2015
Special
Needs Trusts

Friday, October 16, 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

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Special Needs Trusts National Conference
Friday, Oct. 16, 2015

8:50-9:30 a.m.
The Update from Social Security
Ken Brown, Team Leader Office of Income Security Programs and Eric Skidmore, Director, Office of SSI and Program Integrity Policy Social Security Administration (by video conference)

9:30-10:15 a.m.
The SSA Trust Review Process for Your SNT
On April 28, 2014, SSA implemented a process to review all determinations made in field offices on trusts submitted for SSI claims and post-eligibility actions. Representatives will share information about the Regional Trust Review Teams, feedback received from the reviews completed by the Office of Quality Review, and results of regional communication with local trust advocates.
Ila Barnes-Frazier, National Project Manager for SSI Trust Review Process, SSA Atlanta Region and Janet Hobbs, Assistant Regional Commissioner for Management and Operations Support, SSA Atlanta Region (by video conference)

10:15-10:45 a.m.
Did You Ever Wonder What to Do If…?
Taking questions from the audience, this panel of experienced special needs planners will share their expertise and practice tips on staying abreast of the SSA guidance, POMS, and state agency requirements.
Neal A. Winston, Moderator

11:00-11:50 a.m.
ABLE Across the Board: Incorporating ABLE into Your Practice
The session will review the ABLE Act including an analysis of the tax and public benefit provisions of the new law. Planning opportunities and pitfalls will be discussed along with recommended drafting tips to use in your practice.
Bradley J. Frigon

1:00-1:55 p.m.
Breakout Session 1

- **Challenge for Equity: Divorcing Parents and the Child With Special Needs**
  This session will examine the varying laws among the states and emerging trends regarding parents' legal responsibility to provide child support for an adult child with a disability, and ways of determining the appropriate amount. The effects of SSI and SSDI on parents' obligations to make payments for the child and the equitable concept of "chalimony" will be explored in this interactive program.
  Katherine Barr
- **Intellectual and Developmental Disabilities and Dementia**
  This presentation will describe the common dementias and the cognitive losses caused by each dementia. The presenter will discuss how these losses affect the behaviors and capacities of a person with intellectual and developmental disabilities as well as strategies to minimize behaviors and maximize their quality of life.
  Eileen Poiley, M.S. Director of Education University of South Florida Byrd Alzheimer's Institute

- **SSI and SSDI Eligibility for Non-Citizens**
  This session will describe both the complex and restrictive SSI immigration eligibility and the simpler immigration eligibility criteria for SSDI.
  Linda Landry

2:05-3:00 p.m.
Breakout Session 2

- **Estate and Long Term Care Planning for Adults Living with Disabilities**
  Most individuals living with disabilities do not need a guardian or conservator – they need good planning to ensure as much autonomy as possible while at the same time preserving public benefits. In this session we will cover the roles of representative payees and agents appointed under a power of attorney and health care directive; how changes in income (SSI, DAC, and RSDI, employment) over one's life may affect the long-term care plan (e.g., after the retirement and/or death of a parent,); how inherited IRA's may affect the plan, and how other planning tools such as ABLE accounts or first party special needs trusts may be utilized.
  Laurie Hanson
- **For Better or for Worse; In Sickness and In Health – Divorce and the Spouse With Special Needs**
  A former spouse or "soon-to-be former spouse who is receiving or will now be eligible to receive public benefits may find those benefits (or eligibility) threatened by a spousal support or alimony award. This program will explore options available in the SNT world to shelter spousal support/alimony payments using SNTs.
  Stuart D. Zimring
- **Strategies For Maintaining Public Housing and Section 8 Eligibility For People with Special Needs Trusts**
  Eligibility for Section 8 vouchers and subsidized public housing depends on a family's annual income. Some Special Needs Trust distributions can increase family income - reducing benefits or rendering a person ineligible for federal assistance. This session will examine strategies for complying with HUD regulations, maintaining benefits, and responding to reviews of trusts expenditures by Public Housing Agencies. We will also discuss techniques to exclude trust expenditures from income by requesting reasonable accommodations under the ADA and the Fair Housing Act.
  J. Whitfield Larrabee
- **How to Lay the Groundwork to Appeal to a State Court the Specific Issue of Funding a (d)(4)(C) Pooled Trust Account by Someone over 64**
  This session will review the process for challenging state or federal trusts rules and how to lay the groundwork at the trial for a successful challenge.
  Ron M. Landsman

3:15-4:05 p.m.
Breakout Session 3

- **Work and Beneficiaries: What are the SSI and SSDI Work Incentives?**
  This session will explain that the effect of earnings on SSI recipients is as to financial eligibility and show how to calculate countable earnings. The session will also discuss the SSDI work incentives, the trial work period and the extended period of eligibility, and explain how and when they are used and when work results in termination of entitlement. Finally, the session will include a description of the eligibility process and eligibility criteria for expedited reinstatement, which is available to some who have lost entitlement to SSI or SSDI due to work.
  Linda Landry
- **Marketing Your Special Needs Planning Skills to Others; Expanding Your Practice Focus**
  This session will address ways to expand your special needs practice by marketing to, networking and building relationships with wealth management professionals, personal injury and family law attorneys and other allied professionals.
  Shirley B. Whitenack
- **Getting Properly and Legally Paid when Establishing or Defending a Special Needs Trust that Affects SSI Disability Benefits**
  Refusing to file a notice of appearance and thus not "representing the client before the agency" is no safeguard from prosecution, as United States of America vs. Lewis shows. This presentation reviews the draconian federal statute designed to protect clients from attorneys, including which individual or entity can agree pay you without advance SSA fee approval when you are creating an SNT to preserve SSI benefits. Review of the statute, case law, federal regulations, SSA Rulings, and POMS define when you can take a fee, how to get a fee approved by SSA, and how to appeal the denial of a fee petition. Failure to follow the rules can result in disbarment, imprison and fines, as Mr. Lewis's federal criminal conviction upheld on appeal shows.
  David J. Lillesand
- **Strategies For Maintaining Public Housing and Section 8 Eligibility For People with Special Needs Trusts**
  Eligibility for Section 8 vouchers and subsidized public housing depends on a family's annual income. Some Special Needs Trust distributions can increase family income - reducing benefits or rendering a person ineligible for federal assistance. This session will examine strategies for complying with HUD regulations, maintaining benefits, and responding to reviews of trusts expenditures by Public Housing Agencies. We will also discuss techniques to exclude trust expenditures from income by requesting reasonable accommodations under the ADA and the Fair Housing Act.
  J. Whitfield Larrabee

4:15-5:00 p.m.
The Update: Cases, Rules, Statutes and any Other New Developments
Robert B. Fleming

2015 Special Needs Trusts National Conference

Special Needs Trusts

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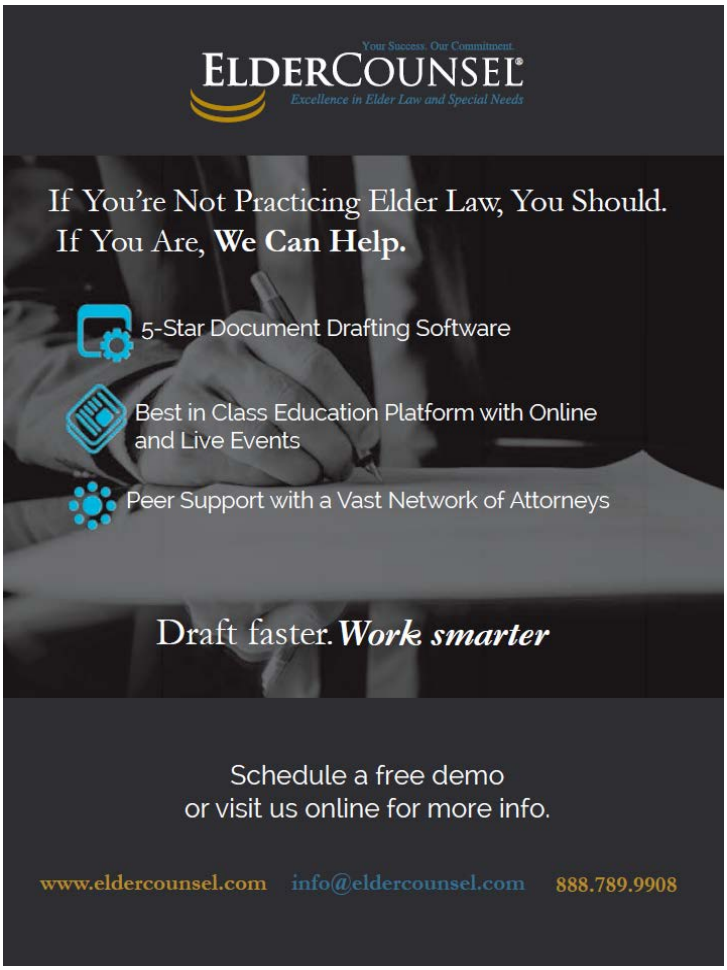

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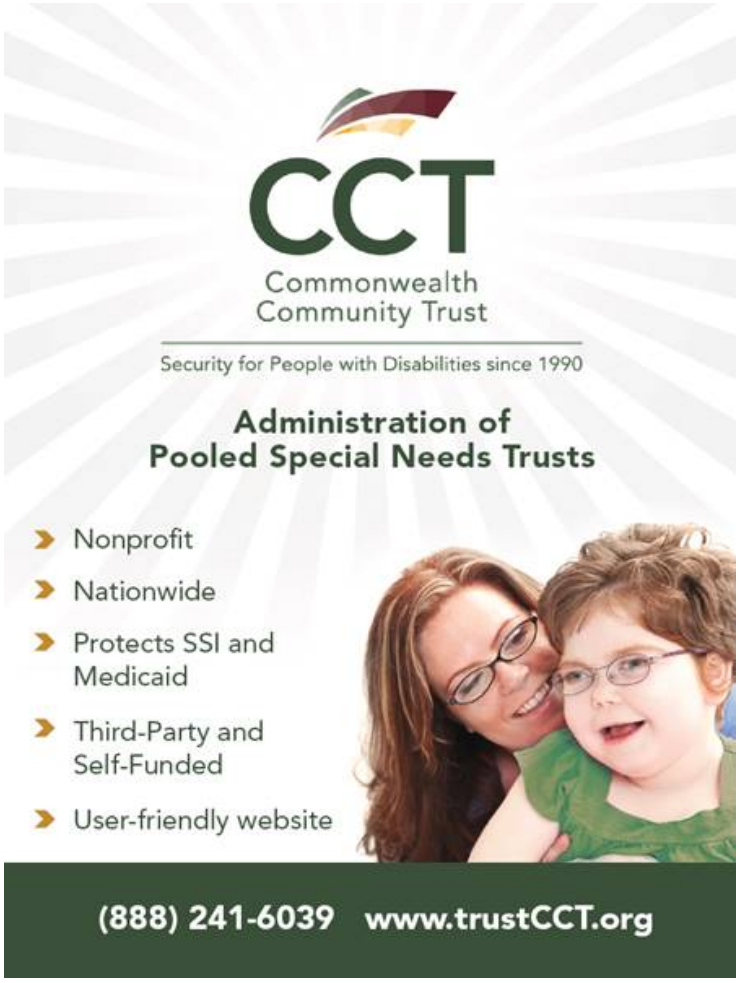

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2015 SPECIAL NEEDS TRUSTS NATIONAL CONFERENCE

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Special Needs Trusts National Conference

Friday, October 16, 2015
9:30 A.M. – 10:15 A.M.

The SSA Trust Review Process for Your SNT

Presenters:
Ila Barnes-Frazier
National Project Manager for SSI Trust Review Process
Social Security Administration
Atlanta Region
and
Janet Hobbs
Assistant Regional Commissioner
Management and Operations Support
Social Security Administration
Atlanta Region

- PowerPoint

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REGIONAL CENTRALIZATION OF SSI TRUST REVIEWS

Stetson University College of Law
2015 Special Needs Trust Conference

Social Security Administration
October 16, 2015

REGIONAL CENTRALIZATION OF SSI TRUST REVIEWS

- Process developed to address concerns raised by Advocates
- Atlanta, Philadelphia, and Seattle regions developed plan to centralize trust reviews
- Process to increase accuracy and consistency of trust determinations

REGIONAL CENTRALIZATION OF SSI TRUST REVIEWS

- Implemented April 28, 2014
- Requires review of **ALL** trust determinations submitted for SSI claims and post-eligibility actions
- Trust determinations reviewed before adjudication of action

REGIONAL CENTRALIZATION OF SSI TRUST REVIEWS
REGIONAL TRUST REVIEW TEAMS (RTRT)

- RTRT in each region comprised of field office technicians with expertise in trust policy; review and evaluate trust determinations
- Regional Trust Lead (RTL) on each RTRT
- RTL is regional subject mater expert for trust workload in regional office
- RTLs review all pooled trusts, provide guidance to field office technicians, monitor workload for region

REGIONAL CENTRALIZATION OF SSI TRUST REVIEWS
REGIONAL TRUST REVIEW TEAMS/TOOLS

- **167** trust reviewers across nation
- **14** Regional Trust Leads
- Reviews completed in **2-5 days**
- SSI Trust Monitoring System (SSITMS) – communication tool to transfer information between field office and RTRT
- SSITMS houses trust precedents, captures management information, policy resources

REGIONAL CENTRALIZATION OF SSI TRUST REVIEWS
COMMUNICATION STRATEGY

- Monthly RTL conference calls
  - Discuss issues/concerns
  - Share tips and best practices
- Quarterly newsletter
  - Audience - field office technicians
  - Provide policy information/clarification based on feedback from RTRT members
  - Policy application reminders
  - Proper use of SSITMS

REGIONAL CENTRALIZATION OF SSI TRUST REVIEWS
MANAGEMENT INFORMATION

- Over 9000 reviews submitted for review
- Average 500 per month
- Trust types – pooled, special needs, third party, Crummey, IGRA
- RTLs review ALL pooled trusts
- Work with trust administrator for clarity
- Develop precedent and house on SSITMS

REGIONAL CENTRALIZATION OF SSI TRUST REVIEWS
QUALITY REVIEW PROCESS

- Office of Quality Review performed end-of-line reviews (after adjudication)
- 396 cases from July – December 2014
- Determinations largely accurate
- 94.4% dollar-accuracy rate
- Process working as intended; achieving desired results

REGIONAL CENTRALIZATION OF SSI TRUST REVIEWS
ADVOCATE COMMUNITY

- Quarterly meetings with Headquarters
- Advocates pleased with success of process; more open communication
- Work with Office of General Counsel on court created trusts

REGIONAL CENTRALIZATION OF SSI TRUST REVIEWS CONCERNS

- Overpayment resulting from subsequent review of trust determination
- RTRTs remind field office technicians to accurately apply overpayment policy; provide waiver of repayment when appropriate

REGIONAL CENTRALIZATION OF SSI TRUST REVIEWS

QUESTIONS?

Special Needs Trusts National Conference

Friday, October 16, 2015
11:00 A.M. – 11:50 A.M.

ABLE Across the Board: Incorporating ABLE into Your Practice

Presenter:
Bradley J. Frigon
Attorney at law
Law Offices of Bradley J. Frigon
Englewood, CO

- Materials
- Attachment 1
- PowerPoint

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ABLE Across the Board: Incorporating ABLE into Your Practice[1]

The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (ABLE Act) was enacted on December 19, 2014, as part of The Tax Increase Prevention Act of 2014.[2] The ABLE Act creates a new section 529A of the Internal Revenue Code (Code) that permits a state (or a state agency or instrumentality) to establish and maintain a new type of tax-advantaged savings program, a qualified ABLE program, under which contributions may be made to an account (an ABLE account) that is established for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account who is a resident of that state and who is disabled (as defined in section 529A).

If a state does not establish and maintain its own qualified ABLE program, it may enter into a contract with another state in order to provide its residents with access to a qualified ABLE program. The statute directs the Secretary of the Treasury or his designee to issue regulations or other guidance to implement section 529A. ABLE savings accounts under section 529A are modeled after section 529 college savings accounts, but, unlike those accounts, ABLE savings accounts may be used to save for many expenses related to an individual's disability, without disqualifying the individual for certain means tested federal benefits.

The ABLE Act Basics

Eligible individuals must be severely disabled prior to age 26, based on a marked and severe functional limitation or receipt of benefits under the SSI or Disability Insurance (DI) programs.[3]

- 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.[4]

Or

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[1] This article was adapted from materials generously provided by Stephen W. Dale.
[2] P.L. 113-295
[33] 529A(e)
[4] 529A(e)(1)(A)(1)

- 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.[5]

If the ABLE account beneficiary qualifies because of certification, ABLE eligibility cannot be used to secure supplemental security income (SSI) or Medicaid.[6]

Other key features of the Act:

• Contributions into an ABLE account can be made by any person;

• Contributions are **not** tax deductible;

• Income earned by the ABLE account is **not** taxable income to the beneficiary;

• The earnings on distributions from an ABLE account are excluded from income only to the extent total distributions do not exceed the qualified disability expenses of the designated beneficiary. In other words, expenditures for non-qualified purposes will be penalized.

Individuals are limited to one ABLE account, and total annual contributions by all individuals to any one account are limited by the gift tax annual exclusion amount.[7] A contribution to an ABLE account by a third party is treated as a gift of a present interest an eligible for the gift tax annual exclusion.[8] Aggregate contributions to an ABLE account are subject to an overall limit matching the State's limit for Section 529 accounts.[9]

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[5] 529A(e)(1)(A)(2)
[6] 529A(e)(2)(B)
[7] $14,000 in 2015
[8] 529A(c)(2)(A)(i)
[9] See Savingforcollege.com for a list of state contributions limitations.

If the beneficiary is receiving Supplemental Security Income (SSI) benefits, when the assets in the account total $100,000, any monthly SSI benefits are placed in suspension. If the assets in the ABLE Account fall below $100,000, the SSI benefit suspension ceases and the recipient's SSI benefit resumes. The beneficiary will not be required to reapply for SSI benefits once the account falls below the $100,000 threshold.

As long as total contribution to the ABLE account do not exceed the state's 529 contribution limits, an ABLE account beneficiary will not lose Medicaid eligibility based on assets in his or her ABLE account or suspension of SSI benefits. For example, in Arizona the maximum amount that can be contributed in a 529 plan is $412,000. Therefore, if contributions exceed $100,000 – SSI eligibility will be lost. The ABLE account beneficiary will maintain Medicaid eligibility as long as total contributions do not exceed $412,000. Aggregate contributions include contributions made under another state's ABLE program.[10]

A program shall not be treated as a qualified ABLE program unless it provides that contribution will not be accepted:

(A) unless it is in cash, or[11]

(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. [12]

The ABLE Act allows a transfer of an ABLE Account to other family members during the lifetime of the ABLE Account beneficiary or upon the beneficiary's death in very limited situations. To avoid being treated as a taxable distribution upon a change of the designated beneficiary, the new beneficiary must be a disabled family member. A family member of the ABLE beneficiary must be a person listed in Section 102(c)(1)(c)(ii). Family members listed

[10] 529A(b)(6)
[11] 529A(b)(2)(A)
[12] 529A(b)(2)(B)

under Section 102(c)(1)(c)(ii) include the following: brother – sister – step brother or step sister.[13]

Qualified disability expenses are any expenses made for the benefit of the designated beneficiary related to their disability, including:[14]

- 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.

A Beneficiary may direct the investment of any contributions to the program (or any earnings thereon) no more than two times in any calendar year. As with 529 college savings accounts, the range of investment options available for ABLE accounts will be determined by the state.[15]

Amounts distributed from a qualified ABLE account are included in the gross income of the distributee as provided in Section 72 (relating to annuities) to the extent not otherwise excluded from gross income. If the distributions from a qualified ABLE account do not exceed the qualified distribution expenses of the designated beneficiary, no amount is included in gross income. If distributions exceed the qualified distribution expenses, the amount otherwise included in gross income is reduced by an amount which bears the same ratio to the distributed

[13] 529A(c)(1)(C)(ii)
[14] 529A(d)(5)
[15] 529A(b)(4)

amount as the qualified disability expenses bear to that amount. The portion of any distribution that is includible in gross income is subject to an additional 10-percent tax unless made after the death of the beneficiary.

