amazing coalition that fought hard to maintain the right amount of pressure on the House and Senate to take up the legislation in the waning days of 2014.

It is rare that major legislative initiatives are passed as stand alone bills in Washington these days. It is even less likely that historic pieces of legislation become law. The passage of the ABLE Act marks the first major piece of legislation impacting the disability community since the passage of the Americans with Disabilities Act in 1990.

The History of the ABLE Act

In 2007, Representative Ander Crenshaw (R-Fla.) sponsored the original proposal for a tax-free savings vehicle for individuals with disabilities and was the leading force behind the bill. That proposal was called the Financial Security Accounts for Individuals with Disabilities Act of 2007,

(HR 2370) and was introduced on May 17, 2007. This draft was introduced primarily to gather support, insights, and comments from the larger community.

These inputs were incorporated into future drafts of the legislation and the name of the bill was changed to the "Achieving a Better Life Experience" or the ABLE Act in the 111th Congress. The second version was of the bill, HR 1205, was introduced on February 26, 2009. This version of the legislation garnered the bi-partisan support of 203 Members of Congress. Without any action, HR 1205 died at the end of the 111th Congress.

In the 112th Congress, the ABLE Act of 2011, HR 3423, was introduced on November 15, 2011 and ultimately gained the support of 235 Members of Congress. Despite stronger support than its previous draft, HR 3423 did not gain enough support to be considered in Committee or on the Floor of the House.

On February 13, 2013, the final draft of the ABLE Act was re-introduced in the 113th Congress - The ABLE Act of 2014, HR 647. This version of the legislation included a few minor changes from the previous draft; however, thanks to broad support in the disability community, and the momentum from previous drafts, the original sponsors of the legislation were able to quickly gather broad bi-partisan support for the proposal after the bill was reintroduced.

Each version of the bill included the simultaneous introduction of a Senate counterpart measure, adding to the significant broad support for the legislation. HR 647 ultimately garnered 380 co-sponsors in the House, and its Senate counterpart, S 313 secured 78 U.S. Senate co-sponsors. The bill passed the House on December 3, 2014 by a vote of 404-17 and the Senate on December 16, 2014 by a vote of 76-16. On December 19, 2014, President Obama signed the legislation and the ABLE Act, nearly eight years after first being introduced in the House, became Public Law 113-295.

In order to secure support, several compromises were incorporated into the final draft the ABLE Act and certainly impacted the ABLE account's effectiveness for some individuals.

The intent of the drafters who wrote the ABLE Act was to assist families with young children with a developmental disability diagnosis. The idea was that ABLE accounts would be easy to open, have low operating costs, provide for tax-free investing, and allow for savings to accumulate while the family gets a better handle on what future expenses lay ahead. More importantly, the ABLE Act was designed to provide families with limited resources an affordable way to protect whatever assets are available for the child's benefit.

The ABLE Act at a Glance

The ABLE Act is not a silver bullet for families with disabled children, nor will it come close to assisting those families in saving for all the costs associated with raising a child with special needs. However, the ABLE Act does give families another weapon for battling the challenges they face. Many people have compared this new tool special needs trusts and that comparison can be misleading - special needs trusts are estate-planning tools, while ABLE accounts are savings vehicles. There has been a lot of excitement in the disability community regarding the passing of the ABLE Act. One of the most important impacts of the eight year struggle to pass ABLE, is the fact that advocates around the country have raised awareness about the need for families to save for their loved one with a disability.

As ABLE plans are implemented around the country, it is important for potential beneficiaries to be aware of the many positives associated with the opening of an ABLE Account as well as the limitations associated with this new savings tool:

- Only individuals whose disability was established before age 26 can set up ABLE Act accounts.

- Only individuals living in a state that has authorized ABLE Act accounts can participate. If a given state declines to authorize ABLE Act accounts at all, its residents cannot create ABLE Act accounts.
- Only one ABLE Act account can be established per individual but there is no limitation on the number of individuals who can contribute to that one account.
- Total contributions for the benefit of a given ABLE Act beneficiary cannot exceed $14,000 in a single year. That figure is expected to increase by $1,000 every few years, but will always be keyed to the maximum federal gift tax exclusion amount.
- Upon the death of an ABLE Act participant, every dollar remaining in the account – including gifts from family members, and earnings in the account itself – must be paid to the state Medicaid agency to repay costs of care received by the participant during life. If the account should grow large enough to fully repay that Medicaid cost, any remaining funds can go to family members or other beneficiaries.
- If the ABLE Act account exceeds $100,000, the participant's ability to receive Supplemental Security Income (SSI) will be temporarily suspended.

Comparing ABLE Accounts to Special Needs Trusts

Issues	ABLE Account	Third Party SNT	Main Difference
Who can use?	Only persons disabled before age 26	Any person with a disability	ABLE is limited and SNT can be used by anyone
Who can fund?	Anyone, including person with disability	Anyone, except person with a disability (must use first party SNT)	ABLE can be funded by person with a disability's own assets unlike the SNT
How many can person have?	One	Unlimited	Person can only have one ABLE account but unlimited SNTs
Who can control?	Person with a disability and likely his or her legal guardian, conservator, or agent	Anyone except the person with a disability and his or her spouse	ABLE allows person with a disability to retain control while SNT requires someone else to be in charge
How much can fund in a year?	$14,000 (or annual gift exemption)	Unlimited	ABLE limit in how much can be funded and SNT allows unlimited funding.
Is funding gift-tax free?	Yes	No	ABLE can be funded gift-tax free; an SNT is subject to gift tax (if funded during lifetime)

Is there a cap on how much can be in account?	Yes, currently $100,000 limitation for SSI recipients and up to state 529-plan limitations	No	ABLE cannot be used for assets over $100,000 while SNT can be used for any amount
How is income taxed?	No income tax	Taxed as a non-granter trust except to the extent funds are used on behalf of the beneficiary	SNT will be taxed on income earned while ABLE account will not
What type of distributions can be made?	Only "qualified disability expenses" as defined by government	No limitation, except for certain disbursements may reduce or eliminate SSI or Medicaid eligibility	ABLE has much stricter limitations on how it can be used than SNT

Developing Regulations

Actions to Date

On March 10, 2015 the Internal Revenue Service (IRS) announced Notice 2015-18 to provide advance notification of a provision it expects to be included in the proposed regulations for section 529A of the Internal Revenue Code regarding ABLE Act accounts.

As states and advocates all around the country watched, that notice made two important points:

(1) *The "Treasury Department and the IRS do not want the lack of guidance to discourage states from enacting their enabling legislation and creating their ABLE programs, which could delay the ability of the families of disabled individuals or others to begin to fund ABLE accounts for those disabled individuals. Therefore, the Treasury Department and the IRS are assuring states that enact legislation creating an ABLE program in accordance with section 529A, and those individuals establishing ABLE accounts in accordance with such legislation, that they will not fail to receive the benefits of section 529A merely because the legislation or the account documents do not fully comport with the guidance when it is issued. The Treasury Department and the IRS intend to provide transition relief with regard to necessary*

changes to ensure that the state programs and accounts meet the requirements in the guidance, including providing sufficient time after issuance of the guidance in order for changes to be implemented;" and

(2) The Treasury Department and the IRS advise the states that the ABLE Act guidance, when issued, may differ in various ways from the current section 529 education programs. "In particular, the Treasury Department and the IRS currently anticipate that, consistent with section 529A(e)(3), the guidance will provide that the owner of an ABLE account is the designated beneficiary of the account. In addition, the Treasury Department and the IRS currently anticipate that the section 529A guidance will provide that, with regard to the ABLE account of a designated beneficiary who is not the person with signature authority over that account, the person with signature authority over the account of the designated beneficiary may neither have nor acquire any beneficial interest in the account and must administer that account for the benefit of the designated beneficiary of that account."

On June 19, 2015, the IRS released the highly anticipated Notice of Proposed Rule Making (NPRM) for the Achieving a Better Life Experience (ABLE) Act. The NPRM stipulates the proposed regulations by which state ABLE programs will largely be developed and administered. The proposed regulations were open for public comment until September 21, 2015 and a public hearing was held on the morning of October 14th in Washington, DC to allow relevant stakeholders and the public at large to further express their comments regarding the details in the NPRM.

The Internal Revenue Service (IRS) Proposed Rule on Qualified ABLE Programs: Key Issues

Signature Authority[i]

The proposed regulations reaffirm that the designated beneficiary, who is the qualified individual with a disability, is also the account owner. The regulations go on to stipulate that If

the designated beneficiary is not able to exercise signature authority over his or her ABLE account or chooses to establish an ABLE account but not exercise signature authority, the designated beneficiary's agent under a power of attorney or, if none, a parent or legal guardian of the designated beneficiary can be allowed signature authority over the account.

Establishing an ABLE Program[ii]

It is critical to note that the ABLE Act only allows a state to establish its own ABLE program – it does not obligate a state to do so. The proposed regulations states that "a program is established by a State, or its agency or instrumentality, if the program is initiated by State statute or regulation, or by an act of a State official or agency with the authority to act on behalf of the State."

This regulation seems to suggest that an ABLE program can be established by a state outside the usual vehicle of some enacted piece of legislation. Most folks believe that is highly unlikely; however, the proposed rule seems to allow that possibility.

Criteria for Establishing Eligibility

The enacted version of the ABLE Act included a provision that states to qualify to establish an ABLE account; a potential beneficiary must have developed such disability before the individual's 26th birthday. This was one of the compromises made in the last few months of grinding out the legislation to hold down costs and maintain broad bipartisan support for the legislation.

The proposed regulation re-affirms this position of the drafters and states that if the potential beneficiary is entitled to benefits based on blindness or disability under title II or XVI of the Social Security Act and the blindness or disability occurred before the individual's 26th birthday then the individual would be eligible to open an ABLE account.

However, the proposed regulations state that each state ABLE program is allowed to verify this

however they see fit.[iii] Additionally, the alternate method written into the statute allows for a potential beneficiary to establish eligibility through a "disability certification," a certification by the designated beneficiary that he or she: (1) has a medically determinable physical or mental impairment, which results in marked or severe functional limitations, and which (i) can be expected to result in death or (ii) has lasted or can be expected to last for a continuous period of not less than 12 months; or (2) is blind (within the meaning of section 1614(a)(2) of the Social Security Act) and that such blindness or disability occurred before the date on which the individual attained age 26.

The certification must include a copy of the individual's diagnosis relating to the individual's relevant impairment or impairment and signed by a licensed physician (as defined in section 1861(r) of the Social Security Act, 42 U.S.C. 1395x(r)). Consistent with other IRS filing requirements, the proposed regulations also provide that the certification must be signed under penalties of perjury.[iv]

When a potential beneficiary is attempting to receive eligibility through establishing a "disability certification," the potential beneficiary must present to the state ABLE program documentation stipulating that the individual meets the criteria in the federal statute, along with the individual's diagnosis related to the individual's relevant impairment or impairments, signed by a licensed physician (DO or DM). Under the proposed regulations, at the point in which this documentation is given to the state ABLE program, that individual is eligible to open an ABLE account.[v]

The regulations certainly provided some relief by nothing that

> *The Treasury Department and the IRS wish to facilitate an eligible individual's ability to establish an ABLE account without undue delay. Therefore, the proposed regulations provide that an eligible individual must present the disability certification, accompanied by the diagnosis, to the qualified ABLE program to demonstrate eligibility to establish an ABLE account.*

When this provision was included in the legislation, there was a tremendous amount of debate over how it would be implemented. From a legislative perspective, requiring the inclusion of a copy of the individual's diagnosis is consistent with our objectives to obtain a disability certification; however, there are concerns that the sufficiency of a disability certification might not be as easy to establish as we had hoped or intended.

Disability Determination

Consistent with section 529A(g)(4), the Treasury Department and the IRS have consulted with the Commissioner of Social Security regarding disability certifications and determinations of disability.

For purposes of the disability certification, the proposed regulations provide that the phrase "marked and severe functional limitations" means the standard of disability in the Social Security Act for children claiming benefits under the Supplemental Security Income for the Aged, Blind, and Disabled (SSI) program based on disability, but without regard to the age of the individual. This phrase refers to a level of severity of an impairment that meets, medically equals, or functionally equals the listings in the Listing of Impairments (the listings) in appendix 1 of subpart P of 20 CFR part 404.[vi] The drafters of the legislation debated the definition of "disabled" for the purposes of the Act for several years. This definition, as interpreted by the proposed regulation, is consistent with legislative intent. The proposed rule reads:

> *This listing developed and used by the Social Security Administration describes for each of the major body systems impairments that cause marked and severe functional limitations. Most body system sections are in two parts: an introduction, followed by the specific listings. The introduction contains information relevant to the use of the listings with respect to that body system, such as examples of common impairments in the body system and definitions used in the listings for that body system.*

The introduction may also include specific criteria for establishing a diagnosis, confirming the existence of an impairment, or establishing that an impairment satisfies the criteria of a particular listing with respect to the body system. The specific listings that follow the introduction for each body system specify the objective medical and other findings needed to satisfy the criteria of that listing. Most of the listed impairments are permanent or expected to result in death, although some listings state a specific period of time for which an impairment will meet the listing.