For example, assume a qualified ABLE account with a balance of $100,000 (of which $50,000 consists of contributions) distributes $10,000 to a beneficiary who has incurred $6,000 of qualified disability expenses. Under Section 73, one-half of the distribution ($5,000) is included in the beneficiary's gross income. The $5,000 amount otherwise includible in gross income is reduced by $3,000 a ($6,000/$10,000 multiplied by $5,000) to $2,000. An additional tax of $200 (ten percent of $2,000) is imposed on the distribution.

Qualified individuals or their families must open an 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.

Upon the death of the designated beneficiary and subject to any outstanding payments due for qualified disability expenses incurred by the designated beneficiary, all amounts remaining in the deceased beneficiary's ABLE account not in excess of the amount equal to the total medical assistance paid for such individual after establishment of the account under any State Medicaid plan established under Title XIX of the Social Security Act shall be distributed to such State upon filing of a claim for payment by such State. Such repaid amounts shall be net of any premiums paid from the account or by or on behalf of the beneficiary to a Medicaid Buy-In program. For purposes of this provision, the state is considered a creditor of an ABLE account and not a beneficiary.

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.

Medicaid Recovery	ABLE Account	3rd Party SNT	D4A Trust
Medicaid 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

ABLE Act – Review of Proposed IRS Regs

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.

At the time an ABLE account is created, 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 eligible individual is an eligible individual for a taxable year if, during that year, the individual meets one of the following criteria:

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**

While evidence of an individual's eligibility based on entitlement to SSI or SSDI benefits should be objectively verifiable, the sufficiency of a disability certification that an individual is an eligible individual for purposes of the second criteria will more difficult to provide. To facilitate proof of the second criteria, the proposed regulations allow an individual to present a disability certification, signed under penalty of perjury, along with a physician diagnosis to demonstrate eligibility to establish an ABLE account. The disability certification must verify that an eligible individual has been diagnosed with a disability prior to 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.

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 $50,000. 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. She may qualify under the second category as Certified as eligible if she 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 months or is blind, and provides a copy of their diagnosis signed by a physician.

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.

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).

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 other words, the ABLE Account does not automatically become taxable just because she does not meet the definition of being disabled. In our example, 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.

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.

The proposed regulations also presume that the designated beneficiary is the owner of that account and manages the distributions. 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.

If the designated beneficiary cannot 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. If the eligible individual under an ABLE Account has capacity – it is best to have the individual sign a power of attorney immediately.

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.

Qualified individuals or their families must open an 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. 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.

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 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.

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.

Sample form language

POA Provision for an eligible Individual

To establish, execute and fund a qualified ABLE account under Section 529(A) of the Internal Revenue Code on my behalf upon such terms and conditions as my Agent shall deem appropriate. My agent is authorized to establish, fund and sign for me as a designated beneficiary. To make withdrawals, investment decisions, receive account information and to exercise all other powers regarding such 529A account, including but not limited to, the power to rollover such account to another to another qualified 529A account or to a 529A account to another eligible individual as defined under Section 529A(c)(1)(C)(ii). Notwithstanding any authority granted to my agent under this document, my agent shall not acquire any beneficial interest in the 529A account during my lifetime and must administer the account for the benefit of me as required by Section 529A and corresponding regulations and such rules and regulations as imposed by any applicable state 529A plan.

I further authorize my agent to provide, access and sign any disability certification to verify that I am an eligible individual as defined under 529A(e)(1) that has been diagnosed with a disability prior to 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. (Document should include HIPPA authorization to obtain medical records).

POA Provision for a Parent - Family members to authorize agent under POA to make contributions to ABLE Account:

To make a contribution or contributions to a qualified ABLE account on behalf of any eligible individual as defined under Section 529A(e)(1) of the Internal Revenue Code. All contributions shall be made in cash. Any contribution to any one eligible individual shall not exceed such annual contribution limits (from all sources) as imposed by Section 529A(b)(2)(B) and the aggregate excess limitations (from all sources) as imposed by 529A(b)(6).

Trust Distribution Provision to authorize trustee of third Party SNT to make contributions to ABLE Account for an eligible beneficiary.

To distribute income or principal on behalf of the beneficiary to a qualified ABLE account provided the beneficiary is, at the time of any such distribution, an eligible individual as defined under Section 529A(e)(1) of the Internal Revenue Code. All distributions of principal and income made on behalf of the beneficiary shall be made in cash directly to the qualified ABLE account. A distribution for the benefit of the beneficiary to a qualified ABLE account shall not exceed such annual contribution limits (from all sources) as imposed by Section 529A(b)(2)(B) and the aggregate excess limitations (from all sources) as imposed by 529A(b)(6).

26 USC 529A: Qualified ABLE programs
Text contains those laws in effect on September 14, 2015

From Title 26-INTERNAL REVENUE CODE
Subtitle A-Income Taxes
CHAPTER 1-NORMAL TAXES AND SURTAXES
Subchapter F-Exempt Organizations
PART VIII-CERTAIN SAVINGS ENTITIES

Jump To:

§529A. Qualified ABLE programs

(a) General rule

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

(b) Qualified ABLE program

For purposes of this section-

(1) In general

The term "qualified ABLE program" means a program established and maintained by a State, or agency or instrumentality thereof-

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

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

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

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

(2) Cash contributions

A program shall not be treated as a qualified ABLE program unless it provides that no contribution will be accepted-

(A) unless it is in cash, or

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

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

(3) Separate accounting

A program shall not be treated as a qualified ABLE program unless it provides separate accounting for each designated beneficiary.

(4) Limited investment direction

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

(5) No pledging of interest as security

A program shall not be treated as a qualified ABLE program if it allows any interest in the program or any portion thereof to be used as security for a loan.

(6) Prohibition on excess contributions

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

(c) Tax treatment

(1) Distributions

(A) In general

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

(B) Distributions for qualified disability expenses

For purposes of this paragraph, if distributions from a qualified ABLE program-

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

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

(C) Change in designated beneficiaries or programs

(i) Rollovers from able accounts

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

(ii) Change in designated beneficiaries

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

(iii) Limitation on certain rollovers

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

(D) Operating rules

For purposes of applying section 72-

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

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

(2) Gift tax rules

For purposes of chapters 12 and 13-

(A) Contributions

Any contribution to a qualified ABLE program on behalf of any designated beneficiary-

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

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

(B) Treatment of distributions

In no event shall a distribution from an ABLE account to such account's designated beneficiary be treated as a taxable gift.

(C) Treatment of transfer to new designated beneficiary

The taxes imposed by chapters 12 and 13 shall not apply to a transfer by reason of a change in the designated beneficiary under subsection (c)(1)(C).

(3) Additional tax for distributions not used for disability expenses

(A) In general

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

(B) Exception

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

(C) Contributions returned before certain date

Subparagraph (A) shall not apply to the distribution of any contribution made during a taxable year on behalf of the designated beneficiary if-

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

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

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

(4) Loss of ABLE account treatment

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

(d) Reports

(1) In general

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

(2) Certain aggregated information

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

(3) Notice of establishment of able account

A qualified ABLE program shall submit a notice to the Secretary upon the establishment of an ABLE account. Such notice shall contain the name and State of residence of the designated beneficiary and such other information as the Secretary may require.

(4) Electronic distribution statements

For purposes of section 4 of the Achieving a Better Life Experience Act of 2014,[1] States shall submit electronically on a monthly basis to the Commissioner of Social Security, in the manner specified by the Commissioner, statements on relevant distributions and account balances from all ABLE accounts.

(5) Requirements

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

(e) Other definitions and special rules

For purposes of this section-

(1) Eligible individual

An individual is an eligible individual for a taxable year if during such taxable year-

(A) the individual is entitled to benefits based on blindness or disability under title II or XVI of the

Social Security Act, and such blindness or disability occurred before the date on which the individual attained age 26, or

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

(2) Disability certification

(A) In general

The term "disability certification" means, with respect to an individual, a certification to the satisfaction of the Secretary by the individual or the parent or guardian of the individual that-

(i) certifies that-

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

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

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

(B) Restriction on use of certification

No inference may be drawn from a disability certification for purposes of establishing eligibility for benefits under title II, XVI, or XIX of the Social Security Act.

(3) Designated beneficiary

The term "designated beneficiary" in connection with an ABLE account established under a qualified ABLE program means the eligible individual who established an ABLE account and is the owner of such account.

(4) Member of family

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

(5) Qualified disability expenses

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

(6) ABLE account

The term "ABLE account" means an account established by an eligible individual, owned by such eligible individual, and maintained under a qualified ABLE program.

(7) Contracting State

The term "contracting State" means a State without a qualified ABLE program which has entered into a contract with a State with a qualified ABLE program to provide residents of the contracting State access to a qualified ABLE program.

(f) Transfer to State

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

(g) Regulations

The Secretary shall prescribe such regulations or other guidance as the Secretary determines necessary or appropriate to carry out the purposes of this section, including regulations-

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

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

(3) to generally define qualified disability expenses,

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

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

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

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

(Added Pub. L. 113–295, div. B, title I, §102(a), Dec. 19, 2014, 128 Stat. 4056 .)

REFERENCES IN TEXT

The Achieving a Better Life Experience Act of 2014, referred to in subsec. (d)(4), probably means div. B of Pub. L. 113–295, Dec. 19, 2014, 128 Stat. 4056 , known as the "Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014" and also as the "Stephen Beck, Jr., ABLE Act of 2014". No section 4 of the Act was enacted.

The Social Security Act, referred to in subsecs. (e)(1)(A), (2) and (f), is act Aug. 14, 1935, ch. 531, 49 Stat. 620 . Titles II, XVI, and XIX of the Act are classified generally to subchapters II (§401 et seq.), XVI (§1381 et seq.), and XIX (§1396 et seq.) respectively, of chapter 7 of Title 42, The Public Health and Welfare. Sections 1614 and 1861 of the Act are classified to sections 1382c and 1395x, respectively, of Title 42. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

EFFECTIVE DATE

Section applicable to taxable years beginning after Dec. 31, 2014, see section 102(f)(1) of Pub. L. 113–295, set out as an Effective Date of 2014 Amendment note under section 552a of Title 5, Government Organization and Employees.

REGULATIONS

Pub. L. 113–295, div. B, title I, §102(f)(2), Dec. 19, 2014, 128 Stat. 4062 , provided that: "The Secretary of the Treasury (or the Secretary's designee) shall promulgate the regulations or other guidance required under section 529A(g) of the Internal Revenue Code of 1986, as added by subsection (a), not later than 6 months after the date of the enactment of this Act [Dec. 19, 2014]."

PURPOSES

Pub. L. 113–295, div. B, title I, §101, Dec. 19, 2014, 128 Stat. 4056 , provided that: "The purposes of this title [title I of div. B of Pub. L. 113–295, enacting this section, amending sections 26, 529, 877A, 4965, 4973, and 6693, of this title, section 552a of Title 5, Government Organization and Employees, sections 521, 541, and 707 of Title 11, Bankruptcy, and section 5517 of Title 12, Banks and Banking, and enacting provisions set out as notes under this section, section 529 of this title, section 552a of Title 5, and section 521 of Title 11] are as follows:

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

"(2) To provide secure funding for disability-related expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, the Medicaid program under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.], the supplemental security income program under title XVI of such Act [42 U.S.C. 1381 et seq.], the beneficiary's employment, and other sources."

TREATMENT OF ABLE ACCOUNTS UNDER CERTAIN FEDERAL PROGRAMS

Pub. L. 113–295, div. B, title I, §103, Dec. 19, 2014, 128 Stat. 4063 , provided that:

"(a) Account Funds Disregarded for Purposes of Certain Other Means-Tested Federal Programs.-Notwithstanding any other provision of Federal law that requires consideration of 1 or more financial circumstances of an individual, for the purpose of determining eligibility to receive, or the amount of, any assistance or benefit authorized by such provision to be provided to or for the benefit of such individual, any amount (including earnings thereon) in the ABLE account (within the meaning of section 529A of the Internal Revenue Code of 1986) of such individual, any contributions to the ABLE account of the individual, and any distribution for qualified disability expenses (as defined in subsection (e)(5) of such section) shall be disregarded for such purpose with respect to any period during which such individual maintains, makes contributions to, or receives distributions from such ABLE account, except that, in the case of the supplemental security income program under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.]-

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

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

"(b) Suspension of SSI Benefits During Periods of Excessive Account Funds.-

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

"(2) No impact on medicaid eligibility.-An individual who would be receiving payment of such supplemental security income benefits but for the application of paragraph (1) shall be treated for purposes of title XIX of the Social Security Act [42 U.S.C. 1396 et seq.] as if the individual continued to be receiving payment of such benefits.

"(c) Effective Date.-This section shall take effect on the date of the enactment of this Act [Dec. 19, 2014]."

[1] *See References in Text note below.*

[2] *So in original. The word "subparagraph" probably should not appear.*

ABLE Across the Board: Incorporating ABLE into Your Practice

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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.

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.

Who Qualifies? (cont.)

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? (cont.)

- 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 (cont.)

- 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 Texas is i$370,000 .)

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.

ABLE and Medicaid Eligibility (cont.)

- 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.

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.

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).

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.

Qualified Disability Expenses

- Qualified disability expenses are any expenses made for the benefit of 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.

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.

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).

Tax Free Growth and Penalties if Used for Non Qualified Expenses (cont)

- For example, assume a qualified ABLE account with a balance of $100,000 (of which $50,000 consists of contributions) distributes $10,000 to a beneficiary who has incurred $6,000 of qualified disability expenses. Under Section 73, one-half of the distribution ($5,000) is included in the beneficiary's gross income. The $5,000 amount otherwise includible in gross income is reduced by $3,000 a ($6,000/$10,000 multiplied by $5,000) to $2,000. An additional tax of $200 (ten percent of $2,000) is imposed on the distribution

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

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.

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.

Medicaid Payback (cont.)

Medicaid Recovery	ABLE Account	3rd Party SNT	D4A Trust
Medicaid 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

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.

Change In Eligible Individual Status

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.

Change In Eligible Individual Status (cont.)

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.

Change in eligible individual status (cont.)

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).

25

Change In Eligible Individual Status (cont.)

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.

26

Change In Eligible Individual Status (cont.)

If the designated beneficiary subsequently again becomes an eligible individual, then additional contributions may be accepted subject to the applicable annual and cumulative limits.

27

Change In Eligible Individual Status (cont.)

Example

- Erica has been on SSI for many years and has set up an ABLE Account that Uncle Steve and Aunt Terri have been contributing into annually. This year they contributed $10,000 and the account now has $50,000.
- 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 she no longer receives supplemental security income benefits or disability benefits under Title II of the Social Security Act.

28

Change in eligible individual status (cont.)

- 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.

29

Who owns the ABLE Account?

The proposed regulations also presumes that the designated beneficiary is the owner of that account and manages the distributions.

30

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.

31

What if Account Holder Lacks Capacity? (cont.)

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.

32

What if Account Holder Lacks Capacity? (cont.)

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.

33

What if Account Holder Lacks Capacity? (cont.)

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.

34

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.

35

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.

36

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.

37

Qualified Disability Expenses (cont.)

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.

38

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.

39

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.

40

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.

41

Residency Requirements (cont.)

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.

42

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.

43

What Happens if State Passes Laws Before Regs Issue? (cont.)

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.

44

Incorporating ABLE into Your Practice

- ABLE accounts will be helpful for a beneficiary with capacity to assist with money management skills.
- See recommended provisions for third party trust and POA documents.
- Concerns with distributions from First Party SNT to ABLE account.
- Will need additional clarification regarding distributions from ABLE account and impact on SSI benefits.
- ABLE accounts are being sold as better alternative to a trust. Educating family members is critical.

45

POA Provision for an Eligible Individual

- To establish, execute and fund a qualified ABLE account under Section 529(A) of the Internal Revenue Code on my behalf upon such terms and conditions as my Agent shall deem appropriate. My agent is authorized to establish, fund and sign for me as a designated beneficiary. To make withdrawals, investment decisions, receive account information and to exercise all other powers regarding such 529A account, including but not limited to, the power to rollover such account to another to another qualified 529A account or to a 529A account to another eligible individual as defined under Section 529A(c)(1)(C)(ii). Notwithstanding any authority granted to my agent under this document, my agent shall not acquire any beneficial interest in the 529A account during my lifetime and must administer the account for the benefit of me as required by Section 529A and corresponding regulations and such rules and regulations as imposed by any applicable state 529A plan.

46

POA Provision for an Eligible Individual (cont).

- I further authorize my agent to provide, access and sign any disability certification to verify that I am an eligible individual as defined under 529A(e)(1) that has been diagnosed with a disability prior to 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. (Document should include HIPPA authorization to obtain medical records).

47

POA Provision For A Parent - Family Members To Authorize Agent Under POA To Make Contributions To ABLE Account

- To make a contribution or contributions to a qualified ABLE account on behalf of any eligible individual as defined under Section 529A(e)(1) of the Internal Revenue Code. All contributions shall be made in cash. Any contribution to any one eligible individual shall not exceed such annual contribution limits (from all sources) as imposed by Section 529A(b)(2)(B) and the aggregate excess limitations (from all sources) as imposed by 529A(b)(6).

48

Trust Distribution Provision To Authorize Trustee Of Third Party SNT To Make Contributions To ABLE Account For An Eligible Beneficiary.

- To distribute income or principal on behalf of the beneficiary to a qualified ABLE account provided the beneficiary is, at the time of any such distribution, an eligible individual as defined under Section 529A(e)(1) of the Internal Revenue Code. All distributions of principal and income made on behalf of the beneficiary shall be made in cash directly to the qualified ABLE account. A distribution for the benefit of the beneficiary to a qualified ABLE account shall not exceed such annual contribution limits (from all sources) as imposed by Section 529A(b)(2)(B) and the aggregate excess limitations (from all sources) as imposed by 529A(b)(6).
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49

Special Needs Trusts National Conference

Friday, October 16, 2015

Breakout Session 1
1:00 P.M. – 1:55 P.M.

Challenge for Equity: Divorcing Parents and the Child With Special Needs

Presenter:
Katherine Barr
Attorney at Law
Sirote & Permutt, P.C.
Birmingham, AL

- Materials

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OCTOBER 14-16, 2015

TODAY'S CHALLENGE FOR EQUITY: DIVORCING PARENTS AND THE CHILD WITH SPECIAL NEEDS

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I. **INTRODUCTION.** -- Special needs planning lawyers learn early in their careers that divorce occurs more frequently between parents of children with special needs. Often the stress of having a child with serious disabling conditions causes great stress on the parents' marriage. Raising any child requires patience, time, sacrifice, devotion and financial means. But when a child has a serious disability or chronic illness, the standard requirements of raising that child are met with challenges of chaos, extraordinary anxiety and unpredictability.[1] In fact, in many circumstances, the child's disability and need for special care is so great that it is difficult for both parents to be employed outside of the home. Often one parent, usually the mother, finds that meeting the demands of a job while caring for the child with a disability is not realistic.

It is generally accepted that absent a statute or agreement, no common law authority exists to require a non-custodial parent to support an adult child.[2] The majority trend, however, recognizes two (2) exceptions to this rule – (1) where the divorce contemplates post-minority support for education before the child reaches the age of majority,[3] and (2) when the child has a physical or mental disability that prevents him from being able to support himself.[4] This article will address the latter exception relating to disability. It is an unfortunate truth today that an adult child with a serious disability may live a normal life expectancy but will be incapable of self-support and will need both parents to continue to support the child indefinitely. Support includes all of the ways that the parents have provided for this child prior to his reaching the age of majority.

This outline will examine the varying laws among the states and emerging trends towards parents' legal responsibility to provide child support in this situation. The effects of child support upon an adult child's SSI payment will also be examined, as well as a new concept, called "Chalimony," which attempts to balance parental resources available to children with disabilities by having enough support (either financially or through care-giving) to allow both parents to work.