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

The regulations affirm the intent of the drafters by stating that for eligibility purposes, the phrase "marked and severe functional limitation" will be the same standard as the disability standard related to the Social Security Act for children claiming benefits under the Supplemental Security Income for the Aged, Blind, and Disabled (SSI) program based on disability, but without regard to the age of the individual.[vii]

It is important to note that several groups have submitted comments to the Internal Revenue

Service raising some concerns that while the proposed regulations stipulate the importance of the accounts being readily available to those who qualify, the responsibility of determining eligibility (primarily for those seeking qualification through the "disability certification" process) may establish an unreasonable obligation to program administrators unfamiliar with this type of determination.

Under draft IRS Instructions, the ABLE program administrator would need to determine that the account owner's certification has been signed or e-signed in the name of the account owner or by someone who has certified that he or she is the account owner's agent, parent or guardian, and that the diagnosis inserted in the blank of such certification matches the diagnosis in the blank of the physician's diagnosis, and that the physician's diagnosis is signed or e-signed.

In addition, draft tax instructions for Form 5498-QA[viii] released by the IRS require a program to report to the IRS annually, for each account and by code number, "the type of disability for which the designated beneficiary is receiving ABLE qualifying benefits." The code menu on the draft IRS instructions is:

- Code 1- Developmental Disorders: Autistic Spectrum Disorder, Asperger's Disorder, Developmental Delays and Learning Disabilities
- Code 2 – Intellectual Disability: "may be reported as mild, moderate or severe intellectual disability"
- Code 3 – Psychiatric Disorders: Schizophrenia, Major depressive disorder, Post-traumatic stress disorder (PTSD), Anorexia nervosa, Attention deficit/hyperactivity disorder (AD/HD), Bipolar disorder
- Code 4 – Nervous Disorders: Blindness; Deafness; Cerebral Palsy, Muscular Dystrophy, Spina Bifida, Juvenile-onset Huntington's disease, Multiple sclerosis, Severe sensoneural hearing loss, Congenital cataracts
- Code 5 – Congenital anomalies: Chromosomal abnormalities, including Down Syndrome, Osteogenesis imperfecta, Xeroderma pigmentosum, Spinal muscular atrophy, Fragile X syndrome, Edwards syndrome
- Code 6 – Respiratory disorders: Cystic Fibrosis

- Code 7 – Other: includes Tetralogy of Fallot, Hypoplastic left heart syndrome, End-stage liver disease, Juvenile-onset rheumatoid arthritis, Sickle cell disease, Hemophilia, and any other disability not listed under Codes 1-6.

Recertification and Change in Eligibility Status

When the ABLE Act was drafted, key stakeholders recognized that there may be situations where a disabled beneficiary may cease to have a disability or may cease to have a disability and at some point down the road, become disabled again. In addressing this concern, the Treasury Department and the IRS agreed that there may be circumstances in which the designated beneficiary changes his or her status.

The proposed rule embodies the fact that the Treasury Department and the IRS believe that it is appropriate to permit continuation of the ABLE account (albeit with some changes in the applicable rules) during the period in which a designated beneficiary is not an eligible individual as long as the designated beneficiary was an eligible individual when the account was established.

The proposed regulations do provide that, beginning on the first day of the taxable year following the taxable year in which the designated beneficiary ceased to be an eligible individual, no contributions to the ABLE account may be accepted. If the designated beneficiary subsequently again becomes an eligible individual, then additional contributions may be accepted subject to the applicable annual and cumulative limits.

In this way, the Treasury Department and the IRS intend to prevent a deemed distribution of the ABLE account (and preserve the account's qualification as an ABLE account for all purposes). The proposed regulations also provide some flexibility regarding annual recertification. A qualified ABLE program generally must require annual recertification that the designated beneficiary continues to satisfy the definition of an eligible individual. However, under the proposed regulations, a qualified ABLE program may deem an annual recertification

to have been provided in appropriate circumstances:

- A qualified ABLE program may permit certification by an individual that he or she has a permanent disability to be considered to meet the annual requirement to present a certification to the qualified ABLE program.
- In other cases:
    - A program may require all of the same evidence needed for the initial disability certification when the account was established,
    - May require a statement under penalties of perjury that nothing has changed that would change the original disability certification, or
    - May incorporate some other method of ensuring that the designated beneficiary continuously qualifies as an eligible individual.
- Alternatively, a qualified ABLE program may identify certain impairments or categories of impairments for which recertification will be deemed to have been made annually to the qualified ABLE program unless and until the qualified ABLE program provides otherwise.

An initial certification or recertification that meets the requirements of the qualified ABLE program will be deemed to have met the requirement of section 529A(e)(1)(B).

The proposed regulations state that a qualified ABLE program generally must require annual recertification confirming that the designated beneficiary continues to satisfy the definition of an eligible individual. However, the proposed regulations also allow the states some broad flexibility. Under the proposal, the IRS wrote enough flexibility into the regulations to allow each state to choose different methods of ensuring a designated beneficiary's status as an eligible individual. In addition, the regulations also allow for the imposition of different periodic recertification requirements depending on a qualified beneficiary's particular circumstance (in particular the severity and nature of their disability).[ix]

The proposed rules would allow for an individual to maintain their ABLE account even in a

circumstance wherein their disability or condition may be temporarily alleviated to a point where they would not be considered a qualified beneficiary. This provides greater flexibility than anticipated, but there is some concern that this rule could establish an unreasonable obligation to program administrators unfamiliar with how to differentiate between severity and longevity of various conditions. Additionally, for individuals with disabilities, frequent and periodic recertifications would be both burdensome and unnecessary.

One solution to the potential recertification burden might be the establishment of a uniform disability certification form that allows a physician to certify that an impairment is not likely to change, and allows for recertification to be waived for five or more years, as suggested by Autism Speaks and other advocacy groups in their comments to the proposed IRS rule.

The sponsors of the legislation, in an effort to ensure ease of accessibility and the eligibility of the accounts, purposefully deemed that those individuals currently obtaining Social Security benefits would automatically be eligible to open an ABLE account. This same concept can be applied to the recertification process by waiving this requirement for beneficiaries whose Social Security benefits qualify them for an ABLE account.

Contributions to an ABLE Account

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

preexisting ABLE account) do not exceed that State's limit for aggregate contributions under its qualified tuition program.

Under these proposed regulations:

- A qualified ABLE program must return contributions in excess of the annual gift tax exclusion (excess contributions) to the contributor(s), along with all net income attributable to those excess contributions;
- All contributions, along with all net income attributable to those contributions, that caused an ABLE account to exceed the limit established by the State for its qualified tuition program (excess aggregate contributions), must be returned;
- When an excess contribution or excess aggregate contribution is returned to a contributor other than the designated beneficiary, the qualified ABLE program must notify the designated beneficiary of such return at the time of the return;
- The return of excess contributions and excess aggregate contributions must be received by the contributor(s) on or before the due date of the designated beneficiary's income tax return for the year in which the excess contributions were made or in the year the excess aggregate contributions caused amounts in the ABLE account to exceed the limit in effect; and
- When contributions exceed the annual gift tax exclusion, a failure to return such excess contributions within the time period will result in the imposition on the designated beneficiary of a 6 percent excise tax under section 4973(a)(6) on the amount of excess contributions.

Residency Requirements

One of the last minute changes made to the bill before passage was the requirement that an ABLE account for a designated beneficiary may be established only under the qualified ABLE program of the State in which that designated beneficiary is a resident. The proposed

regulation adds that if a State does not establish and maintain a qualified ABLE program, it may contract with another State to provide an ABLE program for its residents.[x]

When first drafted, the intent behind the ABLE Act was to allow anyone to open an ABLE account in any state that offered a qualified program. Traditional 529 plans are education savings plans operated by a state or educational institution designed to help families' set-aside funds for future college costs. Under traditional 529 rules, you can be a resident of California and invest in a Vermont plan and send your student to college in North Carolina. Nearly every state (all except for Wyoming) has at least one 529 plan available. It's up to each state to decide whether it will offer a 529 plan (possibly more than one) and what it will look like.

The sponsors of the ABLE Act always envisioned allowing beneficiaries of ABLE accounts the same opportunity to account shop when opening a 529 ABLE as those who opened a traditional 529 account. As a matter of fact, U.S. Senator Richard Burr recently introduced an amendment to eliminate the state residency requirement, which would allow an ABLE account to be started in any state and not be limited to just the individual's state of residence.

The disability coalition that helped to build nationwide support for ABLE also believes that eliminating the state residency requirement would simplify plans for ABLE program development and implementation, lead to a more consistent and uniform ABLE program design, minimize administrative burdens on account beneficiaries and administrators, offer choices for beneficiaries and would make the 529A program more consistent with the traditional 529 program.

Because the residency requirement was added late in the legislative process, it was silent as to whether a designated beneficiary must move his or her existing ABLE account when the designated beneficiary changes his or her residence. According to the proposed rule:

The Treasury Department and the IRS are concerned about imposing undue administrative burdens and costs on designated beneficiaries who frequently change State residency, such as members of military families. Therefore, the proposed regulations provide that a qualified ABLE program may permit a designated beneficiary to continue to maintain his or her ABLE account that was created in that State, even after the designated beneficiary is no longer a resident of that State. However, in order to enforce the one ABLE account limitation and in accordance with section 529A(g)(1), the proposed regulations provide that, other than in the case of a rollover or a program-to-program transfer of a designated beneficiary's ABLE account, a qualified ABLE program must require the designated beneficiary to verify, under penalties of perjury, when creating an ABLE account that the account being established is the designated beneficiary's only ABLE account.

Without allowing the same flexibility provided by traditional 529's, the proposed rule compromises by allowing the designated beneficiary to continue to maintain his or her ABLE account that was created in that State, even after the designated beneficiary is no longer a resident of that State. Several comments submitted to the IRS suggest that there may be a need for some education on the common practice as it relates to the Medicaid payback provision in circumstances in which a resident moves from the original state of the account's origin to another state (collecting Medicaid related supports and services from both over a period in which the ABLE account had been established). This is an important concern and it is hoped that IRS will issue some additional guidance on this point.

Rollover from 529 to 529A[xi]

Perhaps one of the greatest disappointments to the drafters of the legislation is the fact that the proposed regulations confirm that funds from a 529 college saving account will not be allowed to be rolled over to a 529A account (ABLE account) without applicable penalties and tax implications. This is against the intent of the drafters, those who supported the legislation, and self advocates. The legislation envisioned a situation where a disability is not determined

or identified until well after birth. In those situations, families who established traditional 529 accounts should have the ability to roll these assets to an ABLE account in the case where a disability was later identified. This issue may require some additional legislative correction in the future.

The proposed rules take this position because such a distribution to the ABLE account would not constitute a qualified higher education expense under section 529; therefore, without further legislative direction, the Treasury Department and the IRS do not believe they have the authority to allow such a transfer on a tax-free basis. However, this interpretation does not account for one of the key intentions of the legislation and ignores the fact that a family could establish and begin investing in a qualified tuition account before the beneficiary is disabled. This rule has the unintended impact of creating a significant hardship on families with a child with autism and other disabilities that occur after birth or are not apparent at birth.

Qualified Disability Expenses[xii]

Drafting qualified disability expenses was perhaps the most difficult portion of the legislative process and varied from the original draft to the final version that was enacted into law.

The final legislation included a simple statement that:

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

Earlier versions of the legislation spelled out uses for qualified expenses; however, the drafters made a decision to limit descriptions for each qualified expense in an effort to allow broader interpretation on such expenditures. The draft introduced in the 112th Congress included the following list of qualified expenses:

- **Education**- including tuition for preschool thru post-secondary education, books, supplies, and educational materials related to such education, tutors, and special education 6 services.

- **Housing**- Expenses for a primary residence, including rent, purchase of a primary residence or an interest in a primary residence, mortgage payments, real property taxes, and utility charges. It should be noted that the ABLE Act's impact on the Supplemental Security Income (SSI) program and housing is unclear, per a bulletin issued on by the Social Security Administration on December 5, 2014.[xiii]

- **Transportation**- Expenses for transportation, including the use of mass transit, the purchase or modification of vehicles, and moving expenses.