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[1] http://www.huffingtonpost.com/Karen-Czapanskiy/Chalimony/a-new-solution. May 25, 2011.
[2] See, e.g., **Lightel v. Myers**, 791 So.2d 955, 958 (Ala. Civ. App. 2000).
[3] **Id.** (citing ***Ex parte*, Bayliss**, 550 So.2d 986 (Ala. 1989)).
[4] **Id.** (citing ***Ex parte*, Brewington**, 445 So.2d 294 (Ala. 1983)).

II. **SUPPORT AFTER MAJORITY FOR CHILDREN WITH DISABILITIES.** -- Whether a parent can be required financially to support a child who has reached the age of majority depends upon where the parent and child live. The laws across the United States vary widely in this area. Thirty-seven (37) states (including the District of Columbia) recognize a parent's duty to support an adult child with a disability after that child reaches the age of majority.[5] Whether addressed by statute,[6] by case law or by historical common law[7] relating to parental duties, the majority of states hold a parent responsible for some level of support for an adult child who is unable (as opposed to unwilling) to support himself.[8]

A. **State Statutes That Require Support**. -- A few states have passed statutes that impose a duty on parents to support an adult child with a disability. Only five (5) state statutes, however, impose a duty of support if the adult child became disabled after attaining majority. These states are California, Maryland, Pennsylvania, South Carolina and West Virginia. It should be a fairly easy task in any of these states to obtain an Order continuing adult child support payments if the child has a disability that satisfies statutory requirements. In states that impose a post-majority duty to pay child support, both the custodial parent and the

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[5] **ARIZ. REV. STAT. ANN.** §9-12-312 (West 2012); **CAL. FAM. CODE**§3910 (West 2012); **CONN. GEN. STAT. ANN.** §46b-84 (West 2011); **FLA. STAT. ANN.** §743.07 (West 2012); **HAW. REV. STAT.** §580-47 (West 2012); **750 ILL. COMP. STAT. ANN.** 5/513 (West 2008); **IND. CODE ANN.** §31-16-6-6 (West 2012); **IOWA CODE ANN.** §598.1 (West 2012) ; **KY. REV. STAT. ANN.** §405.020 (West 2012); **LA. REV. STAT. ANN.** 9.315.22 (2012); **MD. CODE ANN.** 13-102 (West 2012); **MISS. STAT. ANN.** § 518A.26 (West 2012); **MO. STAT. ANN.** §452.340 (West 2012); **MONT. CODE. ANN.** §40-6-214 (West 2011); **NEV. REV. STAT. ANN.** §125b.110 (West 2011); **2005 N.H. LAWS 273**; **N.D. CENT. CODE ANN.** §14-09-08.2 (West 2011); **OHIO REV. CODE ANN.** §3119.86 (West 2012); **OKLA. STAT. ANN.** Tit.43 §112.1A (West 2012); **OR. REV. STAT. ANN.** §109.010 (West 2012); **23 PA. CONS. STAT. ANN.** §4321 (West 2012); **R.I. GEN. LAWS ANN.** §15-5-16.2 (West 2012); **S.C. CODE ANN.** §63.3-530 (2012); **TENN. CODE ANN.** §36-5-101 (West 2012); **UTAH CODE ANN.** §78B-12-102 (2012); **V.A. CODE ANN.** §20-124.2 (West 2009); **W. VA. CODE ANN.** §48-11-103 (West 2009); **WYO. STAT. ANN**§14-2-204 (West 1977); ***Ex Parte* Brewington**, 445 So.2d 294 (Ala. 1983); **Streb v. Streb**, 774 P.2d 798 (Alaska 1989); **Koltay v. Koltay**, 667 P.2d 1374 (Colo. 1983); **Nelson v. Nelson**, 548 A.2d 109 (D.C. 1988); **Feinberg v. Diamant**, 378 Mass. 131 (1979); **Blakley v. Blakely**, 210 Mich. App. 383 (1996); **Kruvant v. Kruvant**, 100 N.J. Super. 107 (App. Div. 1968); **Cohn v. Cohn**, 123 N.M. 85 (N.M. Ct. App. 1996).

[6] **Supra. n.**

[7] **Brewington**, 445 So2d at 294; **Streb**, 774 798; **Koltay**, 667 P.2d at P.2d at 1374; **Nelson**, 548 A.2d at 109; **Feinberg**, 278 Mass. at 131; **Blakley**, 210 Mich. App. At 383; **Kruvant**, 100 N.J. Super at 107; **Cohn**, 123 N.M. at 85.

[8] Craig C. Reaves, "Child Support for an Adult Child with Disabilities," *The Voice newsletter*, http://www.specialneedsalliance.org., Vol. 8, Issue 6, December 2014.

child, upon reaching majority, can sue to enforce the payments.[9] Six other states (Georgia, Kansas, Maine, Nebraska, New York, and Wisconsin) explicitly hold that a parent's duty to pay child support ends after the child reaches the age of majority, regardless of any type of disability.[10]

In some jurisdictions, the nature of the child's disability will affect whether a duty of support will be imposed. At a minimum, there must be a causal link between the child's disability and the need for child support, as is the case in Virginia.[11] The Virginia statute imposes continued support if the child is "(i) severely and permanently mentally or physically disabled, (ii) unable to live independently and support himself, and (iii) resides in the home of the parent seeking or receiving child support.[12]

B. **Case Law Requiring Support.** -- While all states have statutes regarding child support in some form or the other, some courts have imposed a duty of continuing support after the age of majority based on the fact that the word "child" was not defined by age in the particular state's child support statute. Case law interpreting the statutes supports this interpretation. Alabama, for example, does not have a specific statute regarding post-minority child support, but instead, has important case law. The lead case in Alabama representing the majority opinion is ***Ex parte* Brewington.**[13] The Supreme Court of Alabama granted *certiorari* in **Brewington** to review the Court of Civil Appeals' decision upholding the case of **Reynolds v. Reynolds**, a 1963 Alabama Supreme Court case holding that because the Alabama statute providing for child support (Code of Ala. 1975, Section 30-3-3) had been held to apply to only minor children, the trial court was without jurisdiction to order a parent to support an adult child.[14] The trial court in

[9] See, e.g., ***In Re* Marriage of Drake**, 53 Cal. App. 4th, 1139 (1997); **Harper v. Harper**, 608 So.2d 517 (Fla. Dis. Ct. App. 1992); **Haxton v. Haxton**, 299 OR. 616 (1985).
[10] **Germek v. Germek**, 34 Va.App.1, 8 (2000); **G.A. CODE ANN. §19-6-15** (2004); Neb. Rev. Stat. §42-664(6); **Beiter v. Beiter**, 142 Misc. 2d 954 (N.Y. 1989); ***In Re* Marriage of Doney and Risley** 41 Kan. App.2d 294 (2009); **Lund v. Lund**, 2007 ME 98 (2007); **O'Neill v. O'Neill**, 17 Wis.2d 406 (1962).
[11] VA. Code Ann., §20-124.2 (C)(West).
[12] **Id.**
[13] **Brewington**, 445 So.2d at 296.
[14] **Id.** at 295 (citing **Reynolds v. Reynolds**, 274 Ala. 477 (1963)).

Brewington, ordered the father to support past the age of majority his adult child who had a disability.[15] The Court ordered the father to pay $150 per month in child support for six (6) months in addition to all medical expenses.[16] The Court explained that "the support of the dependent child is the obligation of parents as a matter of public policy."[17] In reviewing **Reynolds**, the Supreme Court based its holding on the fact that **Reynolds** – type decisions were based on the position that, absent a statute or agreement, no common law authority existed to impose upon a non-custodial parent the obligation to support his adult child. Nevertheless, in **Brewington**, the Court recognized that the majority trend is to grant an exception to this rule when the adult child is so mentally and/or physically disabled as to be unable to support himself.[18] The **Brewington** Court went on to explain that **Reynolds** was founded upon the idea that the term "child" as used in the Alabama Child Support statute should not be so narrowly interpreted as to mean only minor children.[19]

Many other state courts have used similar logic in ruling in favor of post-minority child support for a child with a disability.[20] These cases tend to conclude that the duty of support arises when the child has insufficient resources and, because of mental or physical infirmity, insufficient income capability to enable him to meet his reasonable living expenses. In other words, it is not the mere fact that the adult child has a disability that triggers a parent's ongoing duty to provide support. Rather, it is the fact that the child cannot support himself independently due to an existing disability that imposes the legal obligation on a parent to ensure that support available. If, in fact, the child with a disability has sufficient income or resources to support himself, a custodial parent should not expect the Court to require the non-custodial parent to pay child support.

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[15] **Id.**
[16] **Id.**
[17] **Id.** at 295-296.
[18] **Id.**
[19] **Id.** (citing **Murrah v. Bailes**, 255 Ala. 178 (1951)).
[20] See, Exhibit A attached.

C. **By When Must the Disability Occur? When is a Child Emancipated?** -- Many cases addressing post-minority child support have focused on a request for support when the adult child did not have the disability at the age of majority, but later became disabled. State courts and decisions are split on this issue. The majority appear to side with the school of thought that the adult child must have incurred the disability before reaching adult age. Others, however, have determined that even if a child is chronologically an adult, if the child has never been emancipated, then support is still owed regardless of age. Georgia, Kansas, Maine, Nebraska, New York and Wisconsin have all held that a parent's duty to pay child support ends after the child reaches the age of majority. The fact that the child has a disability rendering him incapable of support is of no merit.

Emancipation is the word used to describe the time when a parent's duty to support a child stops. While states use various definitions of emancipation, most generally agree that a child under the age of 18 (or under 19 in Alabama or 21 in Mississippi), or still attending high school, is not emancipated unless the child has married, joined the military or permanently left the parental home. Some states continue to treat an adult child as not being emancipated if the child has a disability and, as a result, cannot support himself or herself independently. The subject of whether a child remains unemancipated upon reaching majority has been the subject of numerous court decisions. Not surprisingly, the Ohio Court of Appeals in ***In Re* Owens**, held that "ordinarily, emancipation eludes to the freeing of a minor child from parental control," and "[t]he question to when a child remains emancipated so as to relieve a parent from the obligation of support depends upon the particular facts and circumstances of each case."[21]

An important decision by the West Virginia Supreme Court in **Casdorph v. Casdorph**, held that emancipation does not necessarily occur when the child reaches the age of majority. The Court explained, "[E]mancipation may encompass more than a child's age as the following statutory language demonstrates: A child over the age of 16 may petition a Court to be declared

[21] ***In Re*, Owens**, 96 Ohio App.3rd 429, 645 N.E.2d 130 (1994).

unemancipated upon a showing that such child can provide for his physical and financial well-being and has the ability to make decisions for himself."[22]

Many cases exist in the area of determining whether a child has been emancipated. Many of the more difficult decisions involve a child who presents symptoms of a mental illness throughout his or her life, but has not become debilitated by the illness until after the age of majority.[23] Under statutes that do not allow for post-majority child support, if the disability arose after reaching the age of majority, parents of these children are not obligated to provide them with child support.[24] In the **Sininger v. Sininger** case, the Maryland Court of Appeals stated the unfairness of this statutory scheme in explaining that mental disabilities, unlike physical disabilities, often develop over time.[25] The Court explained that under this scheme, two (2) twenty-three (23) year olds, both incapacitated, one for five years (after majority), the other for six years (before majority). The result in Maryland is that one of the individuals is entitled to support, while the other is not.[26]

Only five (5) of the 37 states recognizing post-majority child support for children with disabilities having imposed a duty of support on the parents of children who became disabled subsequent to attaining majority.[27] These states have, in essence, adopted the antiquated notion of "poor laws," which attempt to protect the public from the burden of supporting a person who has a parent capable of providing support.[28] These states allow a custodial parent and the child with a disability to sue to enforce the obligation once the child reaches the age of majority.

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[22] **Casdorph v. Casdorph**, 194 W.Va.490 (1995)(citing W.Va. Code Ann. §49-7-27).
[23] See, e.g., **Sininger v. Sininger**, 300 Md. 604 (1984).
[24] **Id.**
[25] **Id.** at 617.
[26] **Id.**
[27] **Casdorph**, 194 W. Va. at 490; **O'Malley**, 105 Pa. Super. at 232; **Riggs**, 353 S.C. at 230; **Sininger**, 300 Md. at 604; **Woolams**, 115 Ca. App.2d at 1.
[28] **Woolams v. Woolams**, 115 Cal. App.2d 1 (1952).

III. **EFFECT OF CHILD SUPPORT ON SSI.** -- POM SI 00830.420A.1 states: "A child-support payment **is a payment from a parent to or for the child to meet the child's needs for food & shelter**. Child support can be in cash or in-kind. It can be voluntary or court ordered." Assuming that child support will be awarded for the child with the disability, regardless of age, the effect of the child support payment upon the child's eligibility for public benefits as both a minor and an adult should be considered. Proper management of child support payments is critical to establish or maintain eligibility for this means-tested government benefit, which in the majority of states automatically qualifies the child for Medicaid. Made payable directly to the custodial parent, as normally occurs, a negative reaction with these means-tested benefits will occur.

In calculating child support the divorce settlement agreement usually provides specific details regarding how each parent will share in the financial responsibility for the child with special needs. Even if a state does not have a formal requirement of this type, the non-custodial parent often agrees to pay a monthly sum to the custodial parent or to a trust for the benefit of the adult child with a disability. Discussions or negotiations about payments to a trust for the special needs of a child who will never be adequately self-supporting may even help to settle a divorce case.

Unfortunately, child support payments may end up reducing or eliminating the child's SSI benefit. In 36 states, loss of SSI also causes loss of Medicaid which may be a source of the child's medical coverage, including important drug therapy and home or institutional services that help the child and the custodial parent. Because many programs for individuals with disabilities are only available to individuals who have Medicaid eligibility, preserving this eligibility does more than just keep medical coverage in place. If Medicaid is lost, the custodial parent may feel as if he or she has won the so-called "battle", but lost the "war". The post-divorce child support that was intended to benefit the child and custodial parent thus may result in unintended, detrimental consequences. Divorce attorneys rarely know that how child support payments made directly to a custodial parent interact with means-tested government benefit programs like SSI and Medicaid, or that these unintended consequences can be avoided with a few careful steps.

A. **How to Maximize SSI and Child Support.** -- Government benefits can be protected if the divorce decree directs the non-custodial parent to make child support payments to a special needs trust for the sole benefit of that child. Alternatively, an irrevocable assignment by the custodial parent of the child support to the special needs trust may also work. This trust must be carefully drafted as a self-settled trust. This approach will pass through Social Security more easily, plus payback concerns are largely unwarranted since the money that comes in is spent each month.

To understand this process, a review of the Social Security regulations governing SSI is needed. The SSI program provides a basic monthly cash subsidy for an individual with a disability who has very limited (under $2,000) countable resources and income. The maximum federal SSI payment in 2015 is $733.00 per month. All income above $20 paid to or on behalf of the individual, including child support payments, off-set or reduce the SSI payment.

Child on SSI under age 18 or still in school up to age 22: For a child on full SSI who is under the age of 18, Social Security regulations specify that two-thirds (2/3) of a child support payment is "countable income," which causes a dollar-for-dollar reduction in the SSI benefit. For example, if child support of $500.00 is paid to the custodial parent of a child on SSI, the $733.00 SSI benefit will be reduced by $313.33 (2/3 of 500=333.33, minus $20.00) to $419.67. Total support will be $500 + $419.67 SSI, or $919.67.

Child on SSI age 18 or older and not in school: For a child age 18 or older, however, one hundred percent (100%) minus $20.00 of the child support payment counts as a reduction against SSI. For example: The $733.00 SSI payment before child support for a child age 18 will be reduced by $480.00 ($500.00 minus $20.00) to $253.00 SSI plus $500.00 in child support, for aggregate support of $733.00, afterwards. In other words, once child support payments begin, the aggregate monthly amount received by the custodial parent may not change much, just the source of the payments.

The amount of a child's SSI payment also depends upon several other factors, including the age of the child, the living arrangements in the household, whether the custodial parent is charging rent for the child's living at home, the amount of any earned income from a child's employment, and other cash or gifts a child receives during a month. The child's SSI can easily be eliminated by the child support payments being made directly to the custodial parent or other person who applies it for the child's benefit. The policy behind SSI may help parents and divorce lawyers understand this better. SSI payments, in theory, provide government assistance with food and shelter (rent, garbage and sewer charges, heating, cooling, water, property taxes and insurance) for the individual with a disability. When other funds such as child support, that can be used for food and shelter items, are supplied for the child's benefit, the government regulations require the SSI amount to be reduced because this additional support source exists, whether used for these purposes or not.

While limitations apply concerning the amount of reduction to a person's SSI when another individual, trust, or other entity directly pays an SSI recipient's food, power bill, rent or other shelter expenses, this differs when child support is paid directly to the custodial parent. Except for excluding one-third (1/3) of the child support payment for a child under 18 and the first $20.00 of any type of income, no other exclusions apply.

Social Security regulations require that all changes in financial circumstances of a person receiving SSI must be promptly reported by the person who receives the SSI check. SSI recovers overpayments made in error. When a person with a disability is not eligible for the full SSI amount he or she has already received, the overpayment must be repaid (sometimes by reduction of the future monthly benefits). If the monthly child support payment of an age 18 or older child exceeds the child's SSI amount by $19.00, then in 36 states, the child's SSI and Medicaid will both be lost.

Some children with special needs will not qualify for SSI or Medicaid if they are under age 18 because of the parents' assets and income. In that case it may be advisable to wait on having support payments assigned to a special needs trust until the child is 18. Upon reaching age 18, the child may likely qualify for SSI when the income and assets of the parents no longer count.

Some children below age 18 do qualify for SSI, however. The child may have a disability that prevents the custodial parent from full-time employment, so that earnings in the post-divorce, single-parent household are low enough for the child to qualify. The "countable" resources of that parent may be below the $2,000.00 resource threshold, allowing the child to qualify for SSI.

B. **Example of Calculation With and Without Child Support Paid to an SNT.** -- Consider this example of the benefits of ordering the payment to a trust: a 16 year old child, John, is eligible for $475.00 per month of SSI. The divorce decree orders the non-custodial parent to pay $750.00 per month in child support directly to the custodial parent. Since Social Security regulations exclude one-third (1/3) of the child support payment from countable income, $500.00 counts. When the $500.00 is applied against the $475.00 of SSI, the first $20.00 is ignored, but the remaining $480.00 completely displaces the $475.00 of SSI, causing John's loss of SSI eligibility. Eventually his Medicaid will also be terminated. The custodial parent who anticipated having the $750.00 child support plus $475.00 of SSI and Medicaid co-pays to pick up drug costs not covered by other health care insurance will be disappointed, at the very least.

If instead the divorce decree required the non-custodial parent to make the $750.00 monthly payment for John directly to his special needs trust, John would also receiving the $475.00 of SSI. The non-custodial parent would not be any worse off under this arrangement, and John and his custodial parent could have much more. The additional costs to have the self-settled special needs trust and carefully crafted divorce order prepared in the divorce proceeding are quickly

recouped by the retention of SSI and Medicaid. In this example, note that if John had been 18, and even if he was then eligible for the maximum SSI amount of $733.00, the $750.00 of child support directly to his parent would have offset all but $3.00 of his SSI. Almost any increase in child support would cause immediate termination of his Medicaid.

C. **Follow-up is Critical.** -- It is far better to address these issues during the divorce process, rather than after discovering that SSI has been reduced or lost. The divorce decree should direct the non-custodial parent to make a monthly payment for the child with special needs to the Trustee of the Self-Settled Special Needs Trust prepared for this purpose. The custodial parent may serve as Trustee.

Follow-up to this transaction is also crucial. The Court Order and the trust must be reported to Social Security promptly. Because many Social Security case workers may not be familiar with the regulations allowing this exception, it is best to attach a copy of the regulations when the transaction is reported. The regulation added in February 2009 to Social Security's POMS (Program Operating Manual System) at POMS SI 01120.200 G.1.d., regarding self-settled special needs trusts provides:

> A legally assignable payment (see SI 01120.200G.1.e. for what is not assignable), that is assigned to a trust, is income for SSI purposes **unless** the assignment is irrevocable. [For example, child support or alimony payments paid directly to a trust as a result of a court order, are not income.] If the assignment is revocable, the payment is income to the individual legally entitled to receive it.

Because the regulation refers to the assignment of income, instead of relying upon the court order, a custodial parent may prefer to irrevocably assign his or her right to the child support payment stream to a self-settled trust. This remains untested by the author, but the POMS regulations suggests it might be permissible and may work to avoid an unnecessary trip to court where the divorce decree has already been issued. The same follow-up would be required. It may also be possible for an ABLE Act account to be the depository of the monthly support payment.

D. **Another Circular Calculation Problem to Avoid.** -- It is important that the lawyers and court fashioning the child support order avoid structuring the child support in terms that reduce the required payment each month by the amount of SSI or any other cash government benefits received on the child's behalf. Instead, the divorce decree should state a specific amount that will be paid each month and avoid the offset calculation, which will create continuing problems. The following example illustrates the consequences of tying the child support amount directly to the SSI amount. Consider the case of Robert, a 15 year old with a disability on SSI, who recently became a child of divorce. The parents' divorce decree stipulated a dollar-for-dollar offset between SSI and child support. As Robert's needs increased, his mother went back to court and was awarded a large increase in child support from Robert's father. As required under SSI regulations, his mother reported the new child support amount to SSI, which caused a reduction. The lesser amount of SSI then increased the father's child support obligation, which caused a further reduction in SSI, and an increase in the monthly child support payment, and on and on. The downward, then upward, spiral would never end. In order to stop the cycle, Robert's mother went back to court to have the divorce decree revised to eliminate the offset and to require that Robert's father pay a lesser amount to a special needs trust for Robert of which she will serve as Trustee.

E. **This Works for Alimony, Too.** -- The reasons discussed in this article for directing child support to a self-settled special needs trust may also apply to alimony or maintenance (hereafter “alimony”) for a former spouse with a disability who is under age 65 at the time of divorce. A court order directing alimony to a self-settled special needs trust (or an irrevocable assignment of the right to alimony to the trust) provides the same benefits as described here for child support and, depending on other circumstances, might allow the spouse with the disability to qualify for SSI and/or Medicaid services. This is effective in cases of early onset Alzheimer's and mental illness or brain injury.

IV. CAN PUBLIC BENEFITS REDUCE THE PARENT'S SUPPORT OBLIGATION?

-- Once the public benefit eligibility of the child is discussed during the negotiations regarding child support calculations, this question will invariably arise. It relates to all children with a disability receiving child support, whether a minor or an adult. The answer varies depending on the form of public assistance the child is actually receiving.

A. **Social Security**. -- It is generally known that most courts do consider Social Security payments received by a child as the result of the disability or retirement of the parent obligated to pay child support may be considered when calculating the amount of that parent's support obligation. This is true whether the child is receiving Social Security Disability Income (SSDI) or Social Security as a dependent child. The rational used by courts for this decision is that the Social Security being received by the child results solely from the parent having paid into the Social Security system and are not cash benefits otherwise publicly available to persons with disabilities. If the child receives Social Security benefits for reasons other than the retired or disabled parent's work history, then the parent is not credited for the Social Security paid to the child. The court's rationale is the inverse of the situation first described. Since the parent paying support did not contribute to the Social Security account being used for the child, no credit against the child support obligation is allowed.

When considering Social Security benefits being paid to a child with a disability in calculating the parent's support obligation, four (4) ways exist to treat the cash benefits.[29] Courts may treat these cash benefits either as

(1) a direct dollar-for-dollar offset against the parent's child support obligation, or

(2) add the amount of benefits received by the child to the parent's income (thereby increasing the parent's child support obligation) on the theory that it is based on income, or

(3) consider the Social Security received by the child as though it were paid by the parent, or

[29] Craig C. Reeves, "Child Support for an Adult Child with Disabilities," *The Voice* newsletter, Dec. 2014, Vol. 8, Issue 6.

(4) consider the Social Security received by the child as the child's own income, which proportionately reduces the child's support obligations of both parents.

B. **Supplemental Security Income (SSI).** -- When a child is receiving SSI rather than SSDI, courts generally apply a different analysis to the calculation of child support. The majority of courts that have considered this question have ruled that any SSI being received by a child is not to be taken into account when calculating a parent's child support obligation. This particular approach to calculating the income of support results from the fact that since neither parent worked and earned the SSI being received by the child, the SSI benefit should not be used to offset a parent's obligation to financially support their child.[30]

V. **THE CONCEPT OF CHALIMONY.** -- "Chalimony" is a term coined by Karen Czapanskiy, a professor at the University of Maryland School of Law. Her article, "Chalimony: Seeking Equity Between Parents of Children with Disabilities and Chronic Illnesses," published in 2010 in *The New York University Review of Law and Social Change*[31] proposes a financial solution for resource problems of families with disabled and chronically ill children through the creation of a new inter-parental financial remedy. This remedy would highlight the inter-dependent reality of these children with caregivers whose ability to earn an income is limited because of their unusual caregiving responsibilities. Czapanskiy's proposes to improve family law's responsiveness to the family in this unfortunate situation through this remedy.

Briefly stated, a principle caregiver would be entitled to chalimony if three (3) conditions are met:

(1) meeting the child's reasonable caregiving needs would have to be incompatible with full market participation (i.e., employment) by the caregiving parent; and

(2) the child's other parent would not be meeting enough of the child's caregiving needs to permit the primary caregiving parent to engage fully in the market; and

[30] **Id.**

[31] Karen Czapanskiy, "Chalimony: Seeking Equity Between Parents of Children with Disabilities and Chronic Illnesses," *The New York University Review of Law and Social Change*, 34 N.Y.U. Rev. L. & Soc. Change 253 (2010).

(3) the economic resources of the paying parent would have to be sufficient to provide chalimony in addition to child support and alimony.

Czapanskiy justifies chalimony on the grounds of economic fairness to the paying parent, gender fairness to the caregiving parent, and the value of chalimony to the child, especially in terms of the child's access to additional parental time and economic resources.[32] The paying parent could avoid paying chalimony if he or she were meeting enough of the child's needs to permit the primary parent to work full-time.

Chalimony is not a substitute for child support under current law, states Czapanskiy.[33] It is designed as a substitute for the money that would have been spent on the child by typical parents making average expenditures in a shared household. She believes that current formulas used throughout the country fail to take into account the unusual employment challenges faced by parents raising a special needs child. In addition, she points out that alimony is not an adequate substitute either because it is based upon the needs of the parent, not on the predictable financial losses the parent experiences because of the child's unusual care needs.

Although paying parents will complain that chalimony is unfair, since they are already paying child support and possibly alimony, Czapanskiy replies that the complaint is unjustified, since the child's caretaking parent is making a far greater financial sacrifice that will last throughout that parent's working life.[34] She points out that the alternative to parental care would cost the paying parent much more – consider the cost of putting the child into a suitable residential facility, or paying for round-the-clock care by appropriate specialists in the child's home. Chalimony could help balance the legitimate complaints of the caregiving parents (usually mothers) that lead them to accept the primary parenting role in the first place and lead fathers to make employment their higher priority. The chalimony concept would provide a new financial incentive for parents to change

[32] **Id.**
[33] **Id.**
[34] **Id.**

gendered parenting practices, since any parent who is doing enough care to allow the other to be employed isn't obligated to pay.

Czapanskiy explains that child support is designed to provide a child with resources equivalent to the financial support that the average child would receive if the child's parents live together. Alimony is designed to meet the needs of the former marital partner, at least temporarily. Neither remedy takes into the account the unusual and demanding situation of parent raising a child with special needs. Chalimony is designed to bridge that gap. Until a concept of this type is put into place, policymakers will continue to ignore the inter-dependent reality between the child's unusual caregiving needs and the caregiver's opportunities to make a living. Chalimony provides incentives for parents to work together so that they may each participate in the child's care and in the work force. Most importantly, it provides an economic structure necessary for parents with children with disabilities and chronic illnesses to enjoy a little more parental time and energy – time not just to address their child's condition, but also to have some fun just being a parent.[35]

VI. **CONCLUSION**. -- As more children with special needs evolve in our world, legislation and case law will continue to evolve in the legal community as more family lawyers deal with an increasing number of cases involving children with special needs. The support of the caregiving parent and the child with the disability will remain a challenge until a creative solution, like chalimony, becomes a best practice.

[35] **Id.** at 298.

EXHIBIT A

STATE	MOST CITED CASE	MAJORITY/ MINORITY
Alabama	***Ex parte*, Brewington**, 445 So.2d 294 (Ala. 1983)	Majority
Alaska	**Sanders v. Sanders**, 902 P.2d 310 (Alaska 1995).	Majority
Arizona	**Mendoza v. Mendoza**, 870 P.2d 421 (Ariz. App. 1994).	Majority
Arkansas	**Towry v. Towry**, 695 S.W. 2d 155 (Ark. 1985).	Majority
California	**Chun v. Chun**, 235 Cal. Rptr. 553 (Cal. App. 1987).	Majority
Colorado	**Koltay v. Koltay**, 667 P.2d 1374 (Colo. 1983).	Majority
D.C.	**Nelson v. Nelson**, 548 A.2d 109 (D.C. 1988).	Majority
Florida	**Perla v. Perla**, 58 So.2d 689 (Fla. 1952).	Majority
Georgia	**Crane v. Crane**, 170 S.E.2d 392 (Ga. 1969).	Minority
Illinois	**Strom v. Strom**, 142 N.E.2d 172 (Ill. App. 1957).	Majority
Indiana	**Liddy v. Liddy**, 881 N.E.2d 62 (Ind. App. 2008).	Majority
Iowa	**Davis v. Davis**, 67 N.W.2d 566 (Iowa 1954).	Majority
Kansas	**Prosser v. Prosser**, 157 P.2d 544 (Kan. 1945).	Majority
Kentucky	**Williams v. West**, 258 S.W.2d 468 (Ky. 1953).	Majority
Louisiana	**Mayeaux v. Mayeaux**, 536 So.2d 836 (La. App. 1988).	Majority
Maine	**Lund v. Lund**, 927 A.2d 1185 (Me. 2007).	Minority
Maryland	**Sininger v. Sininger**, 479 A.2d 1354 (Md. 1984)	Majority
Massachusetts	**Feinberg v. Diamant**, 389 N.E.2d 998 (Mass. 1979)	Majority
Michigan	**Smith v. Smith**, 447 N.W.2d 715 (Mich. 1989).	Minority
Minnesota	**McCarthy v. McCarthy**, 222 N.W.2d 331 (Minn. 1974).	Majority
Mississippi	**Taylor v. Taylor**, 478 So.2d 310 (Miss. 1985).	Majority
Missouri	**Fower v. Fower Estate**, 448 S.W.2d 585 (Mo. 1970)	Majority
Montana	**Maberry v. Maberry**, 598 P.2d 1115 (Mont. 1979).	Majority
Nebraska	**Meyers v. Meyers**, 383 N.W.2d 784 (Neb. 1986).	Majority
Nevada	**Edington v. Edington**, 80 P.3d 1282 (Nev. 2003).	Majority
New Hampshire	**In re Jacobson**, 842 A.2d 77 (N.H. 2004).	Majority
New Jersey	**Kruvant v. Kruvant**, 241 A.2d 259 (N.J. 1968).	Majority
New Mexico	**Cohn v. Cohn**, 934 P.2d 279 (N.M. App. 1996).	Majority
New York	**Beiter v. Beiter**, 539 N.W.S.2d 271 (N.Y. Sup. Ct. 1998).	Minority
North Carolina	**Wells v. Wells**, 44 S.E.2d 31 (N.C. 1974).	Majority
Ohio	**Ulery v. Ulery**, 620 N.E. 2d 933 (Ohio App. 1993).	Majority
Oregon	**Haxton by Haxton v. Haxton**, 705 P.2d 721 (Or. 1985).	Majority
Pennsylvania	**Hanson v. Hanson,** 625 A.2d 1212 (Pa. Super. 1993).	Majority
Rhode Island	**Olivieri v. Olivieri**, 760 A.2d 1246 (R.I. 2000).	Majority
South Carolina	**Riggs v. Riggs**, 578 S.E.2d 3 (S.C. 2003).	Majority
South Dakota	**Mower v. Mower**, 47 S.D. 353, 199 N.W. 42 (S.D.	Majority

	1924).	
Tennessee	**Sayne v. Sayne**, 284 S.W.2d 309 (Tenn. App. 1955).	Majority
Texas	**Worford v. Stamper**, 801 S.W. 2d 108 (Tex. 1990).	Majority
Utah	**Dehm v. Dehm**, 545 P.2d 525 (Utah 1976).	Majority
Virginia	**Rinaldi v. Dumsick**, 528 S.E.2d 134 (Va. App. 2000).	Majority
Washington	**Van Tinker v. Van Tinker**, 229 P.2d 333 (Wash. 1951)	Majority
West Virginia	**Kinder v. Schlaegel**, 404 S.E.2d 545 (W. Va. 1991).	Majority
Wisconsin	**O'Neill v. O'Neill**, 117 N.W.2d 267 (Wis. 1962).	Majority

Special Needs Trusts National Conference

Friday, October 16, 2015

Breakout Session 1
1:00 P.M. – 1:55 P.M.

SSI and SSDI Eligibility for Non-Citizens

Presenter:
Linda Landry
Disability Law Center, Inc.
Boston, MA

- Materials
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SSI and SSDI Eligibility for Non-Citizens

September 2015, Linda Landry, Disability Law Center, Boston, MA

Introduction

In 1996, Congress enacted legislation creating alien status eligibility criteria for federal benefits. The federal alien eligibility criteria for needs-based benefits are restrictive, based on a narrow definition of "qualified alien." The SSI alien eligibility criteria are the most restrictive, essentially requiring the individual to meet the "qualified alien" definition plus additional criteria. The alien eligibility criteria for Title II benefits are much broader.

Non-Citizen Eligibility Criteria for Title II Social Security Benefits

Prior to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),[1] there were no citizenship or alien status eligibility requirements for Title II Social Security benefits. Non-citizens with work authorization could obtain a valid social security number (SSN) and earn quarters of coverage. Non-citizens who earned enough quarters of coverage to have insured status could receive Social Security disability or retirement benefits if they met the eligibility criteria.

Section 401(b)(2) of the PRWORA[2] provides that non-citizens must show they are "lawfully present" in order to be eligible for Social Security Insurance program benefits. This provision applies only to benefits payable to wage earners and their eligible dependents/survivors on applications filed on or after December 1, 1996. It does not apply to those receiving benefits on applications filed prior to that date. It also does not apply to benefits paid to non-citizens who reside outside the U.S.[3] The Social Security Administration (SSA) accepts the definition of "lawful presence" contained in regulations published by the Department of Justice, at 8 C.F.R. §103.12, which were effective as of September 6, 1996.[4] The overall definition of "lawful presence" is an alien who has been inspected and admitted to the United States and who has not violated the terms of the status. Specifically included are the following: legal permanent resident aliens; refugees; asylees; certain parolees; certain conditional entrants; withholding of

[1] Pub. L. No. 104-193, 110 Stat. 2170 (8/22/1996)

[2] Codified at 42 U.S.C. § 402(y).

[3] See U.S. Lawful Presence Provisions, POMS RS 00204.010(B)(3).

[4] Evidence Requirements for Lawful Presence, POMS RS 00204.025(B).

deportation status; Temporary Protected Status (TPS); Cuban/Haitian entrants; Family Unity beneficiaries; Deferred Enforced Departure (DED); applicants for asylum; and others.[5]

Non-Citizen Eligibility for Title XVI Supplemental Security Income Benefits

An Supplemental Security Income (SSI) applicant or recipient must either be a citizen of the United States or have qualifying alien status. The PRWORA legislation[6] drastically changed non-citizen eligibility for SSI. The changes have yet to be codified in regulations, but the SSA has developed detailed sub-regulatory instructions in the POMS. This article includes citations are to the PRWORA provisions, and to the POMS.

For SSI purposes, a citizen of the United States is a person born in the United States, Puerto Rico, Guam, or the Virgin Islands. Individuals born in American Samoa, Swains Island, and the Northern Marianas Islands are United States Nationals and are treated as United States citizens for SSI purposes.[7] Citizenship may also be obtained through the naturalization process. Non-citizens who naturalize have the same rights to receive public benefits as other U.S. citizens.

SSI Eligibility for Non-citizens Prior to 8/22/96

Prior to enactment of the PRWORA on August 22, 1996, a non-citizen could be eligible for SSI as

- an alien lawfully admitted in the United States for permanent residence [8]; or
- an alien permanently residing in the United States under color of law (PRUCOL).[9] Permanent residence in the United States under color of law (PRUCOL) is not an immigration status. PRUCOL means that the individual is residing in the United States with the "knowledge and permission" of the Department Homeland

[5] See 61 Fed. Reg. 47.039 - .041 (1996); Evidence Requirements for Lawful Presence, POMS RS 00204.025(B). For the Verification requirements see POMS RS 00204.020. For the entire section on Title II Lawful Presence requirements, see POMS RS 00204.000 et seq. https://secure.ssa.gov/apps10/poms.nsf/lnx/0300204000 `

[6] Pub. L. No. 104-93, 110 Stat. 2170 (8/22/1996)

[7] 20 C.F.R. § 416.1610(d).

[8] 20 C.F.R. §416.1618. 20 C.F.R. §416.1615

[9] 20 C.F.R. §416.1618.

Security (DHS), and that the DHS does not contemplate enforcing the departure of the individual.

This is a broad standard that allowed most non-citizens with immigration status, and even some applicants for status, to qualify for SSI. However, undocumented non-citizens, e.g., those who entered the U.S. uninspected and with no contact with immigration officials, were not eligible under PRUCOL.

SSI Eligibility for Non-citizens On and After 8/22/96

Section 402 of the PRWORA made most non-citizens ineligible for SSI benefits. "Current recipients," i.e., recipients as of August 22, 1996, were facing benefits termination in August and September 1997. The Balanced Budget Act (BBA) of 1997,[10] stopped the scheduled terminations and also reinstated eligibility for some non-citizens. After the PRWORA and the 1997 BBA, one must know both the non-citizen's alien status and the date of entry in order to determine whether the non-citizen meets the SSI alien status eligibility criteria. The following terms and definitions are crucial to understanding which non-citizens are SSI eligible and to applying the current SSI non-citizen eligibility criteria.

PRWORA Alien Status Eligibility Criteria

Under the provisions of the PRWORA, ONLY the following non-citizens qualify for SSI.

- Refugees, asylees, and persons granted withholding of deportation, but only for seven years (increased from five to seven years by Balanced Budget Act) after obtaining these statuses.[11] Note that those who adjust to legal permanent resident status before the seven years runs remain eligible for the remainder of the period, and that Amerasians and Cuban/Haitian entrants are treated as refugees for the purpose of determining eligibility for time-limited benefits. A two year extension of the 7 year period was available to some in this category, but it ended on September 30, 2011.[12]

[10] Pub. L. No. 105-33, 111 Stat. 678 (1997).

[11] Basic SSI Eligibility and Development Requirements, POMS SI 00502.100, Documentary Evidence of Qualified Alien Status, POMS SI 00502.130.

[12] POMS SI 00502.301.

- "Qualified aliens" who are honorably discharged veterans or active duty armed services personnel, their spouses, and unmarried dependent children;[13]

- Legal permanent resident aliens who have earned forty qualifying quarters as defined by Title II of the Social Security Act (as of January 1, 1997, no quarter qualified in which the wage earner was also receiving a Federal means-tested benefit);[14] and

- Legal permanent resident aliens who may be credited with forty qualifying quarters from one or both parents, if the quarters were earned before the individual turned age eighteen, or, from their current spouse (the federal mean-tested benefit exception described above applies for quarters earned after January 1, 1997).[15] Note that most legal permanent residents who enter the United States on or after August 22, 1996, also face a five-year bar on SSI eligibility.[16] The five-year bar does not apply to those eligible for time-limited benefits or to the veterans and armed service personnel described above, even if their "qualified alien" status is that of legal permanent resident.[17]

Definition of "Qualified Alien"

The term "qualified alien" was first created and defined in Section 431 of the PRWORA. It was expanded by subsequent laws, including the 1997 Balanced Budget Act. With some exceptions, a non-citizen must have a status within the definition of "qualified alien" to qualify for SSI. The definition of "qualified alien" now includes: legal permanent residents; asylees; refugees; persons granted withholding of deportation; Cuban Haitian entrants; persons paroled into the United States for a period of at least one year; and certain spouses and children affected by domestic violence.[18]

[13] Veteran or Active Duty Member of the Armed Forces, a Spouse or Dependent Child, POMS SI 00502.140.