- **Employment Support**- Expenses related to obtaining and maintaining employment, including job-related training, assistive technology, and personal assistance supports.

- **Health Prevention and Wellness** - Expenses for health and wellness, including premiums for health insurance, mental health, medical, vision, and dental expenses, habilitation and rehabilitation services, durable medical equipment, therapy, respite care, long term services and supports, nutritional management, communication services and devices, adaptive equipment, assistive technology, and personal assistance.

- **Other Approved Expenses**- Any other expenses which are approved by the Secretary under regulations and consistent with the purposes of this section.

- **Assistive Technology and Personal Support**- Expenses for assistive technology and personal support with respect to any item described in clauses (i) through (vi).

- **Miscellaneous Expenses**- Financial management and administrative services; legal fees; expenses for oversight; monitoring; home improvement, and modifications, maintenance and repairs, at primary residence; or funeral and burial expenses.

Of course, the balance between the two positions was difficult because we all know that when examining the daily life of a person with a disability, especially an individual with complex needs, is fraught with extraordinary challenges and the intent of the drafters was to allow a broad interpretation of these expenses.

The proposed regulations document the same disability related expense categories as stated in the statute; however, the proposal clearly articulates that the list of permitted allowable expenses are not exhaustive and should additionally include basic living expenses. The proposed rule is consistent with the legislative intent in that it stipulates that the disability related expenses should be construed broadly, may be attributed to the designated beneficiary's health, independence and quality of life, should not be limited to items for which there is a medical necessity, and may include expenses which could benefit individuals in addition to benefiting the designated beneficiary.

The regulation also states that the administrative entity is responsible for establishing "safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions…" Like any other responsibility of a tax payer, the drafters did not intend for this potential unforeseen administrative burden on the program administer, which in turn could elevate the fees and costs of opening and maintaining an ABLE account.

Instead, the drafters intended for the opening, maintaining, and administration of an ABLE account be simple. The drafters envisioned that the beneficiary would be solely responsible for

keeping receipts and other evidence of allowable expenditures, potentially incorporating a check-off statement on appropriate forms attesting to the fact that these expenses were valid under penalty of perjury. The beneficiary would only need to produce this documentation if expenditures were challenged or an audit of the ABLE account was requested. This aligns with how taxpayers submit annual tax forms and keep supporting documentation and the Health Savings Account model. Implementing such a system of accountability keeps the recordkeeping burden on the individual instead of on the state administrator. To do otherwise would only saddle the administrating authority with the burden of determining whether particular withdrawals from an ABLE account are attributable to a non-housing qualified disability expense, a housing qualified disability expense, or a nonqualified expense.

Generally, these determinations are highly fact-intensive determinations that would add expense to the program that would need to be passed through to the account beneficiary and therefore contrary to the legislative intent of the drafters of the legislation. In addition, the Social Security Administration already has in place robust self-reporting requirements by SSI benefit recipients to which the receipt and application of ABLE account withdrawals could readily be added. Such duplicative reporting by administrators should be eliminated from the proposed ABLE regulations.

Community Development Financial Institutions

The proposed regulations surmise that because each qualified ABLE program will have significant administrative obligations beyond what is required for the administration of qualified tuition programs under section 529. As a result, the proposal allows for a qualified ABLE program or any of its contractors to contract with one or more Community Development Financial Institutions (CDFIs) that commonly serve disabled individuals and their families to provide one or more required services. There is no doubt that the drafters anticipated that ABLE accounts would be subject to a higher frequency of transactions - withdraws, deposits, and account management functions - than those of traditional 529 accounts. Nevertheless, the language in the proposed rule suggests that CDFI's would be a prudent option for account

administration and may lead some policymakers to look no further than establishing CDFI's as their ABLE account administrators.[xiv]

ABLE accounts were crafted for people with disabilities and the range of potential beneficiaries is incredibly broad, with some beneficiaries having some complex and significant needs, while some could be on the opposite end of that scale. Therefore, expressly allowing a qualified ABLE program or any of its contractors to contract with one or more CDFIs makes sense.

The regulations go further to reiterate that:

> A CDFI also may be able to obtain grants to defray the cost of administering the program. In general, if certified by the Treasury Department, a CDFI may receive a financial assistance award from the CDFI Fund that was established within the Treasury Department in 1994 to promote community development in economically distressed communities through investments in CDFIs across the country.

The overriding goal of the drafters was to make ABLE accounts accessible to everyone at a reasonable cost and as the regulation is written, there could be some confusion that only CDFI's can assist in performing these functions. Such a perception could have the unintended consequence of increasing costs or making ABLE accounts less accessible than the drafters had envisioned.

CDFI's could, with additional appropriations (government or otherwise) and the appropriate training, assist states in ABLE implementation and program maintenance. Additionally, to fully embrace the legislative intent of the ABLE Act, it should be made clear by the IRS that other entities could play a similar role.

Investment Direction

The final version of the ABLE Act included a section in the law entitled "Investment Direction Rule for 529 Plans" that applies to taxable years beginning after December 31, 2014. Current 529 college savings plan owners have previously been restricted to only making one investment change per year.

The ABLE Act included this amendment for all existing 529 plans (and ABLE Accounts in the future) that allows for twice-yearly investment changes. This is the same investment tool that allows account holders to make changes to their retirement portfolio based on changing investment objectives.

State Implementation

Since passage of the ABLE Act, numerous state legislatures have considered some version of an ABLE Act in their respective states. State legislatures, backed and heavily lobbied by a motivated community of ABLE Act supporters, quickly moved to pass versions of the bill in their states.

As of today's date, thirty-one (31) states have enacted legislation to provide ABLE Accounts in their states and two bills are awaiting approval from the Governor (California and New York).

As states consider legislative models, they have many different approaches to consider. However, the minimum requirements that all bills include are:

- Authorization of 529A ABLE program
- Consistent with federal law, including definitions
- Designation of state agency

- Exemption of state means-tested programs
- Exemption of ABLE accounts from state taxes
- Authority to contract with other state programs

Even after legislation is approved, however, state governments and the financial industry are likely to need time to set up the new offerings before they are available to consumers and some states are further along than others in hammering out the behind-the-scenes details.

As a result, its important to note that the first states to enact ABLE legislation may not be the first to offer accounts.

Reviewing One Example - The Florida Achieving a Better Life Experience Act

During the Regular Session, the Legislature passed the Florida Achieving a Better Life Experience (ABLE) Act. The ABLE Act eases financial strains faced by individuals with disabilities by making tax-free savings accounts available to cover qualified expenses such as education, housing, and transportation. The legislation passed the Florida Senate by a vote of 38 to 0 and the Florida House by a vote of 117 to 0. Governor Rick Scott signed the bill into law on May 26, 2015.

The Florida legislation includes several key components:

- Governing Board
- Consistent with key federal requirements – Purpose – Eligibility – Disability expenses

Timeframe and Costs

- Effective July 1, 2015
- For 2015, contributions capped at $14,000
- Only the first $100,000 disregarded for SSI eligibility; continued eligibility for Medicaid and other means-tested programs

  $3,386,000 allocated for start-up for 2015-16 fiscal year

Framework for Operation

- Florida ABLE (not-for-profit direct support organization) to be established by the Florida Prepaid College Board
- Oversight by Prepaid College Board
- Will maintain a Florida ABLE website
- Moneys and property held in trust by Florida ABLE

The Board - Five members

- Chair of Florida Prepaid
- An advocate for persons with disabilities appointed by the President of the Senate
- An advocate for persons with disabilities appointed by the Speaker of the House
- A person with expertise in accounting, risk management, or investment management appointed by the Prepaid Board (may be member)
- A person with expertise in accounting, risk management, or investment management appointed by the Governor

Participation Agreements

- Maximum annual contribution of $14,000 per year
- Amendments to increase or decrease participation, change beneficiaries or other authorized purposes
- Contracting
- May contract with another state if Florida ABLE is not qualified
- May contract with another state to provide their services if they do not have an ABLE program

Other Information and Provisions

- An estimated 4,000 of Florida's 400,000 population may participate during 2015-16
- Formal operation as early as April 1, 2016, but no later than July 1, 2016
- Status report required to the Governor by November 1, 2015

- Rule making authority granted

Status of ABLE Acts Around the Country

Overview

As of the date this document was drafted, thirty-one (31) states have passed some version of ABLE enacting legislation in their state. Two additional states have legislation awaiting signature by the governor.

The following nine (9) states and the District of Columbia have considered some version of an ABLE enactment bill; however, they have not yet passed the legislation:

Alaska, the District of Columbia, Kentucky, Maine, Michigan, New Hampshire, New Jersey, New Mexico, Pennsylvania, and South Carolina

The following eight (8) states did not consider any version of the ABLE Act during the current legislative session:

Arizona, Georgia, Idaho, Indiana, Mississippi, Oklahoma, South Dakota, and Wyoming

State by State Updates

State	Legislative Session Adjournment	ABLE Related Bill	Introduction Date	Program Administrator	Date Became Law
Alabama	**15-Jun-15**	SB 226	3/12/15	State Treasurer	9-Jun-15
Alaska	**11-Jun-15**	SB 104	4/11/15	Dept. of Commerce, Community & Economic Development	

	6/11/15	HB 188	4/11/15	Dept. of Commerce, Community & Economic Development	
Arizona	**4/3/15**				
Arkansas	**4/22/15**	HB 1239	2/3/15	ABLE Program Comm.: Human Services, Career Education & State Treas.	8-Apr-15
California	**9/1/15**	AB 449	2/23/15	State Treasurer	Awaiting Signature
	9/11/15	SB 324	2/23/15	State Treasurer	
Colorado	**5/6/15**	HB 1359	4/14/15	CollegeInvest/Dept. of Higher Education	3-Jun-15
Connecticut	**6/3/15**	HB 6738	2/9/15	State Treasurer	19-Jun-15
Delaware	**6/30/15**	HB 60	3/19/15	ABLE Board & State Treasurer	10-Jun-15
District of Columbia		B21-0252	6/16/15	Chief Financial Officer of the District of Columbia	
Florida	**5/1/15**	SB 642	2/3/15	FL Prepaid College Brd	21-May-15
	5/1/15	SB 644	2/3/15	FL Prepaid College Brd	21-May-15
	5/1/15	SB 646	2/3/15	As above	21-May-15
Georgia	**4/2/15**				
Hawaii	**5/7/15**	HB 119	1/22/15	Director of Finance	2-Jul-15
Idaho	**4/11/15**				
Illinois	**5/31/15**	SB 1383	2/20/15	Treasurer/Board of Investment	27-Jul-15
Indiana	**4/29/15**				
Iowa	**6/5/15**	SF 505	5/4/15	State Treasurer	2-Jul-15
Kansas	**6/12/15**	HB 2216	2/3/15 (ABLE Added 3/25/15)	State Treasurer	16-Apr-15
Kentucky	**3/25/15**	SB 188	2/13/15	Dept. for Behavioral Health/Developmental & Intellectual Disabilities	

	3/25/15	HB 460	2/13/15	Dept. for Behavioral Health/Developmental & Intellectual Disabilities	
Louisiana	**6/11/15**	HB 833 (2014)	2/28/14	Dept. of Health & Hosp/ ABLE Account Authority	16-May-15
	6/11/15	HB 598 (prev.15RS-928)	4/3/15	Dept. of Education/ABLE Account Authority	1-Jul-15
Maine	**6/17/15**	LD 1421 (HP 967)	5/18/15	State Treasurer	
Maryland	**4/13/15**	SB 761	2/16/15	College Savings Plans of Maryland Board	12-May-15
Massachusetts	**11/18/15**	HB 4047 (2014)	4/15/14	Massachusetts Educational Financing Authority	8/5/2014; New legislation (HD 3853) is about to be introduced to revise the pre-federal legislation.
Michigan	**12/31/15**	HB 4542	5/5/15	State Treasurer	
	12/31/15	SB 361	6/3/15	State Treasurer	
Minnesota	**5/18/15**	SF 1458	3/9/15	Commissioner of Human Services	22-May-15
Mississippi	**4/3/15**				
Missouri	**5/30/15**	SB 174	1/7/15	The Missouri Achieving a Better Life Experience (ABLE) Board	29-Jun-15
Montana	**4/28/15**	SB 399	3/13/15	Department of Health & Human Services	5-May-15
Nebraska	**6/1/15**	LB 591	1/21/15	State Treasurer	27-May-15
Nevada	**6/1/15**	SB 419	3/19/15 (ABLE added 4/16/15)	State Treasurer	29-May-15
New Hampshire	**7/1/15**	SB 265	2/19/15	State Treasurer	

New Jersey	**1/1/16**	AB 3956	12/11/14	Div. of Developmental Disabilities-H. Services	
	1/1/16	SB 2770	2/24/15	Div. of Developmental Disabilities-H. Services	
New Mexico	**3/21/15**	HB 448	2/3/15	State Investment Office	
	3/21/15	HB 467	2/3/15	State Investment Office	
New York	**6/17/15**	SB4472	3/23/15	State Superintendent of Financial Services	Passed 6/18/15, waiting on Governor's signature
North Carolina	**4/15/15**	H 556	4/2/15	State Treasurer	8/11/15
North Dakota	**4/29/15**	HB 1373	1/19/15	Bank of North Dakota	1-Apr-15
Ohio	**12/31/15**	HB 155	4/21/15	Treasurer of the State	16-Jul-15
Oklahoma	**5/22/15**				
Oregon	**7/6/15**	SB 777	2/24/15	State Treasurer / Oregon 529 Savings Board	12-Aug-15
Pennsylvania	**12/31/15**	HB 444	2/12/15	State Treasurer	
	12/31/15	HB 583	2/26/15	State Treasurer	
	12/31/15	SB 726	4/23/15	State Treasurer	
	12/31/15	SB 879	6/8/15	Treasury Department	
	12/31/15	HB 1319	6/10/15	Treasury Department	
Rhode Island	**6/30/15**	HB 5564	2/25/15	Dept. of Human Services	9-Jul-15
	6/30/15	SB 465	2/26/15	Dept. of Human Services	9-Jul-15
South Carolina	**6/4/15**	HB 3768	3/3/15	State Treasurer	
	6/4/15				
South Dakota	**3/30/15**				
Tennessee	**4/22/15**	SB 1162	2/12/15	State Treasurer	18-May-15
Texas	**6/1/15**	SB 1664	3/13/15	Prepaid Higher Education Tuition Board	19-Jun-15

Utah	**3/12/15**	SB 292	3/3/15	Dept. of Workforce Services	31-Mar-15
Vermont	**5/16/15**	SB 138	3/17/15	State Treasurer	3-Jun-15
Virginia	**2/27/15**	HB 2306	1/22/15	Virginia College Savings Plan Board	17-Mar-15
Virginia	**2/27/15**	SB 1404	1/22/15	Virginia College Savings Plan Board	17-Mar-15
Washington	**4/24/15**	HB 2063	2/10/15	State Treasurer	1-May-15
West Virginia	**3/14/15**	HB 2902	2/24/15	State Treasurer	31-Mar-15
Wisconsin	**12/31/15**	SB 21	2/3/15	Department of Administration	12-Jul-15
Wyoming	**3/5/15**				

Conclusion

After an incredibly long journey that began with a group of advocates meeting in a Congressional office in 2006, the Stephen Beck, Jr. Achieving a Better Life Experience Act is law in the United States.[xv]

The bill would not be a reality without a committed group of Members of Congress, dedicated congressional staffers, engaged disability groups, and caring, educated, and enthusiastic advocates and families. As a Congressional staffer who worked on this issue from the first day, steering the ABLE Act from a concept to becoming law was a professional highlight for me.

The ABLE Act is a ground breaking new law that allows qualified individuals with disabilities the opportunity to save significant amounts of resources without jeopardizing their eligibility for critically important federally funded supports and services. I hope that the legislation will live up to its name by allowing individuals with disabilities an opportunity to live full, productive lives in their communities without losing essential benefits. It makes no sense that we as a nation would penalize individuals with disabilities for holding assets.

While I believe the objectives of removing some of the barriers to employment, independent living and perhaps one day, economic self-sufficiency have been realized, I also know that we as a nation have so much more to do for individuals with disabilities in this country.

Regulations are being discussed in Washington right now, and a solid majority of states have passed implementing legislation. But I hope that the lasting legacy of the ABLE Act is awareness of fact that due to antiquated laws in this country, people with disabilities are forced to live in deep poverty and there is no choice for too many of these individuals but to remain impoverished. Even the original vision of the ABLE Act was modified before it finally became law with the addition of some restrictions on age, annual contributions, and residency requirements.

The ABLE Act is a step in the right direction; however, living with a disability is expensive. We should continue to build upon the momentum and good work of the ABLE Act by removing restrictions that leave people with disabilities trapped in poverty.

---

[i] Guidance Under Section 529A: Qualified ABLE Programs NPRM, https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able- programs#p-207

[ii] Guidance Under Section 529A: Qualified ABLE Programs NPRM, https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able- programs#p-230

[iii] Guidance Under Section 529A: Qualified ABLE Programs NPRM, https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able- programs#p-31

[iv] Guidance Under Section 529A: Qualified ABLE Programs NPRM, https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able- programs#p-32

[v] Guidance Under Section 529A: Qualified ABLE Programs NPRM, https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able- programs#p-32

[vi] 20 CFR 416.906, 416.924 and 416.926a

[vii] Guidance Under Section 529A: Qualified ABLE Programs NPRM, https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able- programs#p-34

[viii] IRS 2016 Draft of Instructions for Forms 1099-QA and 5498-QA, published August 28, 2015: http://www.irs.gov/pub/irs-dft/i1099qa--dft.pdf

[ix] Guidance Under Section 529A: Qualified ABLE Programs NPRM, https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able- programs#p-240

[x] Guidance Under Section 529A: Qualified ABLE Programs NPRM, https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able- programs#p-270

[xi] Guidance Under Section 529A: Qualified ABLE Programs NPRM, https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able- programs#p-47

[xii] Guidance Under Section 529A: Qualified ABLE Programs NPRM, https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able- programs#p-261

[xiii] Social Security Administration, Social Security Legislative Bulletin 113-29, December 5, 2014 - http://www.socialsecurity.gov/legislation/legis_bulletin_120514.html

[xiv] Guidance Under Section 529A: Qualified ABLE Programs NPRM, https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able- programs#p-27

[xv] 26 U.S.C. § 529A

BECKER & POLIAKOFF
Legal and Business Strategists

The ABLE Act: From Federal Regulations to your State Legislature

John M. Ariale
Attorney and Senior Government Relations Consultant
Washington, D.C. 20005

Legislative History

- First introduced in 2007 – Called the Financial Security Accounts for Individuals with Disabilities Act
- Re-introduced in each Congress
- HR 647 – passed on 12/3/14 (404-17)
- S 313 – passed on 12/16/14 (76-16)
- Signed into law – 12/19/14

BECKER & POLIAKOFF

ABLE at a Glance

- Not a silver bullet for families with disabled children, nor will it come close to assisting those families in saving for all the costs associated with raising a child with special needs.
- The ABLE Act does give families another weapon for battling the challenges they face.

BECKER & POLIAKOFF

ABLE at a Glance

- Disability was established before age 26,
- Individuals living in a state that has authorized ABLE Act accounts can participate,
- Only one ABLE Act account per individual,
- Total annual contributions cannot exceed $14,000,
- Upon the death of an ABLE Act participant, every dollar remaining in the account must be paid to the state Medicaid
- If the ABLE Act account exceeds $100,000, the participant's ability to receive Supplemental Security Income (SSI) will be temporarily suspended.

BECKER & POLIAKOFF

Comparing ABLE to SNT

Issues	ABLE Account	Third Party SNT	Main Difference
Who can use?	Only persons disabled before age 26	Any person with a disability	ABLE is limited and SNT can be used by anyone
Who can fund?	Anyone, including person with disability	Anyone, except person with a disability (must use first party SNT)	ABLE can be funded by person with a disability's own assets unlike the SNT

Comparing ABLE to SNT

Issues	ABLE Account	Third Party SNT	Main Difference
How many can person have?	One	Unlimited	Person can only have one ABLE account but unlimited SNTs
Who can control?	Person with a disability and likely his or her legal guardian, conservator, or agent	Anyone except the person with a disability and his or her spouse	ABLE allows person with a disability to retain control while SNT requires someone else to be in charge

Comparing ABLE to SNT

Issues	ABLE Account	Third Party SNT	Main Difference
How much can fund in a year?	$14,000 (or annual gift exemption)	Unlimited	ABLE limit in how much can be funded and SNT allows unlimited funding.
Is funding gift-tax free?	Yes	No	ABLE can be funded gift-tax free; an SNT is subject to gift tax (if funded during lifetime)

Comparing ABLE to SNT

Issues	ABLE Account	Third Party SNT	Main Difference
Is there a cap on how much can be in account?	Yes, currently $100,000 limitation for SSI recipients and up to state 529-plan limitations	No	ABLE cannot be used for assets over $100,000 while SNT can be used for any amount
How is income taxed?	No income tax	Taxed as a non-granter trust except to the extent funds are used on behalf of the beneficiary	SNT will be taxed on income earned while ABLE account will not

Comparing ABLE to SNT

Issues	ABLE Account	Third Party SNT	Main Difference
What type of distributions can be made?	Only "qualified disability expenses" as defined by government	No limitation, except for certain disbursements may reduce or eliminate SSI or Medicaid eligibility	ABLE has much stricter limitations on how it can be used than SNT

BECKER & POLIAKOFF
Legal and Business Strategists

Regulatory Updates

Key Regulation Developments

- On March 10, 2015 the Internal Revenue Service (IRS) announced Notice 2015-18 to provide advance notification of a provision it expects to be included in the proposed regulations for section 529A of the Internal Revenue Code regarding ABLE Act accounts
- On June 19, 2015, the IRS released the highly anticipated Notice of Proposed Rule Making (NPRM) for the Achieving a Better Life Experience (ABLE) Act
  - Public comment until September 21, 2015
  - Public hearing October 14, 2015

BECKER & POLIAKOFF

Signature Authority

- Regulation:
  - The designated beneficiary, who is the qualified individual with a disability, is also the account owner
  - If the designated beneficiary is not able to exercise signature authority, designated beneficiary's agent, or a parent or legal guardian can be allowed signature authority over the account
- Comments:
  - Good rule in general
  - Should add extension of rule to designee of parent

BECKER & POLIAKOFF

Establishing An ABLE Program

- Regulation:
  - The proposed regulations states that "a program is established by a State, or its agency or instrumentality, if the program is initiated by State statute or regulation, or by an act of a State official or agency with the authority to act on behalf of the State."
- Comment:
  - ABLE Act only allows a state to establish its own ABLE program – it does not obligate a state to do so
  - Suggests that an ABLE program can be established by a state outside the usual vehicle of some enacted piece of legislation – highly unlikely

BECKER & POLIAKOFF

Criteria for Establishing Eligibility

- Regulation:
  - Reaffirms Definition of Statute
  - 26th Birthday
  - Each state can verify as they determine
- Comments:
  - Age limitation was added late in the legislative process by the W&M staff

BECKER & POLIAKOFF

Disability Determination

- Regulation
  - Standard of disability in the Social Security Act for children claiming benefits under the Supplemental Security Income for the Aged, Blind, and Disabled (SSI) program based on disability
  - Certification leaves the responsibility of determining eligibility to administrators
- Comments
  - May establish an unreasonable obligation to program administrators unfamiliar with this type of determination
  - Standardize the documentation necessary for eligibility
  - Consistency in proof of eligibility would minimize confusion in the disability community

BECKER & POLIAKOFF

Recertification/Change in Status

- Regulation
  - There may be circumstances in which the designated beneficiary changes his or her status
  - Permits account continuation if eligible when account opened
  - No contributions can be made
- Comments
  - Uniform disability certification
  - Longer term waiver for unlikely change in disability
  - Those receiving SS benefits, should be exempt from recertification

BECKER POLIAKOFF

Residency Requirements

- Regulation
  - May be established only under the qualified ABLE program of the State in which that designated beneficiary is a resident
  - If State does not establish and maintain a qualified ABLE program, it may contract with another State
  - If move, may maintain ABLE account
- Comment
  - Strongly support this proposed regulation
  - Intent was not to have residency requirement
  - Concern over Medicaid Payback regulations/confusion

BECKER POLIAKOFF

Rollovers

- Regulation
  - funds from a 529 college saving account will not be allowed to be rolled over to a 529A account (ABLE account) without applicable penalties and tax implications
- Comment
  - IRS rationalizes this because such a distribution to the ABLE account would not constitute a qualified higher education expense
  - Contrary to ALL legislative intent
  - Will be fixed legislatively

BECKER POLIAKOFF

Qualified Expenses

- Regulation
  - List of permitted allowable expenses are not exhaustive and should additionally include basic living expenses
  - Disability related expenses should be construed broadly, may be attributed to the designated beneficiary's health, independence and quality of life, should not be limited to items for which there is a medical necessity, and may include expenses which could benefit individuals in addition to benefiting the designated beneficiary
- Comment
  - Strongly support interpretation
  - Beneficiary should be solely responsible for record keeping

BECKER & POLIAKOFF

Community Development Financial Institutions (CDFI's)