[14] LAPR with 40 Qualifying Quarters of Earnings, POMS SI 00502.135.

[15] LAPR with 40 Qualifying Quarters of Earnings, POMS SI 00502.135(B).

[16] LAPR with 40 Qualifying Quarters of Earnings, POMS SI 00502.135(B)(1).

[17] POMS SI 00502.135B.

[18] Basic SSI Alien Eligibility Requirements, POMS SI 00502.100 ; see also Qualified Alien Status Based on Battery or Extreme Cruelty by a Family Member, POMS SI 00502.116, for the domestic violence criteria.

Definition of "Current Recipient" (Grandfatheree)

A "current recipient" is a non-citizen who was receiving SSI on August 22, 1996, the date of enactment of the PRWORA, or who was in a non-pay status, like suspense status, on that date, or who had received at least a partially favorable disability decision prior to August 21, 1996.[19] The importance of being a "current recipient" is that most "current recipients" are "grandfathered" into the SSI program as to alien status eligibility.

Definition of "Lawfully Residing"

An alien is "lawfully residing" in the U.S. if he/she is a resident of the U.S. and is "lawfully present" as defined by the U.S. Attorney General in regulations published on 9/6/1996. "Lawfully present" is a fairly broad term defined by the Department of Justice and includes more types of alien status than the definition of "qualified alien." See Non-citizen Eligibility Criteria for Title II Social Security Benefits, above.

Current SSI Alien Status Eligibility Criteria

The following are the SSI eligibility categories for non-citizens now in effect.

- "Current Recipients" (Grandfatherees)

"Current" SSI recipients, as defined above, who are "qualified aliens", as defined above, are SSI eligible, if otherwise eligible.[20] Those who are not "qualified aliens" are also "grandfatherees" as long as they are at least PRUCOL[21] "Current recipients" retain their "grandfathered" status, even if they lose eligibility for another reason and later become eligible again. For example, a "current recipient" on 8/22/96 who later loses disability eligibility and even later applies for age-based benefits at age 65 retains his or her "grandfathered" status as to alien status eligibility.[22] Without grandfathered status, as an applicant based on age, he or she would have to meet the restrictive PRWORA alien status to be eligible, or, if he or she has status meeting the definition of "qualified

[19] Qualified Aliens Receiving Benefits on 8/22/96 (Balanced Budget Act of 1997, P.L. 105-33), POMS SI 00 Qualified Aliens Receiving Benefits on 8/22/96 (Balanced Budget Act of 1997, P.L. 105-33), POMS SI 00502.150(A) 502.150(B)(2)(6).

[20] Qualified Aliens Receiving Benefits On 8/22/96 (Balanced Budget Act of 1997, P.L. 105-33), POMS SI 00502.150, https://secure.ssa.gov/apps10/poms.nsf/lnx/0500502150

[21] SSI Eligibility of Nonqualified Aliens Who Were Receiving SSI on 8/22/96, 1998 "Grandfathering" Legislation, POMS SI 00502.153(B)(1), https://secure.ssa.gov/apps10/poms.nsf/lnx/0500502153

[22] Basic SSI Alien Eligibility Requirements, POMS SI 00502.100(B).

alien," he or she could try, as an alien "lawfully present" on August 22, 1996, try to prove disability eligibility.

In addition, individuals who are long-term SSI recipients (since prior to January 1, 1979) will continue to be eligible in the absence of "clear and convincing evidence" of ineligibility on the basis of alien status.[23]

- "Qualified aliens" who were "lawfully residing" in the United States on August 22, 1996

These non-citizens are SSI eligible if they meet the SSI disability standard. SSA will perform disability determinations for those 65 to determine SSI non-citizen eligibility under these criteria. This means that legal permanent residents (meets qualified alien definition), who were lawfully residing in the U.S. on August 22, 1996, and who meet the disability standard are SSI eligible without having earned forty quarters of coverage. It also means that asylees and refugees lawfully present on August 22, 1996, who are disabled are SSI eligible without the seven-year eligibility limit. The SSA will perform disability determinations for elders (age sixty-five and over) who are "qualified aliens" and who were "lawfully residing" on August 22, 1996.[24]

Practice Note

Social Security Ruling 03-03p:[25] Titles II and XVI: Evaluation of Disability and Blindness in Initial Claims for Individuals Aged 65 or Older, describes the disability review process for non-citizens aged sixty-five and older. Note that conditions often found in older individuals, i.e., arthritis, can be the basis of a disability finding if medically determinable, i.e., diagnosed by a doctor. Evidence from many other sources can then be used to show the severity of resulting functional limitations. The Social Security Administration will use the disability determination rules for individuals aged sixty to sixty-five, which generally require less severe functional limitations than those for younger individuals to meet the severity standard. In addition, the Social Security Ruling includes two special rules for older non-citizens: 1) individuals aged seventy-two and older who have a medical determinable impairment will be deemed to have a severe impairment as defined in Step 2 of sequential analysis of disability and the evaluation will proceed to Step 3; 2) for individuals aged sixty-five or older who retain the capacity

[23] Eligibility on the Basis of Receiving SSI Benefits on an Application Filed Before January 1, 1979, POMS SI 00502.120(B).

[24] Qualified Aliens Who Are Blind or Disabled and Lawfully Residing in the U.S. on 8/22/96, POMS SI 00502.142(E).

[25] http://ssa.gov/OP_Home/rulings/di/01/SSR2003-03-di-01.html

to perform medium work and who are further limited by illiteracy in English or the inability to communicate in English, a finding of disabled is warranted, unless the individual's past relevant work was skilled or semiskilled and resulted in transferable skills.

- All other non-citizens

Non-citizens who do not meet the criteria in either of the two bullets immediately above must meet the restrictive PRWORA SSI alien status eligibility criteria described above in PRWORA Alien Status Eligibility Criteria.

Exceptions to the SSI Alien Eligibility Criteria

Two groups of American Indians are exempt from all SSI non-citizen provisions, as follows: 1) individuals born in Canada who establish one-half American Indian blood; and 2) foreign-born members of federally recognized United States Indian tribes.[26]

Verification

Generally, SSA will verify alien status with the Department of Homeland Security (DHS, formerly the Immigration and Naturalization Service) if there is any reason to question the authenticity of the documents presented or if the information on the documents presented is insufficient to determine alien status eligibility.[27] Many SSA offices now have the capacity to verify status for non-citizens with "A" numbers through SAVE, a computerized systems link with DHS.

Reporting Requirement

Section 404 of the PRWORA requires certain federal agencies, including the SSA, to furnish the DHS with identifying information on persons whom the agency knows to be unlawfully present in the United States. The extent of this reporting requirement was unknown until publication of notice in the Federal Register.[28] The notice explains that the reporting requirement applies to the SSA with respect to the SSI program only. The notice provides that affected agencies are not required to file reports unless they have something to report. The trigger for filing a report, "knowing" that a non-citizen is not lawfully present, is narrowly defined. An agency "knows" that an individual is not lawfully

[26] See Exemption from Alien Provisions for Certain Non-citizen Indians, POMS SI 00502.105.

[27] Basic SSI Alien Eligibility Requirements, POMS SI 00502.100 ; Verification of Alien Eligibility With the Department of Homeland Security (DHS), POMS SI 00502.115.

[28] 65 Fed. Reg. 58,301 (Sept. 28, 2000).

present only when the unlawful presence is a finding of fact or conclusion of law made by the agency as part of a formal determination that is subject to the administrative appeal process. A finding of fact or conclusion of law must be supported by a determination by DHS or the Executive Office of Immigration Review, such as a Final Order of Deportation. This means that a SAVE response showing no DHS record on an individual or an immigration status making the individual ineligible for a benefit is not a finding of fact or conclusion of law that the individual is unlawfully present.

For more information on the reporting requirement see the website of the National Immigration Law Center.[29]

Practice Note

It is important to consider whether the need for a public benefit like SSI outweighs any risk that receipt of the public benefits will harm the non-citizen's ability to better his or her status. As the "public charge" issue requires consideration of all the circumstances, the non-citizen should consult an immigration specialist for advice.

Public Charge

Immigration law allows DHS to deny entry into the U.S. or to deny applications for lawful permanent residence ("green cards") upon a determination that the non-citizen is likely to become dependent upon government benefits for support, i.e., a "public charge." DHS's implementation of the public charge policy had been confusing and inconsistent. As a result, many non-citizens have avoided seeking basic benefits and services for fear that use of such government programs would lead to denial of a green card or deportation. In May 1999, the DOJ also published a helpful Field Guidance on Deportability and Inadmissibility on Public Charge Grounds.[30] The Field Guidance provided much needed standardization and clarification of the DHS public charge policy and the exceptions, but it is not expected to significantly change the number of non-citizens who will be found inadmissible or deportable on public charge grounds. It is expected to result in less confusion on the public charge issue and more confident use of basic public services by non-citizens. SSA also published a POMS section on the Public Charge issue for SSA workers.[31] Highlights of the public charge Field Guidance

[29] https://www.nilc.org/overview-immeligfedprograms.html

[30] 64 Fed. Reg. 28,689-28693 (May 26, 1999). See also DOJ. Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28676-28688(May 26, 1999); U.S. Department of State, INA 212(A)(4) Public Charge: Policy Guidance, 9FAM 40.41.

[31] Alien Requests for Information About Possible Deportation for Receiving SSI, POMS SI 00501.450, https://secure.ssa.gov/apps10/poms.nsf/lnx/0500501450

include the following, however, this is another area where it is important for the non-citizen to receive advice from an immigration expert.

- Use of cash welfare benefits, including SSI, does not require but might result in a public charge finding, depending on the situation. The DHS adjudicator must consider the totality of the circumstances, including whether receipt of the benefit is temporary.[32] Also, DOJ published as an appendix to the proposed regulations is a letter from former SSA deputy commissioner, Susan Daniels, which sets out limitations on application of the "public charge" policy to SSI recipients.[33]

- Benefits that are "earned," such as Title II Social Security benefits, unemployment compensation benefits, and veterans' benefits, will not be considered for "public charge" purposes.[34]

- Receipt of cash welfare benefits, including SSI, by a non-citizen's children or other family members will not make the non-citizen a public charge, unless these benefits are the family's only income. [35]

- Use of food stamps, Women, Infants, and Children (WIC), public housing, or other noncash programs by non-citizens and their families will not make the non-citizens public charges.[36]

- Use of Medicaid or other public health services by non-citizens or their family members will not make the non-citizens public charges, unless these or other government funds are used to pay for long-term care.[37]

For more information on Public Charge see the website of the National Immigration Law Center.[38]

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[32] 64 Fed. Reg. at 28692.

[33] 64 Fed. Reg. at 28687.

[34] 64 Fed. Reg. at.28692.

[35] 64 Fed. Reg. at 28691 – 28692

[36] 64 Fed. Reg. at 28693.

[37] 64 Fed. Reg. at 28693

[38] https://www.nilc.org/pubcharge.html

Social Security Numbers

The SSA may issue social security numbers (SSNs) to "lawfully present" non-citizens who have work authorization. SSA also requires verification of age and identity.[39] "Non-work" SSNs may be issued in limited circumstances to non-citizens who do not meet this standard but who need a SSN for a valid non-work reason. Valid non-work reasons include a federal statute requiring a SSN to receive a benefit or a state statute requiring a SSN to receive a public assistance benefit.[40] As of October 2003, SSNs are no longer assigned for the sole purpose of getting a driver's license.

Regulations issued in 1996 provide that, based on a person's immigration status, a restrictive legend may appear on the face on an SSN card to indicate that work is either not authorized or that work may be performed only with DHS authorization.[41] In addition, SSA has set a limit on the number of replacement SSN cards. Unless the individual provides evidence establishing significant hardship if a replacement card is not issued, SSA will limit individuals to 3 replacement cards per year and 10 per lifetime.[42]

Practice Note

A child who does not have an SSN must apply for one when s/he applies for SSI. If the child meets the citizenship or alien status standards for SSI, the child will be eligible for an SSN. As of February 9, 1998, the SSN application for a child requires the SSA to request the parents' SSNs, unless the parents cannot be assigned SSNs.[43]

SSI Sponsor to Alien Income and Resource Deeming

Deeming is the process for determining the amount of a third party's income and resources that count to determine the SSI financial eligibility of an SSI applicant or recipient.

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[39] For verifications see POMS RM 01205.015 https://secure.ssa.gov/apps10/poms.nsf/lnx/0110205015 , POMS RM 10210.020., https://secure.ssa.gov/apps10/poms.nsf/lnx/0110210020

[40] POMS RM 10211.610, https://secure.ssa.gov/apps10/poms.nsf/lnx/0110211610

[41] 20 C.F.R. §422.103.

[42] 20 C.F.R. §422.103.

[43] POMS RM 105.160, https://secure.ssa.gov/apps10/poms.nsf/lnx/0110205160

Deeming Circumstances

Deeming applies only in the following circumstances:[44]

- from SSI-ineligible spouse to SSI-eligible spouse in the same household;
- from SSI-ineligible parent to SSI-eligible minor child in the same household;
- from sponsor to SSI-eligible alien, whether or not the applicant/ recipient non-citizen resides with the sponsor; and
- from SSI-ineligible essential person to SSI eligible individual.[45]

Income Deeming

Income deeming is the process of considering a portion of another person's income as the unearned income of an SSI recipient.[46] The deemed income is considered available to the SSI recipient, whether or not it is actually available. The deemed income will be deducted from the maximum SSI benefit to which the recipient is entitled, along with the recipient's own countable income, if any.[47] SSA uses different deeming formulas for each type of deeming.[48] If two deeming rules could apply to a sponsored alien, e.g., sponsor is also the alien's ineligible spouse, SSA uses the spouse-to-spouse deeming rules instead of the sponsor-to-alien rules. If an SSI applicant alien has a sponsor and also has an ineligible spouse who is not the sponsor whose income can be deemed, both rules apply.[49]

Resource Deeming

In resource deeming, the SSA "deems" or treats the countable resources of SSI ineligible parents, spouses, or alien sponsors, whether or not the sponsor lives with the alien SSI recipient, as if they were available to the SSI recipient, even if they are not

[44] 20 C.F.R. § 416.1160.

[45] See 20 C.F.R. § 416.1160(d) for the definition of "essential person." Since essential persons had to be identified prior to 1974, there are few left.

[46] 20 C.F.R. § 416.1161.

[47] 20 C.F.R. § 416.1160.

[48] 20 C.F.R. §§ 416.1163 (spouse to spouse), 416.1165 (parent to minor child), 416.1166a (sponsor to alien), 416.1168 (essential person).

[49] 20 C.F.R. 416.1160(a)(3

actually available.[50] All the usual resource exclusions apply in determining countable resources for deeming purposes.[51] Additionally, funds in an IRA or other work-related pension plan of an SSI ineligible parent or spouse are excluded from countable resources for parent-to-child and spouse-to-spouse deeming purposes.[52]

Effect Changes in Sponsor Affidavit of Support on Sponsor to Alien Deeming

The PRWORA, Pub. L. No. 104-193 (Aug. 22, 1996) required the DHS to design a new legally enforceable affidavit of support to be used by non-citizens who enter with sponsors. The form is effective for use after December 19, 1997. For non-citizens whose sponsors have signed the new affidavit, deeming will apply until the non-citizen attains United States citizenship or earns forty quarters of coverage. In addition, no quarter of coverage earned after December 31, 1996, will count for SSI eligibility purposes if the non-citizen received a federal means-tested benefit during that quarter. See SSI Eligibility for Non-citizens On and After 8/22/96, above. This deeming change applies only to non-citizens with sponsors who have signed the new affidavits of support. Note that the prior deeming rules in the SSI program continue to apply to non-citizens whose sponsors signed the prior affidavit of support.[53] Under the prior sponsor-to-alien deeming rules, deeming of both income and resources applies for only three years after the non-citizen enters the United States. And, deeming does not apply at all if the sponsored alien became disabled after entering the United States.[54] The prior rules will continue to apply to recipients who entered with sponsors who signed the prior affidavit of support, unless a new affidavit of support is required for some reason.[55]

Non-citizen Parents of SSI Eligible Children

Non-citizen parents, including undocumented parents, can help their children file for benefits and can be their representative payees. A parent must file an application to be appointed as a child's representative payee. This application is usually taken at the same time as the application for benefits. The payee application requires that the applicant provide his or her Social Security Number (SSN), primarily for identification

[50] For specific sponsor-to-alien resource deeming rules, see 20 C.F.R. §416.1204.

[51] 20 C.F.R. §416.1200 et seq.

[52] 20 C.F.R. § 416.1202(b)(1).

[53] Sponsor-to-Alien Deeming, POMS SI 00502.200(A)(2) .

[54] 20 C.F.R. §416.1166(a).

[55] Sponsor-to-Alien Deeming, POMS SI 00502.200(A)(2), (3).

purposes. There is one exception to the SSN requirement, however. If the applicant is a parent filing to be the representative payee for his or her minor child and the parent cannot be assigned an SSN, the SSA must use an alternative procedure and appoint the parent if otherwise suitable.[56]

Practice Note

A bigger problem for some non-citizen parents may lie in the income and asset verification requirements. The SSI application requires information about the income and assets of the both the child and the parents who live with the child. The SSA must verify the parents' income and assets before the child can be found eligible for benefits. This is because a portion of the parents' income and assets may be counted (deemed) to the child to determine whether the child is SSI eligible and what the benefit amount should be. Verification is by paychecks, bank statements, and tax records. The SSA also verifies reported income with the parents' employers. This reporting and verification process may pose significant problems for parents who are working without authorization or working "under the table." Also note that the SSA shares reported and verified income periodically with the IRS.

Communication Access at SSA

If an individual is unable to effectively communicate in English, it is SSA's policy to provide an interpreter at no expense to the individual in order to assist the individual in completing business transactions with the SSA.[57] Interpreters can be provided for all SSA interactions and at all levels of administrative appeal upon request by the applicant. See SSA's Multilanguage Gateway website page for more information on language access.[58] Also note that SSA has publications in many languages other than English available on its website.

[56] See Obtaining a Representative Payee Application, POMS GN 00502.107, Verification of Information Provided by Payee Applicants, POMS GN 00502.117.

[57] Special Interviewing Situations (Non-English Speaking or Limited English Proficiency), POMS GN 00203.011; Special Interviewing Situations (Deaf and Hard-of-Hearing Individuals), POMS GN 00203.012.

[58] http://www.socialsecurity.gov/multilanguage/langlist1.htm

SSI and SSDI Eligibility for Non-Citizens

Linda Landry
Disability Law Center
September 2015

1

1996 -Watershed Year for Non-Citizen Eligibility for Benefits

Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), P.L. 104–193 (August 22, 1996)

Imposed new alien status eligibility criteria for both Title II and Title XVI benefits.

The most restrictive criteria apply to Title XVI benefits (SSI).

2

Title II Benefits

Title II - Social Security Insurance program that pays a monthly cash benefit to insured adults who are at retirement age or who are under retirement age and disabled.

Benefits are also payable to certain survivors of insured workers and to certain dependents of disability and retirement benefit recipients.

These benefits are not "needs-based."

3

Non-Citizen Eligibility Criteria for Title II Benefits

- **Lawful Presence in US.**
- SSA adopted DOJ standard at 8 CFR 103.12: inspected & admitted to U.S. & no violation of terms of admission.
- Includes "qualified aliens" and many others, *e.g.*, most lawful non immigrants, aliens in temporary resident status, aliens under Temporary Protected Status, aliens who are the spouse or child of a United States citizen whose visa petition has been approved and who have a pending application for adjustment of status.