- Regulation
  - Qualified ABLE program or any of its contractors may contract with one or more Community Development Financial Institutions (CDFIs)
- Comment
  - Rule suggesting CDFI's may lead some policymakers to look no further than establishing CDFI's as their ABLE account administrators
  - Should clarify that other entities could play similar role

BECKER & POLIAKOFF

BECKER & POLIAKOFF
Legal and Business Strategists

State Implementation

Typical State Enactment

As states consider legislative models, they have many different approaches to consider. However, the minimum requirements that all bills include are:

- Authorization of 529A ABLE program
- Consistent with federal law, including definitions
- Designation of state agency
- Exemption of state means-tested programs
- Exemption of ABLE accounts from state taxes
- Authority to contract with other state programs

BECKER & POLIAKOFF

Florida's ABLE Act

The Florida legislation includes several key components:

- Governing Board
- Consistent with key federal requirements
  - Purpose
  - Eligibility
  - Disability expenses

BECKER & POLIAKOFF

Florida's ABLE Act - Timeframe

- Effective July 1, 2015
- For 2015, contributions capped at $14,000
- Only the first $100,000 disregarded for SSI eligibility; continued eligibility for Medicaid and other means-tested programs
- $3,386,000 allocated for start-up for 2015-16 fiscal year

BECKER & POLIAKOFF

Florida's ABLE Act – Framework

- Florida ABLE (not-for-profit direct support organization) to be established by the Florida Prepaid College Board
- Oversight by Prepaid College Board
- Will maintain a Florida ABLE website
- Moneys and properly held in trust by Florida ABLE

BECKER & POLIAKOFF

Florida's ABLE Act – The Board

- Chair of Florida Prepaid
- An advocate for persons with disabilities appointed by the President of the Senate
- An advocate for persons with disabilities appointed by the Speaker of the House
- A person with expertise in accounting, risk management, or investment management appointed by the Prepaid Board (may be member)
- A person with expertise in accounting, risk management, or investment management appointed by the Governor

BECKER & POLIAKOFF

Florida's ABLE Act – Participation Agreements

- Maximum annual contribution of $14,000 per year
- Amendments to increase or decrease participation, change beneficiaries or other authorized purposes
- Contracting
- May contract with another state if Florida ABLE is not qualified
- May contract with another state to provide their services if they do not have an ABLE program

BECKER & POLIAKOFF

Florida's ABLE Act – Other Provisions

- An estimated 4,000 of Florida's 400,000 population may participate during 2015-16
- Formal operation as early as April 1, 2016, but no later than July 1, 2016
- Status report required to the Governor by November 1, 2015
- Rule making authority granted

BECKER & POLIAKOFF

Status of ABLE Act Implementation

- 31 states have passed some version of ABLE enacting legislation in their state
- 2 states have legislation awaiting signature (California and New York) by the governor

BECKER & POLIAKOFF

ABLE Considered - Not Enacted

- 9 states and the District of Columbia have considered some version of an ABLE enactment bill; however, they have not yet passed the legislation:
  - Alaska
  - District of Columbia
  - Kentucky
  - Maine
  - Michigan
  - New Hampshire
  - New Jersey
  - New Mexico
  - Pennsylvania
  - South Carolina

BECKER & POLIAKOFF

ABLE Implementation - Acts Not Considered

- The following eight (8) states did not consider any version of the ABLE Act during the current legislative session:
  - Arizona
  - Georgia
  - Idaho
  - Indiana
  - Mississippi
  - Oklahoma
  - South Dakota
  - Wyoming

BECKER & POLIAKOFF

Conclusion

- Lasting legacy of the ABLE Act is awareness of the fact that due to antiquated laws in this country, people with disabilities are forced to live in deep poverty and there is no choice for too many of these individuals but to remain impoverished
- We should continue to build upon the momentum and good work of the ABLE Act by removing restrictions that leave people with disabilities trapped in poverty

BECKER & POLIAKOFF

Questions/Comments/Discussion

John Ariale
202-236-4835
jariale@bplegal.com

BECKER & POLIAKOFF

PRE-CONFERENCE:
Pooled Trust Intensive

Wednesday, October 14, 2015
3:55 P.M. – 4:45 P.M.

Paying for Purchases: The Method Does Matter

Presenter:
Stephen W. Dale
Attorney at Law
The Dale Law Firm, PC
Pacheco, CA

- Materials
- Elias v. Colvin, Elder Law Issues -Fleming & Curti PLC LegalIssues Newsletter
- PowerPoint

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

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

Paying for Purchases: The Method Does Matter

Trustees of special needs trusts often struggle with how to provide for beneficiaries' needs without giving beneficiaries cash, since the use of cash will almost always affect the beneficiaries' eligibility for assistance programs like SSI and Medicaid. Sometimes a trustee will arrange direct payment for services and items the SSI beneficiary is allowed to receive, but this can be burdensome for all parties involved. It also takes away autonomy from the beneficiary and restricts the beneficiary's choices.

A frequently used alternative is the use of traditional gift cards, but as we will explore, there can be major limitations to this method. Alternatively, beneficiaries can secure a credit card and request that the trustee pay the credit card statement or reimburse the beneficiaries for those items that are allowed or will not cause an unexpected reduction in benefits. However, it can be very difficult for the trustee to control what purchases are made with the card, as well as the credit limit of the card. For instance, I once had a beneficiary who was clean and sober for 20 years who made his purchases through a credit card which the trustee paid promptly each month. The beneficiary's credit limit soared and unfortunately he broke his sobriety in a spectacular fashion and racked up $30,000 in debt that the trustee could not reimburse. He ultimately went bankrupt, and even worse lost his Section 8 housing because of his escapade.

A traditional debit card is viewed by the Social Security Administration as an equivalent to cash, and if a beneficiary makes purchases using his or her traditional debit card and the trustee reimburses the traditional debit card account, the result will be a dollar for dollar reduction in SSI benefits. A new option is the reloadable and restricted debit card which combines the advantages of using a credit card with the ability to impose important limitations on spending to protect the beneficiary's eligibility for benefits and ensure the card is not misused.

SSI Income and Resources Basics

The trustee of a special needs trust (and, for that matter, the beneficiary) must understand the basic rules concerning what is income and what is a resource. SSI is a federal program administered by the Social Security Administration. Participation is determined by documenting needs based on disability and financial necessities. The maximum federal benefit (the FBR, or Federal Benefit Rate) is $733 for an individual in 2015. In addition, a few states supplement SSI payments, so that there can be a second component to the benefit. In California, for example, the

2015 State Supplement Payment (SSP) adds $156.40 for a single person, for a maximum total of $889.40.

Once a person has been determined to be eligible for SSI as a result of a disability, there are still two tests that the individual must meet to continue to receive benefits. The first test is an income test, which determines how much money the individual will receive. The second test is the resource test, which determines whether or not the individual is eligible.

Test 1 – Income Test

Think of SSI as a supplement that will raise the individual's income up to the maximum SSI rate (this is not quite accurate, but it will help make the program more understandable). SSI classifies income into three categories: 1) Unearned income; 2) In-kind support and maintenance (ISM); and 3) Earned income. Through this categorization of income, the government is able to determine the amount of benefits an individual will receive. For this guide, we will focus on unearned income and in-kind support and maintenance. Earned income can create its own concerns, but use of the Restricted Reloadable Card should not have any effect on the earned income tests.

Unearned Income

SSI defines unearned income as any cash or gift the SSI recipient receives, or is entitled to receive, from annuities, pensions, alimony, support payments, dividends, interest, rent, litigation awards or settlements, or payments from other programs. This is to distinguish the income from earned income like wages. If an SSI recipient receives unearned income from anywhere, it will reduce their SSI benefits amount dollar-for-dollar (after the first $20, which is sometimes referred to as the "disregard"). A basic principle of SSI is that the benefits recipient cannot receive direct funds of more than $20 a month without having their benefits reduced.
Note that the unearned income rules are not the same as tax concepts, accounting principles, or common everyday language use. If a concerned parent gives an SSI beneficiary $50 for a movie date, popcorn, and soft drinks, and the individual actually spends the money exactly as planned, the $50 gift will be unearned income for SSI purposes and will affect the level of benefits. The same principles apply for any cash received by the SSI beneficiary, regardless of the source (except, as noted above, for wages – they follow different, more complicated, rules).

In-Kind Support and Maintenance

ISM – in-kind support and maintenance – is often considered the hardest category of income to understand. ISM is non-cash assistance to a benefits recipient, which helps the recipient secure food and/or shelter. One example of ISM is when someone other than the benefits recipient is paying rent directly. For example, if the trustee of a special needs trust pays the beneficiary's rent directly, then the beneficiary has received ISM. Another example would be giving the recipient a week's worth of groceries.

Let's recap how this is calculated. As of 2015, SSI payments are set at a maximum of $733, the FBR. Remember that some states add a supplement to that figure; the state supplement can be larger or smaller, and might or might not change each year. The federal amount generally goes up every year based on a cost of living adjustment. The SSI benefit (with the addition of any state supplement) is intended to provide the beneficiary's basic support needs – shelter, food, and incidentals.

SSI reasons that if an individual is not paying the full amount of their rent or food from the SSI benefit, then SSI can be reduced without affecting the beneficiary's ability to provide essential needs. When someone else – including a concerned parent, a charitable organization, or a special needs trust – provides food and/or shelter directly, the SSI benefit will be reduced dollar-for-dollar for the amount paid for food and shelter, up to a maximum of one-third of the federal contribution plus $20. That means a maximum reduction of $264.33 in 2015; this capped amount is referred to as the Presumed Maximum Value, or PMV.

> Example 1: Sam receives $733 in SSI benefits. He moves to an apartment that costs $1,000 per month. The trustee of Sam's special needs trust pays the $1,000 rent directly to Sam's landlord. Sam's SSI will be reduced by the 2015 maximum of $264.33, and his federal SSI check will be $468.67 ($733 minus $264.33).
>
> Example 2: Cheryl is also receiving $733 in SSI benefits, and she moves into the apartment next to Sam. In order to help Cheryl manage funds and exercise as much personal autonomy as possible, the trustee of her special needs trust gives her $1,000 per month and lets her pay her own rent – which she does, like clockwork, on the same day she receives the money from the trust every month. Because she handled the cash, though, her SSI reduction is more than the amount of her benefit; she loses SSI altogether.

Example 3: Sally, also an SSI recipient, lives next door to Cheryl and pays the same rent. Her special needs trustee has arranged with the landlord to give Sally access to the communal dining room in the apartment complex, and she takes all her meals at the complex. Her trustee pays an extra $400 per month for her meals, and so sends a total of $1,400 to the landlord each month. How much is the reduction in Cheryl's SSI benefit? Exactly the same as Sam's: $264.33. Payment for Cheryl's food does not increase the benefit reduction over the Presumed Maximum Value amount.

Test 2 – Resource Test

For purposes of SSI eligibility, income determines how much a beneficiary receives while resources determine whether an individual is eligible at all. So what is a resource? SSI defines a resource as anything you can convert into cash or support. One simple way to make the distinction: "income" is money you receive in a given month, and "resources" include anything that is still there on the first day of the next month.

If a benefits recipient's countable resources exceed $2,000 on the first moment of the first day of the calendar month, the individual is not eligible for benefits that month. Note that this does not mean the benefits are reduced for that month – even a small amount of excess resources will result in complete loss of the SSI benefit.

For example, if an SSI recipient has $1,999 in their checking account on the 1st of January, and he receives $733 from SSI on January 3rd for a total of $2,732, he remains eligible for benefits for the month of January. If, on the other hand, he does not spend down the account below $2,000 by the 1st of February, eligibility for SSI (and, in most states, Medicaid) will cease for the month of February.

However, it is important to note that there are a number of exceptions to the $2,000 resource rule – items that Social Security considers excluded from the resource calculation. These items are called "exempt resources." Exempt resources can include the beneficiary's residence, one automobile, household furnishings, prepaid burial amounts plus up to $1,500 set aside for funeral expenses (or life insurance in that amount), and tools of the beneficiary's trade. Each of those exempt resources categories is subject to its own special rules, and so it may require some special consideration to figure out the differing effect in individual cases.

Eligibility for Medicaid

In most states (but not all), any SSI beneficiary who receives even a small monthly payment will automatically be eligible for Medicaid, which will provide for most of their medical needs. It is often true that Medicaid eligibility is more important for the beneficiary than the small monthly SSI payment. As a consequence, it can sometimes be true that there is no particular drawback to reducing the special needs trust beneficiary's SSI payment – so long as it is not eliminated altogether.