4

Need Valid Work SSN to Earn Credits for Insured Status

* Social Security Protection Act of 2004, P.L. 108-203, requires that to be "fully insured" or "currently insured," a noncitizen must have been assigned an SSN that was, when assigned or at any later time, valid for work purposes.
* Effective for applications based on SSNs issued on or after 1/1/04.

5

What is SSI?

- Supplemental Security Income
- Federal, needs-based, cash support program created in 1972 and run by SSA.
- Available to disabled adults and children and to those age 65 and older.
- No work history required.
- Strict income, asset and non-citizen eligibility criteria.

6

SSI Basic Requirements

- Disabled, Blind, or Aged (65+).
- Income and resource limits. Resource limit: $2000/individual, $3000/couple.
- Residence in U.S. for 30 days.
- Restrictive non-citizen status requirements for benefits payable after 12/1/96.

7

More SSI Basics

- SSI pays a monthly cash benefit.
- The benefit amount depends on whether recipient is disabled, blind, or aged, and on the recipient's living arrangement.
- The maximum monthly payment is set each year by SSA. States can choose to add a supplement. Federal payment in 2015 is $733 p/month.
- In most states, SSI recipients also qualify for Medicaid.

8

Non-Citizen SSI Eligibility Criteria

- Before 8/22/96 PRUCOL (Permanently Residing Under Color of Law) was the standard. Eligibility now is much more limited.
- Eligibility depends on the immigrant's status and date of entry into the U.S.
- There are now 3 basic groups of eligible non-citizens.

9

(1) Non-Citizens Receiving SSI on 8/22/96

- All non-citizens who were "receiving" SSI on 8/22/96 are "grandfathered" into the SSI program, as long as they meet at least PRUCOL and are otherwise eligible.
- Grandfathering applies even if SSI benefits terminate and the non-citizen subsequently files a new SSI application.

10

(2) Noncitizens Who Entered Prior to 8/22/96

Eligible for SSI if they:

- were "**lawfully residing**" in U.S. on 8/22/96; **AND**
- are now "**qualified aliens**;" **AND**
- are now "**disabled**" or blind (regardless of age)

11

Definition - "Lawfully Residing"

- SSA uses DOJ definition at 8 CFR103.12.
- **U.S. Resident** = establishes residency in the U.S. with the intent to continue living within the geographic limits of the U.S., **AND**
- "**Lawfully Present**" = inspected & admitted to U.S. & no violation of terms of admission.

12

Definition - "Qualified Alien"

- Legal Permanent Resident
- Granted Conditional Entry
- Paroled into the U.S. for at least 1 year
- Asylees
- Refugees
- Deportation or removal withheld
- Certain Cuban/Haitian entrants
- Certain aliens who have been subjected to battery or extreme cruelty, or whose child or parent has been subjected to battery or extreme cruelty

13

(3) Noncitizens Who Entered U.S. After 8/22/96

Must be super-qualified. Eligible for SSI only if they are:

- LPRs, **BUT** only those credited with 40 quarters of coverage **AND** after 5 years in the U.S.; **OR**
- refugees, asylees, persons granted withholding of deportation/removal, Cuban/Haitian entrants, and certain Amerasian immigrants; **BUT ONLY** for the **FIRST 7 YEARS** in those statuses; **OR**
- honorably discharged veterans and active duty armed services personnel who are "qualified aliens" and their spouses and unmarried, dependent children.

14

40 Quarters of Coverage

- Quarters of Coverage (QCs) must be earned by:
  - LPR him/herself, and/or
  - parent of LPR under 18, and/or
  - current spouse (or "holding out") of LPR, during marriage
- Same QCs can count toward multiple claimants
- **BUT**, QCs earned after 12/31/96 not credited if in the quarter the LAPR alien (or worker parent or spouse) received a Federal means-tested public benefit (SSI, Medicaid, Food Stamps, TANF).

15

Sponsor – Alien Deeming

- Income and resources of sponsor and sponsor's spouse counted as immigrant's.
- Few income deductions. Same resource exclusions as to SSI recipient (*e.g.* house that you live in, 1 car)
- Enforceable Affidavit of Support (I-864) since 12/19/97
- For immigrants whose sponsors have signed the new Affidavit, deeming will apply until the immigrant become US citizen or earns 40 Quarters of Coverage.
- Old deeming rules apply to immigrants sponsored under old Affidavit of Support

16

Exceptions to Sponsor – Alien Deeming

- Refugees and asylees
- Become disabled after getting LPR status
- Not required to have sponsors
- Earned 40 Quarters of Coverage
- First applied for SSI before 10/1/80
- Sponsored by an organization or employer
- After sponsor dies
- If sponsor is spouse, spouse-spouse deeming rules apply; if parent, use parent-child deeming.

17

Proving Qualified Alien Status

- POMS SI 00502.130: Documentary Evidence of Qualified Alien Status
- POMS SI 00502.115: Verification of Alien Eligibility with the Department of Homeland Security
- Systematic Alien Verification for Entitlement (SAVE) program at DHS

18

Appealing SSI Alien Status Eligibility Denials

- 1st Appeal = Request for Reconsideration
- 2nd Appeal = Request for ALJ Hearing
- Appeal forms at www.ssa.gov/online/
- 60-day appeal deadline (assuming 5 days for mailing); look at date on notice
- File appeal at local SSA office & **keep a copy**
- Late appeals taken for "good cause"

19

Appealing SSI Terminations

- Same rules and procedures as appealing eligibility denials except:
- You can keep benefits pending the appeal if you appeal the termination within 10 days (+ 5 days for mailing) and you tell SSA you want to keep your benefits while the appeal is pending

20

Public Charge

- An immigration term to describe people who the immigration service believes will be primarily dependent on public benefits
- Factors: age, health, income, family size, education and skill.
- Applies to:
  - Immigrants who are trying to get their green cards
  - Low-income LPRs who leave the country for more than 6 months

21

Public Charge

- Use of SSI does not require but might result in a public charge finding, depending on "totality of the circumstances," including whether SSI is temporary.
- Refugees and asylees, Amerasian immigrants, and certain Cuban/Haitian entrants are exempt from the public charge.
- Receipt of SSI by an immigrant's children or other family members will not make the immigrant a public charge, unless public benefits are the family's only income.

22

SSA Reporting Obligations

- Applies to SSI but not Title II benefits.
- SSA required to report to DHS if it "knows" a noncitizen is not lawfully present.
- "Knows" = agency finding of fact or conclusion of law as part of a formal determination that is subject to appeal and the agency's finding or conclusion of unlawful presence must be supported by a determination of DHS such as a Final Order of Deportation.
- Computer check showing ineligible status for SSI does not mean SSA "knows" of unlawful presence.

23

Interpreters and SSA

- It is SSA policy to provide qualified interpreters free of charge to those who need them at every level of SSA process.
- Interpreter may be bilingual SSA staff or outside interpreter.
- Applicant for benefits may choose to provide own interpreter, but must be qualified and can't be minor child.

24

Qualified Interpreter

- Able to read, write, and speak fluently in English and the language or dialect of the applicant; and
- Provides an accurate interpretation and does not add information; and
- Is familiar with basic SSA terminology; and
- Agrees to comply with SSA's disclosure and confidentiality of information requirements; and
- Has no personal stake in the outcome of the case that would create a conflict of interest.

25

Special Needs Trusts National Conference

Friday, October 16, 2015

Breakout Session 2
2:05 P.M. – 3:00 P.M.

Estate and Long Term Care Planning for Adults Living with Disabilities

Presenter:
Laurie Hanson
Attorney at Law
Long, Reher & Hanson, P.A.
Minneapolis, MN

- Materials
- PowerPoint

Stetson University College of Law presents:
2015 SPECIAL NEEDS TRUSTS
THE NATIONAL CONFERENCE
October 14-16, 2015
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ESTATE and LONG-TERM CARE PLANNING
FOR ADULTS LIVING WITH DISABILITIES

By
Laurie Hanson, Long, Reher & Hanson, P.A.

October 16, 2015

I. INTRODUCTION

A person with a disability is not always, or even usually, unable to manage her own financial and personal affairs. Whenever possible, such an individual's estate planning should resemble the estate planning that an attorney undertakes for a non-disabled person. If the client's disability is cognitive, it will be necessary to explore whether the client has sufficient capacity to execute traditional estate planning documents such as a will, a power or attorney health care directive, or a trust document.

The goals of a long-term estate plan for a client with a disability include maximizing autonomy in the management of personal and financial affairs, preserving current and future public benefits, and assuring access to payment sources for health and long-term care. The planning strategies that are utilized for each client will depend on many factors, including the nature and extent of the person's disabilities, the age and life expectancy of the person, and the extent to which personal or family resources may be available to the individual in the short or long term.

This paper discusses the various tools and strategies that are available to the practitioner when engaging in estate and long term care planning for an adult with a long term disability. It does not address issues that are of primary importance to elderly individuals who develop disability due to age or diseases associated with the aging process. For the most part, it assumes that the person with a disability is the client. As appropriate, the paper will address any special considerations that apply when a child with a disability is nearing the age of majority, and the child's parents or guardians wish to ensure a smooth transition to adulthood. While it is often assumed by parents that their disabled child will need to be placed under guardianship when he turns turn 18, this is not always necessary or in the best interests of the young adult. The practitioner's obligation to the client is to maximize autonomy while assuring protection if the person is vulnerable, not to seek guardianship in order to preserve parental control over an adult

child.

II. Understanding the Nature of the Client's Disability and Consequent Needs over Time.

The term "disability" is used to describe a broad range of physical and intellectual impairments. Taking time to read about the nature of the client's disability before the client comes for the initial meeting is critical to the development of an appropriate plan. For example, the client may have a physical disability but no intellectual impairment. That client is fully capable of making his or her own decisions about work, home life, and property management. If the physical impairment is severe enough that she will require assistance with activities of daily living (such as bathing, dressing, grooming, eating, transferring, toileting and mobility), the special needs estate plan needs to ensure that the client can access government benefits such as Medicaid, to pay for long-term care services. The client may never be able to work and earn a living so may need to apply for Supplemental Security Income. Special needs planning for this client may include setting up first- and third special needs trusts or an ABLE account for management of personal and inherited assets to protect the receipt of SSI. Exploring with the client his choice of agents – attorney-in-fact, health care agent, trustee, representative payee - may be the most important part of developing the plan.

On the other hand, the parents of a minor child with a developmental disability severe enough that the child will never likely become independent may wish to develop a long term special needs plan to take effect when the child turns 18. If the child is not likely ever to be able to care for himself, live independently, or work, the plan will be different than if the child does have some ability to provide for or take care of himself. The predicted level of the child's future abilities and needs will determine whether the estate needs plan should include such matters as nominating a guardian, establishing a trust for management of any assets the parents want to leave the child, finding an appropriate trustee, and identifying the sources of funds and/or government benefits to pay for the cost of housing, medical care, and long-term care services.

Finally, it is critically important to understand the adult disabled client's long-term care needs and the cost of care. Many people living with disabilities require some long-term care services, which can range from merely living with someone to a very complex and expensive set

of services. Long-term care services can include socialization, community integration, physical and emotional supports, care giving, monitoring, supervision, advocacy, housing supports, skilled nursing care, unskilled care, home chore services, assistance with activities of daily living, health care advocacy, and surrogate financial management. Usually, an individual's resources will be insufficient to pay for these services over time. Understanding the client's likely long-term care, housing, and income needs is crucial to developing a plan to meet those needs, and one aspect of developing a special needs plan will involve identifying state, federal, and local government benefits that are available to assist the client over the long term. If a needs-based program is the person's sole or primary source of income, the practitioner must take great care to ensure that planning will not adversely affect those benefits.

III. UNDERSTANDING THE CLIENT'S PUBLIC BENEFITS ISSUES

Prior to developing an estate and long term care plan for an adult with a disability, the practitioner must understand the types of public benefits that the client is currently receiving, and/or may require in the future. By understanding the eligibility rules, a plan may be developed that maximizes the public benefits on which the client must rely to live independently. It is essential to review the actual documentation of the benefits, as many clients or their families do not understand the difference between SSI and SSDI, or between Medicaid, Medicaid for an employed person with a disability, and Medicare.

A. INCOME BENEFITS

Depending on the age of the client, the nature and extent of the client's disability, and her work history, the client may be eligible for Supplemental Security Income (SSI), SSDI (Social Security Disability Insurance), a Social Security retirement benefit (SS) or a combination of these. While the details of eligibility for and calculation of the benefit amount for these programs are beyond the scope of this paper, the practitioner must ascertain promptly whether the client is or may be eligible for these benefits, and then ensure that the planning does not jeopardize the client's receipt of those benefits. Maintaining or accessing these benefits is a critical component of planning for the disabled adult.

1. Supplemental Security Income (SSI)– a needs-based benefit

The purpose of the SSI program is to provide a minimum income level for food and shelter. Many persons who are not eligible for SSDI benefits (see below) because they have not accumulated enough work credits may nevertheless be eligible for SSI. Actual payment amounts vary depending on income, living arrangements, and other factors. SSI benefits are available only to persons who are blind, elderly, or disabled. The maximum federal SSI benefit in 2015 is $733 for an individual and $1,100 for a couple (most states add a small amount as a state supplement). Individuals may have only $2,000 and couples may have only $3,000.

A beneficiary's monthly SSI payment amount is offset by earnings at a rate of $2:$1. Eligibility for SSI will cease if the client's combined earnings and federal SSI benefit total (in 2015) $1551. This is often referred to as the SSI break even amount. Persons on SSI must report all income from all sources every month; both earned and non-earned income received will reduce future benefit payments. Unearned income reduces the SSI benefit dollar for dollar. Thus, if the goal is to maintain eligibility for SSI (which, in most states, is necessary to maintain eligibility for Medicaid), planning must ensure that monthly income does not jeopardize SSI eligibility. In states where MA is linked to SSI, this is particularly crucial.

2. SSDI – not a needs-based benefit

Social Security Disability Income (SSDI) is a federal program that pays cash benefits to people who are unable to work because of a disability. It is not a needs-based benefit. SSDI benefits are paid to persons who have accumulated Social Security work credits and then become disabled to the extent that they are unable to engage in substantial gainful activity (SGA). The number of credits needed depends on the age at which the person becomes disabled. SGA is defined by a fixed dollar amount that generally increases each year. The SGA amount for 2015, for example, is $1,090 for non-blind disabled persons, and $1,820 for blind individuals.
The amount of the SSDI benefit is based on historical earnings by the person during the period

before she became disabled. Thus, workers with higher earnings will have a larger SSDI payment than those who earned less during their income-earning years.

Occasionally, a younger adult with a disability who is on SSI and is working part-time but earning less than the SGA amount will accumulate enough work credits to, essentially, acquire eligibility for SSDI. This is because the number of work credits necessary to become eligible for SSDI depends on one's age as well as work history. For example, a person who is under 24 needs only six Social Security credits earned over three years to be eligible for SSDI.[1] If an individual on SSI accumulates enough work credits, the SSA sends a notice that the person has become eligible for SSDI, and SSDI payments will begin in the month of eligibility.

When a person who has been on SSI acquires SSDI eligibility due to part-time work, but the SSDI payment is less than the SSI maximum payment, it is sometimes best to take the person off needs-based benefits (e.g. SSI, Medicaid). If the client does not anticipate needing long-term care, and has become eligible for Medicare, there may be no need to remain on SSI or Medicaid; leaving these programs frees the individual to accumulate non-earnings based assets such as savings and investments.

3. Derivative Social Security Benefits for Disabled Adult Child – DAC –A needs-based benefit

When a parent who has accumulated Social Security work credits dies, that parent's non-disabled minor children are entitled to a benefit that continues only until they turn 18. Adult children who were determined to be disabled before age 22, on the other hand, can receive benefits deriving from their parents' entitlement to Social Security benefits as long as they meet certain criteria. This payment is referred to as the disabled adult child benefit (DAC).[2]

[1] For information on the number of credits necessary by age, see SSA, Benefits Planner: Social Security Credits, http://www.ssa.gov/planners/credits.html#&a0=2. In addition, if the person has been disabled according to SSA criteria, and on SSI for at least 2 years, she will also be eligible for Medicare.

[2] The POMS refers to this benefit as the Childhood Disability Benefit, but it is more commonly known as DAC when discussing adult disabled children. See generally SSA, POMS DI 10115.001 Requirements for Entitlement to Childhood Disability Benefits (CDB); Thomas E. Bush, *Disabled Adult Children*, 6 Marq. Elders Adv. 243 (2005).

DAC is a monthly cash payment to an adult child based on the social security earnings record of a parent of that adult child. Essentially, an adult child with a disability that began prior to the age of 22 can receive the derivative DAC benefit if he or she satisfy several criteria:

- The child currently meets the definition of "disabled" applicable to SSDI applicants;
- The child is not married, or is married to a social security beneficiary;
- The child is age 18 or older and has a disability which that began before age 22; and
- The parent (or step-parent or grandparent, if the child's parents are deceased) is entitled to Social Security Disability Insurance or Retirement Insurance benefits, or is deceased.

The amount of the payment is tied to the parent's primary insurance amount (PIA).[3] The DAC benefit is one-half of the parent's PIA if the parent is living, and three-fourths of the PIA if the parent is deceased. If both parents are disabled, retired, or deceased, the child is entitled to DAC benefits deriving from the higher PIA.

The DAC benefit is often higher than the maximum SSI benefit or the SSDI benefit that the child may be entitled to on her own record. If the DAC amount is higher than the SSI maximum federal benefit, SSI benefits will be terminated. To preserve Medicaid coverage for certain groups of individuals who lose SSI payments, Congress enacted special Medicaid continuation provisions. These provisions require the State Medicaid agencies to continue to consider specified groups of former SSI beneficiaries as SSI beneficiaries for Medicaid purposes, as long as they would otherwise be eligible for SSI payments. This applies to individuals who become eligible for DAC. (*See* DAC Disregard discussion, below.)

B. Medical Benefits

Planning must consider the source of payment for the client's medical and long-term care needs. These may shift over time as the client's income changes from SSI, to SSDI, to DAC and maybe even on to Social Security retirement benefits. If your client is the parent of a child with a disability, knowing the source of income and the eligibility criteria will allow you to decide

[3] "The 'primary insurance amount' (PIA) is the benefit (before rounding down to next lower whole dollar) a person would receive if he/she elects to begin receiving retirement benefits at his/her normal retirement age." SSA, Primary Insurance Amount, http://www.ssa.gov/oact/cola/piaformula.html

whether or not child's inheritance can be an outright gift or should be in a supplemental needs trust and how to structure gifts of retirement assets.

This phase of planning is critical; with Medicaid expansion and the ability to get health insurance regardless of pre-existing conditions, the client should explore exactly WHY she thinks she may need Medicaid. It may be the case that the client is better off in the long run to stay with private insurance or Medicare and a supplemental insurance policy. Many families are told by social workers that at age 18 they should get a guardianship, SSI, Medicaid benefits – and that is why they are in your office. As attorneys, we can start there and move the client to the most independent place possible. After all, filling out MA paperwork for a lifetime is daunting and frustrating and time-consuming.

1. Medicaid for Long-Term Care – needs based.

Medicaid for Long-term Care (hereinafter referred to as MA-LTC) benefits are available to adults with disabilities who are on SSI, or (in some states) meet state disability criteria (for instance, the 209B states). Medicaid covers almost all medical services, including long-term care in the community or in an institution. For persons who need long-term care because of the nature of their disabilities, it is a critical element of receiving adequate care in the short and long term. States have home and community based waivers, all with different eligibility criteria (there are differences in the waivers from state to state and within states there are differences between the waivers). A majority of states have adopted a managed-care component to their state programs, and more than half of all current beneficiaries are enrolled in some type of Medicaid managed care. Because strict income standards are part of the eligibility standard, a client on Medicaid may not accumulate assets in excess of the state standard (in most states $2000) and must have income less than 100% of the Federal Poverty Guidelines (in most states). Individuals must regularly report income from all sources to the state to remain on the benefits.

2. Medical Assistance DAC Disregard – needs-based[4]

[4]This is different than employed people with disabilities who received Medical Assistance (MA) the month before the initial month they were certified for special Supplemental Security Income (SSI) status under sections 1619(a) and 1619(b) of the Social Security Act who are eligible for MA without regard to income or assets.