Even individuals not receiving SSI benefits may qualify for Medicaid coverage, though the eligibility process can sometimes be more complicated and difficult to navigate. To further complicate the picture, there are a number of different ways that a given individual might qualify for Medicaid benefits, and the rules may not even resemble one another depending on the program. Direct payment of expenses like food and shelter may have a different effect, or even no effect, depending on the particular Medicaid eligibility standards being applied. Availability of assets may or may not have an effect on direct Medicaid eligibility. For the special needs trust beneficiary receiving Medicaid benefits directly (that is, without qualifying for SSI), it is important for the trustee to consult with a qualified and knowledgeable attorney about how to manage trust benefits.

Guidelines around Payment Mechanisms and Disbursements

The Social Security Administration's "Program Operations Manual System" (POMS) is a series of instructions which function as the primary source of information used by Social Security employees and eligibility workers to process claims for benefits.

What Does Social Security Say About Credit Cards?

The instructions used by the Social Security Administration to inform eligibility workers on the use of credit cards in the SSI recipient's own name is found in POMS SI 01120.201 I.1.d:

> SI 01120.201 I.1.d. Disbursements for credit card bills
>
> If a trust pays a credit card bill for the trust beneficiary, whether the individual receives income depends on what was on the bill. If the trust pays for food or shelter items on the bill, the individual will generally be charged with in-kind support and maintenance up to the PMV. If the bill includes non-food, non-shelter items, the individual usually does not

receive income as the result of the payment unless the item received would not be a totally or partially excluded non-liquid resource the following month.
For example, if the credit card bill includes restaurant charges, payment of those charges results in ISM. If the bill also includes purchase of clothing, payment for the clothing is not income.

This section illustrates the basic concept of making distributions from trusts. If a trust pays a credit card company directly for non-food or non-shelter items, this generally does not count as income for the individual. However, if a credit card statement includes charges for food items, the trust would need to exclude those items from payment or else the beneficiary would be subject to an ISM reduction.

What Does Social Security Say About Gift Cards?

POMS SI 01120.201 I.1.e states the general rule that gift cards that can be used for food or shelter – or exchanged for cash – will be counted as income the month of receipt, and a resource the following month if a balance remains.

SI 01120.201 I.1.e. Disbursements for gift cards and gift certificates
Gift cards and gift certificates are considered cash equivalents. If a gift card or certificate can be used to buy food or shelter (e.g., restaurant, grocery store or VISA gift card), it is unearned income in the month of receipt. Any unspent balance on the gift card or certificate is a resource beginning the month after the month of receipt. If the store does not sell food or shelter items (e.g., bookstore or electronics store), but the card does not have a legally enforceable prohibition on the individual selling the card for cash, then it is still unearned income (see SI 00830.522).

Gift cards, gift certificates, and debit cards are discussed in more detail at POMS SI 00830.522.

SI 00830.522 A2 Gift Cards/Gift Certificates Not Income
The value of a gift card/gift certificate is not income in the month it is received if the gift card/certificate:

- Cannot be used to purchase food or shelter; and
- Cannot be resold.

In addition, if the individual does not have the right, authority, or power to convert or sell the gift card/certificate for cash, and it cannot be used to purchase food or shelter, then the gift card/certificate would not meet the definition of a resource in SI 01110.100. NOTE: A gift card/certificate that is restricted on its use, and is legally prohibited from resale, must be evaluated (case by case) based on the restrictions and or prohibitions for determining income for SSI purposes.

The restriction on use of a gift card/certificate can be legal, (imposed by the card issuer), or practical, (the store where the card must be redeemed does not sell food or shelter items).

A very helpful part of these POMS is that they contain several examples to illustrate the basic concept of when a gift card is income or a resource. The first example of the store-branded card indicates that if an SSI recipient receives a gift card that has no restrictions and can be resold, it will be counted as income the month of receipt.

SI 00830.522 C1 Gift Card/Gift Certificates is Income

Example 1: Bernie receives an award settlement in the form of an Xmart gift card worth $3100. (See Awards, SI 00830.515.) There is no restriction on the use of the gift card in Xmart stores, nor is there any legally enforceable prohibition on its resale. Treat the gift card at its face value as unearned income in the month it is received, subject to the rules pertaining to income and income exclusions for SSI purposes. Any remaining value on the card is a resource beginning the month following the month the gift card was received, subject to the rules pertaining to resource and resource exclusions.

The second example that the POMS provides discusses the use of a Visa-branded gift card – a pre-paid card – with prohibitions against selling the card or redeeming it for cash. However, because the card can be used for food, the entire $200 card is treated as cash.

Example 2: Mrs. Garcia receives a $200 Visa gift card from a friend for use at any locations where Visa debit cards are accepted, including retail stores and online merchants. The gift card includes a prohibition against the beneficiary selling the card to another individual, applying the value as a payment to a store credit card account, or redeeming the card for cash. Thus, it is restricted on its use. However, it can be used to purchase food or shelter

items. We treat the Visa gift card as unearned income based on its value ($200) in the month that it is received, **subject to the rules pertaining to income and income exclusions for SSI purposes.** Any unspent balance remaining on the card is a resource beginning the month following the month the gift card was received, subject to the rules pertaining to resource and resource exclusions.

A third example given in this section illustrates the use of a gift card that cannot be redeemed for cash and cannot be used for food or shelter.

SI 00830.522 C2 Gift Card/Gift Certificate is Not Income
Mr. Blacksmith receives a $100 Office Warehouse gift certificate from a friend for use at any Office Warehouse store. The gift certificate is restricted for use to purchase only office supplies and has a legally enforceable prohibition on its resale. Since the beneficiary cannot use the gift certificate to purchase food or shelter, nor can he/she sell the gift certificate for cash, do not count the gift certificate as income and it does not meet the definition of a resource. (See SI 01110.100 Distinction Between Assets and Resources).

What Does Social Security Say about Debit Cards?

The POMS do not prohibit the use of debit cards as a means of distributing funds to individuals receiving SSI. In fact, there is very little guidance around debit cards at all, save for a few minor mentions of debit cards as they relate to food support programs, direct deposit information, and victims of Hurricane Katrina, and more substantively, as they relate to health flexible spending arrangements (FSAs). Health flexible spending arrangements (FSAs), also known as flexible spending accounts, are an employer-established benefit plan used to reimburse employees for qualified medical expenses. It is interesting for us to explore the guidelines for FSAs, as they clearly lay out a permissible use of debit cards to distribute funds. Though they are very different kinds of cards, there are several compelling analogies between how FSA funds are restricted and how funds loaded onto a Restricted Reloadable Card are restricted.

POMS SI 01120.230 B provides that health FSAs are not considered resources because employers restrict the use of FSA funds to pay for qualified expenses.

SI 01120.230 B Policy for health FSAs

For Supplemental Security Income (SSI) purposes, do not count health FSAs as resources because FSA funds are restricted to pay for qualified medical expenses. Employers ensure that health FSA funds are only used for qualified medical expenses. Individuals cannot use health FSA funds to pay for their own support and maintenance.

In POMS SI 01120.230 C2, we see that debit cards are one of three allowable ways to distribute FSA funds. Individuals are required to agree to proper use of the card and to save all receipts and documentation. Additionally, the card cannot be used to make purchases anywhere other than authorized merchants and services. If an unauthorized transaction is attempted, the card will be blocked.

SI 01120.230 C2 FSA distributions

For SSI purposes, health FSA distributions paid directly to the individual are not income. For more information on medical and social services, related cash and in-kind items, see SI 00815.050. For more information on cafeteria plans, see SI 00820.102.

Health FSA plans reimburse individuals for qualified medical expenses in three ways.

- Debit cards, credit cards, and stored-value cards

  Most FSA plans issue debit, credit, or stored-value cards to pay for qualified medical expenses. When individuals receive a card, they certify they will use the card for eligible medical care expenses for the individual, his or her spouse, and dependents. The issued card has the certification printed on the back. The individual also agrees to acquire and retain sufficient documentation for any expenses paid with the card, including invoices and receipts. Individuals can only use the card with merchants and service providers the employer authorizes. If the individual uses the card somewhere else or for another purpose other than a qualified medical expense, the merchant will reject the card or purchase. The card is automatically cancelled at termination of employment.

Applying these Guidelines to the Restricted Reloadable Card

When using a Restricted Reloadable Card, it is essential to both the trustee and the beneficiary to understand how income and resources affect SSI eligibility. As mentioned earlier, a critical challenge for the trustee of a special needs trust is how to provide assistance to the beneficiary without giving cash. For many years, trustees have utilized credit cards and gift cards in order to

make distributions. Yet the Restricted Reloadable Card is neither credit card nor gift card; it is more like a "prepaid Visa card," but one which can be customized to restrict or allow any type of purchase at the vendor level or spending category level.

What if a Third Party is the Cardholder?

It is not uncommon for a beneficiary of a special needs trust to have a family member, caregiver, or friend who provides a great deal of assistance to the beneficiary. This is what is commonly called a third-party situation. If the third party is the one to hold the Card, instead of the beneficiary, a special needs trustee will have no problem making a reimbursement to that individual for authorized purchases.

> **SI 01120.201 I.1.f.** Reimbursements to a third party
> Reimbursements made from the trust to a third party for funds expended on behalf of the trust beneficiary are not income. In addition, reimbursements from the trust to pay a credit card belonging to a third party for purchases made for the trust beneficiary are not income. Existing income and resource rules apply to items a trust beneficiary receives from a third party. If a trust beneficiary receives a non-cash item (other than food or shelter), it is in-kind income if the item would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt. If a trust beneficiary receives food or shelter, it is income in the form of in-kind support and maintenance (ISM).

The Restricted Reloadable Card may also have the advantage that it does not require the family member, caregiver or friend to use their own credit card (or their own credit) to make purchases for the trust beneficiary. It also allows the trustee to more directly manage or limit the use of the card, and to review card uses in real time.

Best Practices for Trustees using Cards

Trustees traditionally issue a check to a vendor and mail it out, and that might work well particularly when the payment is consistently the same amount and paid the same day each month. Payments for personal supplies (diapers, medical devices, clothing, etc.) might not be as easy to handle by this method. The Restricted Reloadable Card or Credit Card can be a good way to give the purchaser the ability to make approved purchases on their schedule – even after hours or electronically – and without real-time actions by the trustee.

As mentioned above, the trustee of a special needs trust often needs to facilitate payments to third parties, and the primary benefit of the trust may be to allow provision of those items not covered by the beneficiary's own resources or available public benefits. While the use of a Credit Card, Gift Card or Restricted Reloadable Card can be a useful tool to give some autonomy to the beneficiary or care giver, it is imperative that the trustee remain mindful of the basics of income and resources, and be able to show that the trustee is exercising the level of discretion required to ensure the beneficiary remains eligible for needs based benefits.

- *Never allow use of the trust's or the trustee's debit or credit card by the beneficiary–* Many trustees use a corporate or trust-specific credit card or debit card to pay vendors. In such cases, though, it is important not to let the trust beneficiary handle the trust credit or debit card directly; that may mean that a trustee or employee must physically go to – or at least deal directly with – a vendor for each transaction. The case *Elias v. Colvin*, Middle District of Pennsylvania, July 27, 2015, the trustee of a special needs trust became ill and the beneficiary took control of the debit card tied to her special needs trust directly. The result was that for the period of time she had access to the card, she was ineligible for SSI and Medicaid
- *Reimbursement of a beneficiary's credit card* or restricted reloadable debit card– A trust beneficiary who qualifies for an individual credit card (not a debit card) may have much greater autonomy and personal freedom. The trustee can pay the portion of the credit card bill for approved expenditures, though there may be serious time constraints in getting appropriate documentation and even credit card statements in time to make the payments. Even so, the trustee must review the expenditures that are made and not reimburse expenditures that are not allowed. Best practices include the beneficiary keeping all receipts and giving those receipts or at least a copy of the receipts to the trustee with the reimbursement requests and an explanation when necessary to the trustee to give the trustee the information necessary to approve or deny the expenditure.
- *Create a distribution plan prior to having the beneficiary or caregiver utilize a card –* Whether a trustee gives the beneficiary/care giver a gift card, reimburse a credit card, or a restricted reloadable credit card, it is best that the card user to run past the trustee what they intend to use the card for. This will help identify problems before they happen and reduce frustration. It will also help to show that the trustee is excising discretion and is not merely a bill payer.

Conclusion

A special needs trust by its nature is very paternalistic granting all discretion to the trustee and virtually none to the beneficiary. When appropriate, reimbursing a beneficiary's credit card, giving them gift cards, or utilizing a reloadable restricted debit card can give a beneficiary sole level of autonomy. Even so – each of these options has its hazards and should not be seen as a substitute for the trustee exercising their discretion. This is an area where the rules are changing and it is imperative the trustee retain knowledgeable counsel that keeps up with the changes in policy and case law. The key in the end is to stick to principals about what is income, what is a resource, and that the trustee even when authorizing a payment through a card maintains discretion over all expenditures.