If an adult disabled child loses eligibility for SSI when DAC payments begin, he or she can often continue eligibility for Medicaid. When a child qualifies for and receives DAC benefits, the income is excluded from countable income for Medicaid eligibility if the child's SSI was terminated because of the increased income but the child is otherwise eligible for SSI – still disabled and having countable resources of $2,000 or less. In some states the transition from SSI-linked Medicaid to DAC Medicaid is automatic and in others, the state Medicaid agency may require a new application. Regardless of the mechanism, it is important for families to be aware of the benefit and the transition, so that the transition can be managed as necessary to prevent an interruption in benefits.

3. Medicaid Buy In (Medicaid for Employed Persons with Disabilities) – Needs Based

All but four states have opted in to the Medicaid buy-in option, which allows employed individuals who are categorically eligible for Medicaid to remain on the program even if their income exceeds normal income limits. The beneficiary must pay a premium based on income. Each state's buy-in program is different, so the practitioner should be familiar with the eligibility standards, premium amounts, and other idiosyncrasies of her own state's buy-in option to properly advise the client if applying for this program is in the client's interests.

4. Medicare

Medicare is a federal program that provides health care coverage to individuals age 65 and over; patients with end-stage renal disease or ALS (Lou Gehrig's disease), and those who are disabled (defined to include only SSDI recipients who have been receiving benefits for 24 months). Medicare coverage is not means-tested, and Medicare benefits do not provide long-term nursing or custodial care, only limited skilled-care benefits.

5. Private Health Insurance–Disabled Dependent Adult Child Mandates

A small number of states require private insurance companies to provide coverage under a parent's health insurance policy for disabled dependent adult children even after the federal cutoff age of 26. The circumstances under which such coverage must be provided varies by

state, and the relationship between the state mandate for private coverage and eligibility for federal/state public health insurance benefits can be complex. This potential benefit is not widely known, however, so the practitioner should determine whether and how this option for health insurance may be available to the disabled adult client.[5]

C. MISCELLANEOUS PUBLIC BENEFITS

Clients who reside in public housing pay less than the fair market value of the apartment at a rate calculated at 30% of adjusted income[6]. The tenant must report all income received directly or on her behalf. There is no asset test, per se. Rather, the public housing entity will impute income off assets in excess of $5,000 and the then-current passbook rate. Assets and income earned in a supplemental needs trust are exempt. ***BUT: distributions tend to affect the calculation of rent if the distributions are regular – say payment of the cable or internet bill each month.*** Whether or not certain distributions are counted depends on the housing authority, and the state, county, or city in which the housing authority is located. Thus, it is important that you know how the housing authorities/entities in your area view special needs/supplemental needs trusts. Also, if a parent is giving and adult child living in the housing authority money, even if it is outside the trust, it must be reported.

The client may also be eligible for or receiving a cash benefit for purchasing food through the Supplemental Nutrition Assistance Program – or "SNAP" program[7]. These benefits are also needs based and in most states there is no asset test; only income is counted. A person who lives alone or a person who lives with others but usually buys food and cooks alone is considered a household of one. If the SNAP applicant purchases food and cooks meals with the people with whom he or she lives, then everyone is included in the "SNAP household", meaning everyone's income and assets are included in determining eligibility. Spouses and a person under

[5] For a table summarizing state laws governing dependent adult disabled children and private insurance, see National Conference of State Legislatures, Covering Young Adults Through Their Parents' or Guardians' Health Policy, http://www.ncsl.org/research/health/dependent-health-coverage-state-implementation.aspx

[6] See generally: http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11689.pdf (last visited September 25, 2015)

[7] Some states have a different name, although most states are using the acronym "SNAP." Like other federal programs administered at the state level, there are differences among states as to eligibility criteria. See generally http://www.fns.usda.gov/snap/eligibility (last visited September 25, 2015)

the age of 22 living with his or her parent(s) or step-parent are considered one household even if they do not eat together.

Finally, states have benefit programs funded with state dollars and particular to that state. By getting a copy of an eligibility notice the client has received, the practitioner should be able to determine all benefits the client is receiving.

IV. MANAGING MONEY AND PROPERTY - REPRESENTING THE DISABLED ADULT

A. EXPLORE INFORMAL ARRANGEMENTS FIRST

There are informal ways to receive assistance with finances and property management. Sometimes a person may need only a minimal amount of help in order to live independently. The client may want to hire someone on a regular basis or a one-time basis. For example, if the client has a parent or sibling or someone he trusts enough to confide in about his finances, that person can help him do things like write the checks to pay bills (while still being the only signer on the account, file tax returns, balance accounts, review the on-line accounts regularly, etc.). Other more informal arrangements are automatic banking, joint accounts, and authorized signer accounts.

B. DURABLE POWER OF ATTORNEY

All persons who have the requisite capacity should execute a durable power of attorney (DPOA). This is true even if the client has made informal arrangements to manage her accounts. In most jurisdictions, any individual who has the capacity necessary to enter into a contract may execute a DPOA. Capacity to contract exists when "the person possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he is engaged."[8] Thus, if a client with a disability reasonably understands that, in executing a DPOA, she is giving the agent(s) named in the document the ability to control her money and property, that is likely sufficient to find the requisite capacity to execute the document in most jurisdictions.

The same considerations that apply when drafting a DPOA for a non-disabled adult

[8] *See* Lawrence A. Frolik and Mary F. Radford, *"Sufficient" Capacity: the Contrasting Capacity Requirements for Different Documents*, 2 NAELA J. 303, 315 (2006) (quoting 17A C.J.S. Contracts § 143 (2005)).

pertain to powers of attorney drafted for a client with a disability. The scope of the powers granted should be only those relevant and necessary to assure that the client's affairs can be managed appropriately in the event the principal becomes unable to do so. If the client is particularly vulnerable as a result of her disability, it is, of course, especially critical that the agent(s) named in the document are competent, willing to serve, and trustworthy. It may be useful to include restrictions on gifting powers (so as not to jeopardize public benefits) and an accounting provision requiring that a regular accounting be made to a third-party. The DPOA should include a nomination of guardian/conservator in the event that a proceeding for guardianship and/or conservatorship is initiated in the future. Although a court would not be bound by such a nomination, it is required in most jurisdictions to give considerable deference to proposed ward's preferences.

A general DPOA will, in most cases, allow the agent to manage the range of financial and property-related transactions identified in the document. Some federal agencies and private entities have their own forms that must be executed separately, however, if a client wishes another person to serve as representative when dealing with the agency/entity. These include the IRS (Form 2848, available at http://www.irs.gov/pub/irs-pdf/f2848.pdf); the Social Security Administration (Form SSA-1696, available at http://www.ssa.gov/forms/ssa-1696.html; the Veterans Administration form at http://www.vba.va.gov/pubs/forms/VBA-21-22A-ARE.pdf and many banks, brokerage houses, and investment companies (consult individual companies for the requisite forms).

C. TRUSTS

If there is no reason to assume that the client will ever need to access public benefits, the practitioner can use whatever types of property management that she would use for any other client. This includes establishing revocable and irrevocable *inter vivos* trusts in appropriate situations. If, however, the client is on or may need to access public benefits (Supplemental Security Income, Medicaid, etc.) in the future, careful use of first special needs trusts, special needs pooled trust accounts, and ABLE accounts when they are available, can ensure that such benefits remain available to the client. Engaging the client in determining whom an agent should

be and how the client wants money managed once a parent is no longer able to assist them, is an important part of trust establishment and preserving the client's integrity.

1. First-Party Special Needs Trusts.[9]

The special needs trust is established for the sole benefit of a person under the age of 65 who is disabled as defined under the Social Security Act. The trust is set up by the person's parent, grandparent, court, or guardian and is funded with the assets of the disabled person.[10] 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.

Right now, the client cannot establish a special needs trust herself but should be involved to the extent possible in choosing the trustee. If the Special Needs Trust Fairness Act passes, the individual himself would be able to establish the trust in this will become an integral part of estate planning for the client with a disability. Until then, it may be necessary to bring the parent or grandparent in to assist with the establishment of the trust. Generally, this is preferable to a court established and supervised trust because of the expense involved with engaging the court.

2. Pooled Special Needs Trusts.

A pooled trust is a trust with separate sub-accounts for multiple beneficiaries.[11] Contributions and distributions are tracked separately in sub-accounts established for each beneficiary. To minimize each beneficiary's cost of participation in the pooled trust, however, the property held in the multiple sub-accounts is pooled together for purposes of administration and investment. Pooling multiple sub-accounts together can command better interest rates, and

[9] 42 U.S.C. § 1396p(d)(4)(A).
[10] Note that the Special Needs Trust Fairness Act (H.R. 670) (S349) is currently before Congress to allow an individual to establish a special needs trust in addition to a parent, grandparent, guardian or court. On September 9, 2015, the senate unanimously approved the legislation and it is expected the house will pass it as well. Stay tuned.
[11] For a comprehensive discussion of pooled trusts, *see* Renee C. Lovelace, Pooled Trust Options: A Guidebook, 13 (Melange Press, 2010) and Thomas D. Begley, Jr. and Angela E. Canellos, Special Needs Trust Handbook, *Pooled Trusts*, Chapter 16 (2015).

minimize fees for managing the trust.

The *special needs* pooled trust (pooled SNT) is a creature of the federal Medicaid Statute;[12] it is a particular type of special needs trust that is maintained by a non-profit entity for the benefit of multiple beneficiaries, all of whom are living with disabilities. Funds placed by a client or third parties in a qualified pooled SNT sub-account are treated as excluded assets for purposes of determining the client's eligibility for Medicaid (MA)[13] and Supplemental Security Income (SSI).[14] When correctly established and administered, a pooled SNT sub-account can provide a source of funds to improve the quality of life of a person who relies on needs-based public benefits to meet basic daily needs.

3. ABLE Accounts.

The recently enacted ABLE Act of 2014 (P.L. 113-295, Div. B, codified at 26 U.S.C. § 529A), allows persons who become disabled at age 26 or younger to create tax-preferred savings and investment accounts that can be used by the disabled person herself to purchase a variety of goods and services. The model for the ABLE account is the long-available section 529 college savings accounts that many parents and grandparents establish to help pay educational costs. The critical difference between section 529 accounts and ABLE accounts is that the latter must contain a pay-back provision requiring that funds remaining in the account when the owner dies are be paid to the state to the extent of any Medicaid payments that have been made in the account owner's behalf.

States must enact implementing legislation and have some authority to tinker with the specifics of what will constitute a valid ABLE account for purposes of the federal tax exemption. As of September 2015, 31 states have enacted ABLE statutes. An ABLE account allows the individual, or third persons in the individual's behalf, to set aside money (up to $14,000 per

[12] 42 U.S.C. § 1396p(d)(4)(C).
[13] Id. Funds may also be excluded for other public benefits such as food support or public housing, but not because the funds are in a §1396p(d)(4)(C) trust but because of the particular program's rules about trusts in general.
[14] The Foster Care Independence Act of 1999 authorized first-party special needs trusts for SSI recipients. 42 U.S.C. § 1382(B).

disabled individual annually), up to a total savings of $100,000,[15] and pay no taxes on that money's growth as long as it is used for qualified expenses. Qualified ABLE account expenditures include

> "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,... ."[16]

For the disabled adult client, the advantage of establishing an ABLE account with her own funds, as compared with a first party SNT, is that the beneficiary herself, rather than a third-party trustee, has control over how the funds in the account are used. This enables the person to exercise considerable autonomy over how assets belonging to her are spent and managed. For many such adults, the ABLE account is the only vehicle through which some degree financial autonomy can be achieved. The annual savings limit of $14,000 and the overall savings cap of $100,000 mean that a disabled adult who has large sums available to her may also need to have a first-party SNT set up in the normal manner.

On the other hand, the payback provision contained in the ABLE statute means that a third-party SNT may be a better means through which third-parties (parents, grandparents, etc.) help provide for the future needs of the disabled individual. The third-party SNT is not, of course, subject to a payback provision, so funds remaining in the trust at the death of the original beneficiary can be distributed to other beneficiaries rather than paid to the state.

D. SSA Representative Payee.

A Social Security or SSI beneficiary who is unable to manage her own financial affairs may need a representative payee.[17] The representative payee actually receives the client's benefit

[15] States may allow balances higher than $100,000 but the limit in order to remain eligible for SSI is $100,000.
[16] 26 U.S.C § 529A(e)(5).
[17] See generally 42 U.S. Code § 1007; Social Security Administration, When a Representative Payee Manages Your Money (January 2015), http://www.ssa.gov/pubs/EN-05-10097.pdf.

payment directly, and is required by law to use the proceeds solely for the "use and benefit" of the person entitled to the payment. The process to be appointed as rep payee involves application to and investigation by the SSA. This process can be initiated by filing Form SSA-11 (available at https://www.socialsecurity.gov/forms/ssa-11-bk.pdf). Details regarding the duties of a representative payee vis-a-vis the beneficiary and the SSA are discussed in SSA Publication No. 05-10076 (July 2015), available at http://www.ssa.gov/pubs/EN-05-10076.pdf.

E. Conservator (Guardian of the Estate)

Property management by a conservator is a planning tool of last resort. If a client has capacity sufficient to execute the documents and forms described above, a conservatorship (guardian of the estate) many never be necessary. In some circumstances, however, initiating a protective proceeding may be is unavoidable. These include when a client does not have sufficient legal capacity to execute property management documents (power of attorney, trust documents), if documents that have been executed fail to address a particular area of property management, if the agent(s)/representatives/trustees become unwilling or unable to serve and the principal no longer has capacity, or if the agents/representatives/trustees fail to honor their fiduciary obligations.

Identifying fiduciaries, as noted above, can be challenging. The person or entity nominated to serve in the role of conservator must be trustworthy and competent to manage the money and property of someone who is dependent and therefore vulnerable. If there are family members or close friends of the family who are able and willing to take on this role, this is usually the best choice, as family members generally serve without compensation. In selecting a family conservator, such factors as personal integrity, financial skills, general reliability, and commitment to the client should be considered. In some instances, it makes sense to choose a conservator based on the ability to manage money rather than on whether the individual has a close personal relationship with the client. It is critical to secure an agreement from the person who will be nominated prior to filing a petition for appointment of conservator, and it is also advisable to discuss the choice with others who might wish or expect to become the client's conservator. By being proactive, it may be possible to prevent intra-family conflicts over who

should serve as conservator, which in many cases leads to appointment of a third-party professional conservator as an alternative to the person nominated.

If the client lacks family members or friends who are able to serve as conservator, or if the client has direct access to significant assets, the practitioner should consider recommending a professional fiduciary as conservator. It is important to investigate the credentials of those holding themselves out as professional fiduciaries, of course, because in most jurisdictions there are no credentialing or licensing requirements regulating who may represent themselves to be "professional" in this regard. Professional fiduciaries and banking institutions often limit themselves to managing estates larger than a specific dollar-value minimum. A client whose assets are valued at less than these minimums may have to proceed *in forma pauperis* and request a court-appointed and court-remunerated conservator.

V. MANAGING PERSONAL AFFAIRS AND HEALTH CARE FOR THE DISABLED ADULT

A. HEALTH CARE DIRECTIVE

All individuals 18 or over who have capacity to do so should execute an advance directive for health care (HCD). This document is the client's best assurance of receiving the kind of health care she wants in the event she is able to direct her own treatment, and to control who may act as surrogate decision-maker. As a general rule, the standard of capacity required to execute a health care directive "seems to be the same as or even lower than the level of capacity to execute a valid will."[18] The rationale for this low threshold appears to be "that the state will not intrude on an individual's autonomy with respect to medical decision-making, even where the individual is objectively delusional, because the action in question is self-regarding and, therefore, not an appropriate subject for state intervention."[19] With some exceptions, a health care directive may provide instructions that range from "provide no treatment whatsoever" to "provide all treatment, however unlikely the treatment is to cure or improve" the principal's condition. Instructions can be specific as to particular treatment, or state more broadly the

[18] Frolik and Radford, at 315.
[19] *Id*. (citation omitted).

individual's preferences and thoughts about the quality of life she is willing to tolerate.

The right to control one's own medical care is constitutionally protected. As such, health care providers may not disregard medical treatment directions that are given by a competent individual, whether those instructions are provided orally or in writing. In order to create an evidentiary record of what a client wants with regard to health care treatment and appointment of an agent, however, the HCD should be in writing and comply with any specifics of state law regarding form, content, and manner of execution of a directive. Most states have an online form that can be used as-is or modified to create a document that will be recognized as valid by health care providers in that state. If the client spends substantial amounts of time in more than one state, the directive should be drafted and executed in a manner that complies with each of those states' law.

When assisting the client to select the agent(s), it is important to make sure that the client understands the role of the agent as advocate, and that the chosen agent(s) are willing to follow the client's instructions even if a conflict with providers as to the proper course of treatment develops. If the client's disabilities are cognitive in nature, it may be necessary to meet directly with the agent(s) along with the client prior to drafting the health care directive, to ensure that agents understand the client's preferences and will be able to convey them to health care providers when the time comes.

Caring Info provides access to state-specific health care directive forms at http://www.caringinfo.org/i4a/pages/index.cfm?pageid=3289. Aging with Dignity's "Five Wishes" document, available on line at https://www.agingwithdignity.org/five-wishes.php, is recognized as valid in all but 8 states.

The Coalition for Compassionate Care, a California based advocacy organization, has developed a planning tool specifically to help persons with cognitive disabilities articulate their health care preferences. This tool, "Thinking Ahead: My Way, My Choice, My Life at the end", is available at http://coalitionccc.org/wp-content/uploads/2014/01/Thinking-Ahead-English-web.pdf. The Thinking Ahead pamphlet is, in essence, a health care directive for persons with

intellectual disabilities; it enables them to express their preferences in a written form that maximizes their autonomy in this critical area. Practitioners should make use of the *Thinking Ahead* protocol whenever doing so would enable the client to participate in formulating health care instructions and naming an agent.

B. DNRs AND POLSTs

A health care directive is not a substitute for a do-not-resuscitate order (DNR) signed by the client's physician. In the event that a hospitalized client wishes not to be resuscitated in an emergency situation, she must execute the form mandated in her state (or sometimes county), the document must be made a part of her medical record. If the client does not want to be revived in the event of an out-of-hospital emergency, an out-of-hospital DNR must be readily available to show to paramedics or other first responders. In some states, an out of hospital DNR bracelet can be worn to notify first responders of the individual's wishes. In the absence of a valid DNR, emergency medical personnel are required to resuscitate first, and ask questions later.

The Physician's Order for Life Sustaining Treatment, or POLST, is a doctor's order intended to implement a patient's treatment preferences regarding end-of-life treatment. It is similar to a DNR, but it goes well beyond resuscitation to address other situations in which the patient/client may not want to receive treatment. In theory, the POLST is prepared only after consultation with both the patient and the patient's agent, and it will be consistent with any pre-existing health care directive. In fact, there is some evidence that providers do not understand that there is a difference between a HCD and a POLST, and that, in the event of a conflict between the two documents, the health care directive prevails. In most cases, the client with a disability should avoid the POLST altogether, relying instead of the ability of her health care agent to manage her end-of-life medical treatment preferences.

C. GUARDIANSHIP

If an adult client with a disability is unable to manage some or all of his or her personal affairs, the estate plan should include nomination of a guardian and a proposed successor guardian. A guardian is appointed by the court and can be in charge of some or all of the

personal affairs of the client. As with choosing a conservator, choosing a guardian involves selecting a person or entity that is competent, trustworthy, and willing to serve. It is best if the guardian has or is willing to establish a personal relationship with the client, for this person will be in charge of making many or all decisions for the child including social, educational, personal, and medical decisions. Ultimately, a court will determine who will serve as guardian, but express or implied preferences of the client are entitled to considerable weight.