Stephen W. Dale
Trustee - Golden State Pooled Trust

FLEMING & CURTI PLC
TUCSON • ARIZONA

AA A

HOME | ABOUT US | CONTACT US | SEARCH Subscribe

LegalIssues NEWSLETTER

Posts Tagged 'Elias v. Colvin'

Debit Card for Special Needs Trust Creates Eligibility Problem

AUGUST 3, 2015 VOLUME 22 NUMBER 28

As part of Pennsylvanian Sharon Edwards' (not her real name) divorce settlement, she and her husband agreed to establishment of a special needs trust to hold some of the marital property she would receive. With the trust in place, Sharon would continue to qualify for Supplemental Security Income (SSI), and she would still qualify for Medicaid coverage of her medical needs.

At least that was the plan. It relied on federal law that permits SSI recipients under age 65 to transfer assets to a self-settled special needs trust. This kind of trust must have some specific provisions, including:

- the trust can not be used for food and shelter costs (although that limitation is not absolute)
- the beneficiary can not receive cash or items that could be redeemed for cash
- the trust must pay out to the state Medicaid agency at the death of the beneficiary (at least to the extent of any Medicaid services the beneficiary has received)

That was how Sharon's trust was constructed. Her father was the initial trustee, and her daughter was the backup trustee if her father became unavailable. The trust terms required a payback to the Pennsylvania Medicaid agency upon Sharon's death. The terms of the trust prohibited the misuse of trust funds.

What went wrong? When Sharon's father became ill, Sharon took over a debit card on the trust's bank account. She used the card to pay doctor's bills, and to pay her monthly telephone, insurance and electric bills. There was some evidence that she used the card for other (and impermissible) purposes, but ultimately the result was not dependent on whether Sharon herself used the card for other kinds of things.

With online and electronic banking so widespread, debit cards and automatic bill payment arrangements are commonplace. They might seem to be a reasonable approach to handling special needs trusts, too — but they are a dangerous option. The result of Sharon's use of her trust's debit card: the Social Security Administration ruled that she had improperly received SSI for over two years, and that she owed the agency $18,137.

Sharon appealed the Social Security Administration's ruling, but the Federal District Court upheld the agency. *Elias v. Colvin*, Middle District of Pennsylvania, July 27, 2015. The decision is unsurprising, but it does give us a chance to examine its different elements.

What, precisely, did Sharon and her trust do wrong? Was it the very existence of the debit card, or the specific uses of the card, or the fact that Sharon held it for over two years? Could the problem be solved by tearing up the card, or returning it to the trustee, and stopping the challenged payments? Let's review some of the principles.

Subjects
ALTCS Alzheimer's Arizona Court of Appeals conservatorship dementia elder abuse estate planning Estate Tax fraud guardianship income tax joint tenancy living trusts living wills long-term care long-term care insurance Medicaid Medicare Nursing Homes POA Probate probate court retirement revocable living trust Social Security Special Needs Trusts Trust administration Trusts undue influence Wills
More Subjects...

Latest Issue
Not Every Cognitively-Impaired Senior Needs a Conservator

Subscribe
Subscribe for e-mail updates

Archives
View the Newsletter Archives

Categories
Commentary (8)
Newsletter (852)
Office News (1)
Reviews (18)

Authors
Amy Matheson (2)
Ann Kling (1)
Christina Nevins (1)
Elizabeth Allen (1)
Elizabeth Rollings (3)
Eric Severson (1)
Frederick Rieck (1)
Gary Mansfield (1)
Gerardo Olivarez (1)
Heather Barron (1)
Javier Centonzio (1)
Jessica Fisher (1)
Kathy Kreuzer (1)
Klark Perez (1)
Linda Greenberg (1)
Nova Muhlenberg Bonnett (1)
Pamela Zimba (1)
Robert Fleming (2)
Robert Fleming (855)
Robert McClelland (1)

Generally speaking, Sharon's trustee could have directly paid her doctor's bills (though most should have been covered by Medicaid, of course), and her telephone bills. Neither of those payments would have been an issue, even if the trust covered all the costs, and/or made monthly payments.

Sharon used the trust to pay for insurance, as well. It is unclear from the reported court decision whether that was auto insurance, health insurance, life insurance or homeowners (or renters) insurance. If her insurance bills were for her automobile, the trustee could have paid those bills without any problem. If health insurance, the same answer applies — except, again, it would be unclear why health insurance was required if she was covered by Medicaid. Life insurance payments would have been permissible, though if Sharon owned a life insurance policy it might have resulted in a loss of SSI and possibly Medicaid coverage. Homeowner's insurance would be fine, provided that it was not required by the bank holding a mortgage on her home (that would make the homeowner's insurance look like a housing cost).

Finally, Sharon's use of the debit card resulted in the trust paying for her electricity. If the trustee had written checks directly to the electric company, that might have been permissible — but it might not, depending on state Medicaid rules and the language of the trust itself. If permissible, it would have resulted in a reduction in her SSI payments.

On balance, if the trustee had paid for everything Sharon admitted using her debit card for, the result should have been (at worst) a slight reduction in her SSI. So why was she found to be ineligible for SSI altogether?

The primary problem for Sharon was that she effectively had access to the entire trust. Even though she did not, she could have gone to the ATM and withdrawn every penny in the trust's bank account. That fact made the trust an available resource, and its income counted as income to Sharon.

Does that mean that no special needs trust should ever have a debit card, or that no special needs trust beneficiary can ever have access to a debit card? No, it does not — but there are limitations on the use of debit cards that must be observed.

Sharon's trustee could have had a debit card and arranged for payment of her bills (except, perhaps, for the electricity bill) using the debit card. That would not have caused problems for Sharon's SSI eligibility.

Sharon herself could have had a debit card, provided that it did not permit her to withdraw funds from the trust's main account. Her trustee could have set up a small account with Sharon's SSI money and let her have a debit card on that account. Or her trustee could have arranged for a specialized debit card that could not be used for cash withdrawals or purchase of food or shelter items — one such card is available and marketed by True Link Financial, and we have used their services with excellent results.

It's also worth noting that Sharon was not given a chance to "fix" the problem by handing back her debit card. For a little more than two years, she had access to her special needs trust's bank account — and that meant she was ineligible for SSI during that period. It did not mean that her trust was defective, or that she could never get on SSI again, but it did mean that simply giving back the card did not reverse the $18, 137 overpayment notice.

Management of special needs trusts is very complicated and often confusing. We strongly endorse the Special Needs Alliance's "Handbook for Trustees," a very helpful resource for trustees and those interested in understanding how special needs trusts work. Best of all, the "Handbook" is priced right: it's free.

Paying for Purchases: The Method Does Matter

Presenter: Stephen W. Dale, Esq., LL.M., Trustee
The Golden State Pooled Trust

This presentation is meant for educational purposes only and is not meant as a substitution for legal counsel

The Challenge

- Trustees of special needs trusts often struggle with how to provide for beneficiaries' needs without giving beneficiaries cash.
- Sometimes a trustee will arrange direct payment for services and items the SSI beneficiary is allowed to receive, but this can be burdensome for all parties involved.
- It also takes away autonomy from the beneficiary and restricts the beneficiary's choices.

Using Cards

- A frequently used alternative is the use of traditional gift cards,
  - there can be major limitations to this method.
- Alternatively, beneficiaries can secure a credit card and request that the trustee pay the credit card statement or reimburse the beneficiaries for those items that are allowed or will not cause an unexpected reduction in benefits.
  - It can be very difficult for the trustee to control what purchases are made with the card, as well as the credit limit of the card.

Debit Cards

- A traditional debit card is viewed by the Social Security Administration as an equivalent to cash.
  - If a beneficiary makes purchases using his or her traditional debit card and the trustee reimburses the traditional debit card account, the result will be a dollar for dollar reduction in SSI benefits.
- A new option is the reloadable and restricted debit card

SSI INCOME AND RESOURCES BASICS

A Primer on Public Benefits

	Needs Based Benefits	Benefits based on Entitlement
Cash Assistance	Supplemental Security Income	SSD (Social Security Disability) CDB (Childhood Disability Benefits)
Medical Assistance	Medi-Cal	Medicare

Supplemental Security Income

SSI is a federal program, administered by the states, and based on sufficient evidence of disability and financial need

Supplemental Security Income

SSI is intended to pay for the beneficiary's food, and shelter and nothing more.

Supplemental Security Income

The SSI rate as of January 2015 in California is $889.40 a month

3 Part SSI Test

- Meet Definition of Disability
- Income test determines how much is received.
- Resource test determines eligibility

Types of SSI Income

Unearned Income	Earned Income	In-Kind Support & Maintenance
Includes cash gifts, payments from annuities and pensions, alimony & support payments, dividends, interest, rents, awards and payment from other benefit programs.	Consists of wages, royalties, net earnings from self-employment, and any honoraria received for services rendered.	Actual receipt of food or shelter, or something that can be used to get one of these.
Reduces benefits dollar for dollar after the first $20	Reduces benefits one dollar for every two dollars after the first $65 earned monthly	Reduces benefits dollar for dollar up to a maximum of $264.34 in 2015

10 Items = Food & Shelter

- Food
- Mortgage (including property insurance)
- Real property taxes (less any tax rebate/credit)
- Rent
- Heating fuel
- Gas
- Electricity
- Water
- Sewer
- Garbage removal

3 Part SSI Test

- Meet Definition of Disability
- Income test determines how much is received.
- Resource test determines eligibility

Basics of SSI Eligibility Resources

- Anything that can be converted to cash for support is a resource.
- If resources exceed $2,000 on the first day of a calendar month, the beneficiary's public benefits will be lost until resources are reduced.

WHAT DOES SOCIAL SECURITY SAY ABOUT CREDIT CARDS, GIFT CARDS AND DEBIT CARDS?

15

What Does Social Security Say About Credit Cards?

- **What Does Social Security Say About Credit Cards?**
- The instructions used by the Social Security Administration to inform eligibility workers on the use of credit cards in the SSI recipient's own name is found in POMS SI 01120.201 I.1.d:

What Does Social Security Say About Credit Cards?

- SI 01120.201 I.1.d. Disbursements for credit card bills
- If a trust pays a credit card bill for the trust beneficiary, whether the individual receives income depends on what was on the bill. If the trust pays for food or shelter items on the bill, the individual will generally be charged with in-kind support and maintenance up to the PMV. If the bill includes non-food, non-shelter items, the individual usually does not receive income as the result of the payment unless the item received would not be a totally or partially excluded non-liquid resource the following month.

What Does Social Security Say About Credit Cards?

- For example, if the credit card bill includes restaurant charges, payment of those charges results in ISM. If the bill also includes purchase of clothing, payment for the clothing is not income.

What Does Social Security Say About Credit Cards?

- If a trust pays a credit card company directly for non-food or non-shelter items, this generally does not count as income for the individual.
- If a credit card statement includes charges for food items, the trust would need to exclude those items from payment or else the beneficiary would be subject to an ISM reduction.

What Does Social Security Say About Credit Cards?

- SI 01120.201 I.1.d. Disbursements for credit card bills
- If a trust pays a credit card bill for the trust beneficiary, whether the individual receives income depends on what was on the bill. **If the trust pays for food or shelter items on the bill, the individual will generally be charged with in-kind support and maintenance up to the PMV.** If the bill includes non-food, non-shelter items, the individual usually does not receive income as the result of the payment unless the item received would not be a totally or partially excluded non-liquid resource the following month.
- **For example, if the credit card bill includes restaurant charges, payment of those charges results in ISM. If the bill also includes purchase of clothing, payment for the clothing is not income.**

What Does Social Security Say About Gift Cards?

- POMS SI 01120.201 I.1.e states the general rule that gift cards that can be used for food or shelter – or exchanged for cash – will be counted as income the month of receipt, and a resource the following month if a balance remains.

What Does Social Security Say About Gift Cards?

- SI 01120.201 I.1.e. Disbursements for gift cards and gift certificates
- Gift cards and gift certificates are considered cash equivalents. If a gift card or certificate can be used to buy food or shelter (e.g., restaurant, grocery store or VISA gift card), it is unearned income in the month of receipt. Any unspent balance on the gift card or certificate is a resource beginning the month after the month of receipt. If the store does not sell food or shelter items (e.g., bookstore or electronics store), but the card does not have a legally enforceable prohibition on the individual selling the card for cash, then it is still unearned income (see SI 00830.522).

What Does Social Security Say About Gift Cards?

- Gift cards, and gift certificates, are discussed in more detail at POMS SI 00830.522.
- SI 00830.522 A2 Gift Cards/Gift Certificates Not Income

  The value of a gift card/gift certificate is not income in the month it is received if the gift card/certificate:
  - Cannot be used to purchase food or shelter; and
  - Cannot be resold.

What Does Social Security Say About Gift Cards?

- In addition, if the individual does not have the right, authority, or power to convert or sell the gift card/certificate for cash, and it cannot be used to purchase food or shelter, then the gift card/certificate would not meet the definition of a resource in SI 01110.100.
- NOTE: A gift card/certificate that is **restricted on its use,** and is legally prohibited from resale, must be evaluated (case by case) based on the restrictions and or prohibitions for determining income for SSI purposes.

What Does Social Security Say About Gift Cards?

- The restriction on use of a gift card/certificate can be legal, (imposed by the card issuer), or practical, (the store where the card must be redeemed does not sell food or shelter items).

Examples of using Gift Cards in the POMS

- A very helpful part of these POMS is that they contain several examples to illustrate the basic concept of when a gift card is income or a resource.
- The first example of the store-branded card indicates that if an SSI recipient receives a gift card that has no restrictions and can be resold, it will be counted as income the month of receipt.

Examples of using Gift Cards in the POMS

- SI 00830.522 C1 Gift Card/Gift Certificates is Income
- Example 1: Bernie receives an award settlement in the form of a Xmart gift card worth $3100. (See Awards, SI 00830.515.) There is no restriction on the use of the gift card in Xmart stores, nor is there any legally enforceable prohibition on its resale. Treat the gift card at its face value as unearned income in the month it is received, subject to the rules pertaining to income and income exclusions for SSI purposes. Any remaining value on the card is a resource beginning the month following the month the gift card was received, subject to the rules pertaining to resource and resource exclusions.

Examples of using Gift Cards in the POMS

- The second example that the POMS provides discusses the use of a Visa-branded gift card – a pre-paid card – with prohibitions against selling the card or redeeming it for cash. However, because the card can be used for food, the entire $200 card is treated as cash.

Examples of using Gift Cards in the POMS

Example 2: Mrs. Garcia receives a $200 Visa gift card from a friend for use at any locations where Visa debit cards are accepted, including retail stores and online merchants. The gift card includes a prohibition against the beneficiary selling the card to another individual, applying the value as a payment to a store credit card account, or redeeming the card for cash. Thus, it is restricted on its use. However, it can be used to purchase food or shelter items. We treat the Visa gift card as unearned income based on its value ($200) in the month that it is received, **subject to the rules pertaining to income and income exclusions for SSI purposes.** Any unspent balance remaining on the card is a resource beginning the month following the month the gift card was received, subject to the rules pertaining to resource and resource exclusions.

Examples of using Gift Cards in the POMS

- A third example given in this section illustrates the use of a gift card that cannot be redeemed for cash and cannot be used for food or shelter.

Examples of using Gift Cards in the POMS

- SI 00830.522 C2 Gift Card/Gift Certificate is Not Income
- Mr. Blacksmith receives a $100 Office Warehouse gift certificate from a friend for use at any Office Warehouse store. The gift certificate is restricted for use to purchase only office supplies and has a legally enforceable prohibition on its resale. Since the beneficiary cannot use the gift certificate to purchase food or shelter, nor can he/she sell the gift certificate for cash, do not count the gift certificate as income and it does not meet the definition of a resource. (See SI 01110.100 Distinction Between Assets and Resources).

What Does Social Security Say about Debit Cards?

- The POMS do not prohibit the use of debit cards as a means of distributing funds to individuals receiving SSI.
- There is little guidance around debit cards at all, save for a few minor mentions of debit cards as they relate to food support programs, direct deposit information, and victims of Hurricane Katrina, and more substantively, as they relate to health flexible spending arrangements (FSAs).

What Does SSA say about Flexible Spending Accounts (FSAs)?

- Health flexible spending arrangements (FSAs), also known as flexible spending accounts, are an employer-established benefit plan used to reimburse employees for qualified medical expenses.
- SSA policies on FSAs lay out a permissible use of debit cards to distribute funds.
- Though they are very different kinds of cards, there are several analogies between how FSA funds are restricted and how funds loaded onto a Restricted Reloadable Card are restricted.

What Does SSA say about Flexible Spending Accounts (FSAs)?

- POMS SI 01120.230 B provides that health FSAs are not considered resources because employers restrict the use of FSA funds to pay for qualified expenses.

The Golden State Pooled Trust
34

What Does SSA say about Flexible Spending Accounts (FSAs)?

- SI 01120.230 B Policy for health FSAs
- For Supplemental Security Income (SSI) purposes, do not count health FSAs as resources because FSA funds are restricted to pay for qualified medical expenses.
- Employers ensure that health FSA funds are only used for qualified medical expenses. Individuals cannot use health FSA funds to pay for their own support and maintenance.

35

What Does SSA say about Flexible Spending Accounts (FSAs)?

- In POMS SI 01120.230 C2, we see that debit cards are one of three allowable ways to distribute FSA funds.
  - Individuals are required to agree to proper use of the card and to save all receipts and documentation.
  - The card cannot be used to make purchases anywhere other than authorized merchants and services.
  - If an unauthorized transaction is attempted, the card will be blocked.

36

Policy for health FSAs

- SI 01120.230 C2 FSA distributions
- For SSI purposes, health FSA distributions paid directly to the individual are not income. For more information on medical and social services, related cash and in-kind items, see SI 00815.050. For more information on cafeteria plans, see SI 00820.102.
  Health FSA plans reimburse individuals for qualified medical expenses in three ways.

The Golden State Pooled Trust
www.gspt.org · (877) 336 3056
info@gspt.org

37

What Does SSA say about Flexible Spending Accounts (FSAs)?

- Most FSA plans issue debit, credit, or stored-value cards to pay for qualified medical expenses.
- When individuals receive a card, they certify they will use the card for eligible medical care expenses for the individual, his or her spouse, and dependents.
- The issued card has the certification printed on the back. The individual also agrees to acquire and retain sufficient documentation for any expenses paid with the card, including invoices and receipts.

The Golden State Pooled Trust
www.gspt.org · (877) 336 3056
info@gspt.org

38

What Does SSA say about Flexible Spending Accounts (FSAs)?

- Individuals can only use the card with merchants and service providers the employer authorizes.
- If the individual uses the card somewhere else or for another purpose other than a qualified medical expense, the merchant will reject the card or purchase.
- The card is automatically cancelled at termination of employment.

The Golden State Pooled Trust
www.gspt.org · (877) 336 3056
info@gspt.org

39

What if a Third Party is the Cardholder?

- It is not uncommon for a beneficiary of a special needs trust to have a family member, caregiver, or friend who provides a great deal of assistance to the beneficiary.
- If the third party is the one to hold the Card, instead of the beneficiary, a special needs trustee will have little problem making a reimbursement to that individual for authorized purchases.

What if a Third Party is the Cardholder?

- SI 01120.201 I.1.f. Reimbursements to a third party
- Reimbursements made from the trust to a third party for funds expended on behalf of the trust beneficiary are not income. In addition, reimbursements from the trust to pay a credit card belonging to a third party for purchases made for the trust beneficiary are not income.
- Existing income and resource rules apply to items a trust beneficiary receives from a third party. If a trust beneficiary receives a non-cash item (other than food or shelter), it is in-kind income if the item would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt. If a trust beneficiary receives food or shelter, it is income in the form of in-kind support and maintenance (ISM).

Best Practices for Trustees using Cards

- Trustees traditionally issue a check to a vendor and mail it out, and that might work well particularly when the payment is consistently the same amount and paid the same day each month.
- Payments for personal supplies (diapers, medical devices, clothing, etc.) might not be as easy to handle by this method.
- The Restricted Reloadable Card or Credit Card can be a good way to give the purchaser the ability to make approved purchases on their schedule – even after hours or electronically – and without real-time actions by the trustee.

Best Practices for Trustees using Cards

- While the use of a Credit Card, Gift Card or Restricted Reloadable Card can be a useful tool to give some autonomy to the beneficiary or care giver, it is imperative that the trustee remain mindful of
  - the basics of income and resources, and
  - be able to show that the trustee is exercising the level of discretion required to ensure the beneficiary remains eligible for needs based benefits.

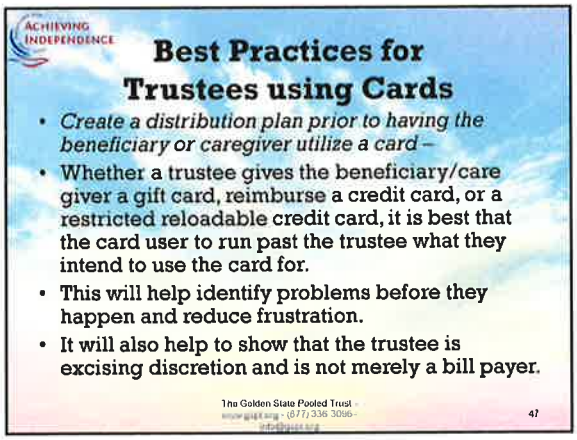
Best Practices for Trustees using Cards

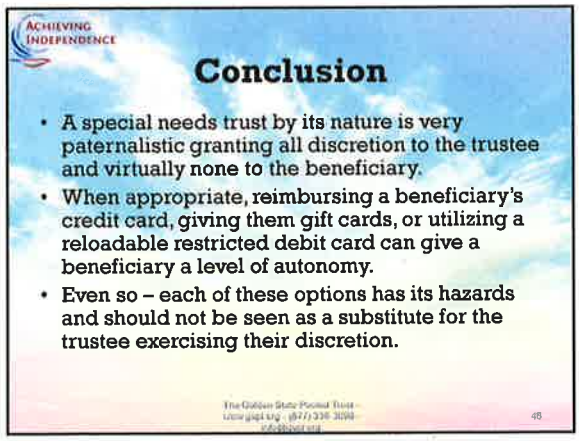
- *Never allow use of the trust's or the trustee's debit or credit card by the beneficiary–*
- Many trustees use a corporate or trust-specific credit card or debit card to pay vendors.
- It is important not to let the trust beneficiary handle the trust credit or debit card directly.
- The case *Elias v. Colvin*, Middle District of Pennsylvania, July 27, 2015, the trustee of a special needs trust became ill and the beneficiary took control of the debit card tied to her special needs trust directly.
- The result was that for the period of time she had access to the card, she was ineligible for SSI and Medicaid

Best Practices for Trustees using Cards

- *Reimbursement of a beneficiary's credit card* or restricted reloadable debit card–
- A trust beneficiary who qualifies for an individual credit card (not a debit card) may have much greater autonomy and personal freedom.
- The trustee can pay the portion of the credit card bill for approved expenditures, though there may be serious time constraints in getting appropriate documentation and even credit card statements in time to make the payments.


ACHIEVING INDEPENDENCE
Best Practices for Trustees using Cards
• The trustee must review the expenditures that are made and not reimburse expenditures that are not allowed.
• Best practices include the beneficiary keeping all receipts and giving those receipts or at least a copy of the receipts to the trustee with the reimbursement requests and an explanation when necessary to the trustee to give the trustee the information necessary to approve or deny the expenditure.
The Golden State Pooled Trust
47


ACHIEVING INDEPENDENCE
Best Practices for Trustees using Cards
• *Create a distribution plan prior to having the beneficiary or caregiver utilize a card –*
• Whether a trustee gives the beneficiary/care giver a gift card, reimburse a credit card, or a restricted reloadable credit card, it is best that the card user to run past the trustee what they intend to use the card for.
• This will help identify problems before they happen and reduce frustration.
• It will also help to show that the trustee is excising discretion and is not merely a bill payer.
The Golden State Pooled Trust
47


ACHIEVING INDEPENDENCE
Conclusion
• A special needs trust by its nature is very paternalistic granting all discretion to the trustee and virtually none to the beneficiary.
• When appropriate, reimbursing a beneficiary's credit card, giving them gift cards, or utilizing a reloadable restricted debit card can give a beneficiary a level of autonomy.
• Even so – each of these options has its hazards and should not be seen as a substitute for the trustee exercising their discretion.
46

Conclusion

- This is an area where the rules are changing and it is imperative the trustee retain knowledgeable counsel that keeps up with the changes in policy and case law.
- The key in the end is to stick to principals about what is income, what is a resource, and that the trustee even when authorizing a payment through a card maintains discretion over all expenditures.

Paying for Purchases: The Method Does Matter

Presenter: Stephen W. Dale, Esq., LL.M., Trustee
The Golden State Pooled Trust

This presentation is meant for educational purposes only and is not meant as a substitution for legal counsel