If a client has been able to live independently without a guardian because parents and family have created a safety net, careful planning regarding the future including the development of a working, active safety net that does not include the parents will maximize the likelihood that a guardian is not necessary. If, however, one is necessary, the court will give great weight to the person whom the client, or perhaps the client's parents, have nominated to take on this important responsibility. To be safe, the client should nominate a guardian by a writing like a health care directive or a durable power of attorney. In some states, such a nomination has priority over all others seeking to be guardian.[20]

VI. ISSUES FOR PARENTS – THE DISABLED ADULT CHILD AS BENEFICIARY

A. LETTER OF INTENT

Parents are generally a large part of, if not the only safety net an adult child with a disability has. If an adult is receiving SSDI or SSI, he generally has struggles with day-do-day living which are allayed by the parents. The purpose of coordinating the client's and his parent's plan is to maximize independent living – or to maintain the current living situation for as long as possible In order to do that, parents should lay out their wishes for their child in a Letter of Intent. This should include everything the parent does for the child that will need to be done by others. Such a letter affords an opportunity to educate future trustees and caregivers about their child. Although a Letter of Intent is not a legal document, it is still a valuable tool that will help everyone in making important decisions affecting a child with a disability. The estate planner should remind parents to discuss any changes that occur so that their plan continues to meet their

[20] *See e.g.*, Minn. Stat. 524.5-309.

needs.

B. TRUSTS, OUTRIGHT, OR AN ABLE ACCOUNT?

Once the parent understands the eligibility criteria for public benefits on which the adult child relies (or may need to rely) in conjunction with the parent's understanding of the adult child's ability to manage financial affairs, the client can make a plan as to how the estate will be handled. This may include outright distribution to the child, distribution to a standard support trust, a third-party special needs trust, a third-party pooled trust, or an ABLE account. Assets distributed outright to the child or assets in a standard support trust sub-account will be considered available to the child for purposes of MA and SSI eligibility. Assets directed to third-party trusts or a third-party pooled trust sub-account will be excluded.

1. Third-Party Special Needs Trusts (Supplemental Needs Trusts).

A supplemental needs trust is established to provide for the well-being and needs of a person with a disability. The trust is funded with money that does ***not*** belong to the person with a disability. The trust is intended and designed to pay for those "extra" items which are not provided by or paid for by publicly funded (government) programs. A properly drafted supplemental needs trust, funded and administered in accordance with the laws of the state in which the client is receiving benefits will not disqualify the client from any publicly funded government programs.

A third party trust- can be *inter vivos* or established by will. If funded during the life of the grantor, it can be revocable or irrevocable. The trust can be funded by gifts, life insurance proceeds, retirement assets, and distributions from a trust or a will. The client's own money may never be used to fund this trust. The trustee will be responsible to keep records of the trust and to make sure that the state has a copy of this trust. The primary difference between the first and third -party special needs trust is that there is no payback requirement in the third party trust. Assets left in the trust at the death of the beneficiary will be distributed according to the grantor's instructions in the trust.

2. Third-Party Pooled Trust Sub-Account.

A third party pooled trust sub-account is administered exactly as a first party sub-account; the only difference is how it is funded and established. It must be funded and established by someone other than the beneficiary. Third parties might include parents, grandparents, siblings, and extended family or friends who have no legal obligation to support the beneficiary. Funds placed in the sub-account must be those in which the beneficiary has no ownership interest. In contrast with the first-party sub-account discussed above, federal law does not require a payback provision in connection with a third party pooled trust account. The pooled trust organization, however, may retain funds remaining in the account at the death of the beneficiary.

3. ABLE accounts.

Only $14,000 (or the then-current annual gift tax exclusion) may be distributed each year to an ABLE account. Thus, the ABLE account is not an appropriate vehicle for general estate planning purposes. If, however, the child can manage money on her own, establishing an ABLE account may be a good way to give the child money annually for extra spending money (on qualified disability expenses). The adult has control over the funds and it gives them autonomy not existing with the third-party supplemental needs trust. Parents may consider giving trustees the discretion to distribute funds to an ABLE account from a third –party special needs trust. (see ABLE discussion above).

C. INHERITED IRAS – TRUST OR NO TRUST; STRETCH OR NOT?[21]

[21] This is a cursory lay discussion similar to what our firm gives our trustees and clients. The source for these materials are Natalie Choate's Life and Death Planning For Retirement Benefits, 7th Edition (2011). In addition, see Bradley J. Frigon, *How do You Leave an IRA/Qualified Plan to a SNT?* Pre-Conference Tax Intensive, 2014 Special Needs Trusts The National Conference. Elements of a "see through" trust are not the subject of this paper.

IRAs are held in the name of the employee while alive. This person is called the owner of the IRA. The owner (hereinafter IRA Owner) may designate an *individual* as beneficiary on his or her IRA (hereinafter DB – Designated Beneficiary). When the IRA owner dies, the DB becomes the owner of what is referred to as an inherited IRA. Any money withdrawn from the IRA by the DB will be taxable to the DB. Thus, if the IRA is withdrawn in one lump sum, the entire lump sum is taxed in the year the IRA was withdrawn. The DB has the option, however, to stretch out the payments over a period of years so as to maximize pre-tax growth within the IRA while at the same time minimize income taxes.

If a child is 18 years of age or older and able to manage money and smart enough to figure out that withdrawing it all as a lump sum is not usually the best idea, a parent usually will leave the IRA directly to the child. If, however, a child is not able to manage money or relies on needs-based benefits for day-to-day living, and the grantor wants the beneficiary to take advantage of the stretch provisions, the IRA may be left to a third-party supplemental needs trust that meets certain IRS requirements. The trust must be a "see through" trust meaning that, even though the trust is the beneficiary, the IRS will "see through" the trust and designate the beneficiary of the trust as the DB. Because the rules regarding trusts and inherited IRA's are complex, it is important that a lawyer and accountant be consulted immediately. Failure to follow the rules may mean that the entire balance be cashed all at once – which would result in a very high tax liability in one year. By "right away," I mean within one month – but at least within the calendar year in which IRA owner dies.

Here are the steps the trustee (or the DB if the beneficiary is not the trustee of a trust) must take to ensure that the payments can be stretched out over the DB's life time.

1. The trustee must provide a copy of the trust to the "plan administrator." This must be done no later than October 31 of the year following IRA owner's death. The plan administrator should be contacted at once to send a copy of the trust to her to get things rolling – don't wait until October 22nd.

2. The trustee must get an account set up for the inherited IRA at the financial institution of your choice. The account should be titled as follows:
   IRA owner (Deceased) IRA f/b/o [Trustee], trustee of the [beneficiary] Supplemental Needs Trust dated _____, 2015.

3. Determine the Required Minimum Distribution (RMD). This is the amount of distribution that must be made out of the inherited IRA to DB each year. If the goal is to minimize income tax and stretch the payment out as long as possible, use the method that gives the most time for the payout – and as between the IRA owner and DB, the youngest of them.

    a. The first step is to determine whose life will be used to determine the RMD. The benefits may be paid out over time as follows:
        i. Over IRA owner's life; or
        ii. Over DB's life; or
        iii. Over a five-year period; or
        iv. Alternatively, the IRA may always be depleted by a more rapid schedule of depletions.

    b. Then determine when you must start making that distribution.

        i. First, if IRA owner is over 70 ½ when he died (April 1 of the year after IRA owner turned 70- ½), you must make sure that her full RMD was paid in the year of her death. Any amount not paid while IRA owner was alive, should be paid to the trust. Do not trust the word of the financial institution that this has been done. Ask how much the RMD was supposed to be and then see for yourself that the distribution has been made. Once that is satisfied, that is all that needs to be paid out in the year of death.
        ii. The first distribution to the trust must be made by December 31 of the year after IRA owner's death.
        iii. Finally, you must determine the amount of the RMD – note it is wise to have an accountant or lawyer help you with this. The RMD is calculated by dividing the measuring life's life expectancy, in this case, DB's, into the value of the IRA. Each subsequent year, one year is subtracted from the measuring life. The IRS mortality table is used to determine life expectancy. Say, for example, that IRA owner dies in 2015 and that DB turned 36 in 2015 and will be 37 by December 31, 2016, the first year an RMD must be made. His life expectancy, based on the IRS mortality table is 47.5 years. If the IRA is worth $180,000, then the RMD for 2016 will be $, ($180,000 ÷ 47.5 = $3,789.47). Each year thereafter, the RMD is calculated by subtracting one from the life expectancy (47.5) and dividing that into the then-current value of the IRA.

4. What type of trust is this? How does the trustee manage the distributions each year? It depends on whether the trust is an accumulation trust or a conduit trust.

If it is an accumulation trust, the IRA must make an RMD to the trust every year; but the trustee does not have to distribute any of the RMD out to the DB.

If it is a conduit trust, the IRA must make the RMD to the DB each year, and it should be done as soon as practicable after the RMD to the trust has been made. Payments should be made directly to or for the benefit of DB using the funds distributed as trustee. The trustee could also direct the plan administrator to make the payments directly to the DB if it will not affect public benefits. If by the end of the year, you have not distributed the full RMD out to DB, you should distribute the remaining funds to him/her and he can in turn place the funds in his special needs trust. (Some practitioners believe a distribution to the trustee of a special needs trust satisfies this rule because the special needs trust is a grantor trust). Remember, if you distribute the funds directly to DB, her public benefits may be jeopardized, but you do not want to violate the distribution rules for the IRA as that could make the entire amount taxable. Also, if, during the course of the year, you make distributions from the IRA to the trust in excess of the RMD, you must distribute that out to DB as well.

5. Make sure that each year a trust tax return is done. What is filed will depend on the type of qualified trust: In this case, your trust is an:

    a. Accumulation trust. Thus, the trust must file an annual Form 1041 trust income tax return. To the extent that the trust makes distributions to DB or for DB's benefit, the trust deducts the amount distributed to DB as Distributable Net Income (DNI) and DB pays the tax on that amount (the trustee must see that a K-1 is issued to DB. To the extent the trust accumulates the income, the trust is taxed on that retained income at a higher rate.

    b. Conduit trust. Thus, the trust must file an annual Form 1041 trust income tax return and report all RMD's and other income but will deduct the amount distributed to DB as Distributable Net Income (DNI). The trust pays no income tax on RMD's because they are distributed annually to DB. The trustee must see that a K-1 is issued showing the net income (including the RMD's) that must be reported on DB's personal tax return (Form 1040).

CONCLUSION

When planning for an adult living with a disability, cognitive or otherwise, a practitioner's goal should be to create a plan to allow the individual to live as independently as possible for as long as possible. This necessarily includes an analysis of the type of disability, the appropriate public benefits, the client's current safety net and perhaps the meeting with the parents to coordinate plans. It may be wise to engage services of professional fiduciaries, caregivers, accountants and financial advisors to achieve the best result.

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GUIDANCE PLANNING ANSWERS.

Estate and Long-Term Care Planning for Adults with Disabilities

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OVERVIEW

- Purpose of long-term planning
  - Autonomy
  - Maintain public benefits
- Elements of planning
  - Finances
  - Health care
  - Protection of benefits
- Checks and balances

UNDERSTAND THE NATURE OF CLIENT'S DISABILITY

- Understand the Diagnosis and Prognosis
- If the disability is cognitive,
  - can you maintain a lawyer/client relationship?
  - Determine the extent of the planning you can do
- How is the client living now?
- Who is providing services now?
- What services will the client need to live independently?

UNDERSTAND THE INDIVIDUAL's SOURCE OF INCOME

- WORK
- SSI – needs based
- SSDI –NOT needs-based
- SSI – SSDI; work incentives
- DAC - needs-based – age 22 critical
- §1619(a) and §1619(b) needs-based

UNDERSTAND THE INDIVIDUAL's Needs-based benefits

- Food Support (SNAP)
- Housing support
- Other needs-based benefits in the state in which the client lives

HOW IS CLIENT PAYING FOR HEALTH CARE?

NON-NEEDS BASED SOURCES OF PAYMENT FOR HEALTH CARE COSTS -

- Private Insurance
- Medicare
- Medicare advantage/Medicare Supplemental Insurance
- Veterans Benefits (Some)
- Long-term care insurance

MEDICAID - NEEDS-BASED SOURCE OF HELP FOR MEDICAL COSTS

- Medical Assistance for Long-term Care
- DAC Disregard
- Medicaid for Employed Persons with Disabilities
- Medicaid Waiver programs for home and community based services

MANAGING MONEY – Individual is your client

- Individual manages him or herself
- Explore Informal Arrangements
- Power of attorney
  - Special authorizations:
    - VA
    - SSA
- Representative payee
- Conservator (guardian in some states)

MANAGING MONEY – Individual is your client

- Revocable Trust – Available for all programs
- First party special needs trust – Exempt for MA and SSI
- First party pooled Special Needs Trust Exempt for MA and SSI
- Establishing an ABLE Account

When a Client may want to use an ABLE account

- The amount to protect is less than $14,000;
- Client is able to manages the money;
- Small annual structured settlement or mandatory trust distribution
- Over-65 beneficiary with lifetime disability

AND.....

When a Client may want to use an ABLE account

The client wants to save for a qualified expenditure:

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 others approved by IRS regulations.

MANAGING HEALTH CARE
Individual is your Client

- Individual manages her own health care
- Advance directives (many names, same purpose)
- POLST
- DNR/DNI
- Guardian – help client nominate a guardian

UNDERSTAND WHAT HAPPENS IF THE INDIVIDUAL INHERITS MONEY OUTRIGHT

- Only needs-based benefits affected
- Types of inheritances
  - Lump sums and Inherited IRAs
- Options to maintain benefits
  - Make sure the individual has an attorney-in-fact to help
  - ABLE account
  - Pooled trust or first party special needs trust

SUPPLEMENTAL NEEDS TRUSTS AS PREVENTATIVE PLANNING – PARENT AS CLIENT

- Letter of Intent
- Assets to adult child outright?
- Third-party Special Needs Trust
- Third-party Pooled Trust sub-account
- ABLE account
- Guardian and/or Conservator

What to do with a Retirement Asset????

- If the IRA belongs to your client, for most public benefit programs, it is considered an asset.
- If it belongs to a parent of disabled adult, the parent may give it to the child:
  - Outright; or
  - To a Qualified Trust for the benefit of the disabled adult; a qualified trust is one that meets IRS requirements allowing the trustee to "see through" the trust to an individual, the designated beneficiary.

What to do with a Retirement Asset????

- The beneficiary designation should read:

To John Doe, Trustee of the Beneficiary Supplemental Needs Trust u/a dated October 16, 2015, fbo Beneficiary.

Administering a Trust with a Retirement Asset

Having the language in the trust correct is just the first step; it must also be administered correctly; the trustee must:

1. Give a copy of the trust to the plan administrator
2. Set up an Account for the Inherited IRA
   IRA owner (Deceased) IRA f/b/o [Trustee], trustee of the [beneficiary] Supplemental Needs Trust dated _____, 2015.
3. Determine whose life will be used to measure the distributions
4. Determine when the Required Minimum Distributions (RMDs) start

Administering a Trust with a Retirement Asset

- The trustee must determine how and when the distributions are made:
  - If it is an accumulation trust, the IRA must make an RMD to the trust every year; but the trustee does not have to distribute any of the RMD out to the beneficiary.
  - If it is a conduit trust, the IRA must make the RMD to the Beneficiary each year, and it should be done as soon as practicable after the RMD to the trust has been made. Payments should be made directly to or for the benefit of DB using the funds distributed as trustee.

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GUIDANCE PLANNING ANSWERS.

Thank you!

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Special Needs Trusts National Conference

Friday, October 16, 2015

Breakout Session 2
2:05 P.M. – 3:00 P.M.

For Better or for Worse; In Sickness and In Health – Divorce and the Spouse With Special Needs

Presenter:
Stuart D. Zimring
Attorney at Law
Law Offices of Stuart D. Zimring
North Hollywood, CA

- Materials
- PowerPoint

Stetson University College of Law presents:
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For Better or for Worse; In Sickness & in Health -Divorce & the Spouse With Special Needs

a presentation for

2015 Special Needs Trusts - The National Conference

by

Stuart D. Zimring

October 16, 2015

Law Offices Of
STUART D. ZIMRING
Attorneys & Counselors At Law

For Better or for Worse; In Sickness & in Health -

Divorce & the Spouse With Special Needs

1. **Introduction**

With the possible exception of the death of a spouse, there is probably no greater upheaval in a married person's life than the dissolution of one's marriage. Under the "best" of circumstances (assuming there is even such a thing in a divorce), the spouses and their children are going to undergo a radical adjustment to their lifestyles and in most circumstances their finances.

Where one of the spouses suffers from a disability, these adjustments can be (and most often are) more traumatic since the spouse with a disability may not have the option of returning to the workforce (assuming he or she was ever there in the first place) and may be totally or significantly dependent on spousal support or alimony, distributions from the other spouse's retirement benefits pursuant to a Qualified Domestic Relations Order (which may not become payable for many years after the divorce depending on the age of the spouse with the retirement plan) and interest and dividends on any assets distributed to the spouse with a disability pursuant to the division of marital property. And then there is the issue of health insurance.

As a result, the spouse with the disability may want to seek public benefits in the form of Supplemental Security Income (SSI), Medicaid, food stamps and additional monetary aid for minor dependent children. However if the spouse with the disability is directly receiving spousal support, child support or unearned income from assets received in the divorce, that spouse's ability to receive any or all of these benefits may be severely

restricted if not eliminated entirely by the fact that the spouse is receiving spousal support.[1]

This paper will explore methods and opportunities by which the use of Special Needs Trusts ("SNTs") can be utilized to shelter spousal support and assets as a means of enabling the spouse with a disability to receive public benefits that the spouse would otherwise be entitled to receive, but for the existence of the spousal support, assets and income derived from those assets.

2. **The Rules**

A. Treatment of Spousal Support

1. Spousal support is defined in the Social Security Administrations Program Operating Manual System ("POMS") as:

> "...an allowance for support made by a court from the funds of one spouse to the other spouse in connection with a suit for separation or divorce.
>
> · Alimony and spousal support payments are cash or in-kind contributions to meet some or all of a person's needs for food and shelter.
>
> · Payments may be court-ordered or voluntary."[2]

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[1]Child support payments may well factor into this equation as well, but for simplicity's sake, this paper will focus solely on spousal support and the assets of the spouse with the disability. It will be assumed that the spouse is not receiving any child support payments on behalf of any children.

[2]POMS SI 00830.418.A, citing Social Security Act as amended §1612(a)(2)(E)

and 20 CFR 416.1121(b).

2. As such, spousal support payments are considered unearned income to the recipient spouse.[3]

3. While child support is beyond the scope of this paper, it should be noted that since spousal support is considered unearned income, the "deeming" rules apply and therefore at least a portion of the spousal support may be deemed from the parent receiving it to a child under the age of 18 who is receiving SSI.[4]

B. Use of SNTs

1. While many types of payments may not be assigned to trusts under the POMS, spousal support is not one of them and therefore, properly structured, spousal support can be directed into a SNT.[5] The remainder of this paper will discuss how to accomplish that.

3. The SNT - First Party or Third Party?

A. The SNT Should be a First Party SNT.

1. Whether to use a First Party SNT created pursuant to 42 USC 1396p(d)(4)(A), a First Party Pooled SNT Subaccount pursuant to 42 USC 1396p(d)(4)(C) or a Third Party SNT is a relatively easy question to answer.

Since spousal support is considered unearned income, it is the property of

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[3] POMS SI 00830.418.B.1

[4] POMS SI 00830.418B.2

[5] POMS SI 01120.200G.1.d. For a list of the types of items that may not be assigned to a trust (SNT or otherwise), see POMS 01120.200G.1.c.

the supported spouse and therefore a "first party" asset. Thus, any SNT created for the benefit of the supported spouse would, of necessity, be a First Party SNT and subject to the relevant restrictions and Estate Recovery claims of the State in which the supported spouse resides.

B. What Kind of First Party SNT?

1. The choice between a (d)(4)(A) or (d)(4)(C) SNT will depend on the circumstances of the case and the jurisdiction. If the supported spouse is under the age of 65 and has a living parent or grandparent, that person could create the SNT which would then receive the spousal support payments.[6]

2. If a parent or grandparent is not available, but the supported spouse's disability is of such a nature that a Guardian or Conservator or Guardian ad Litem has been (or ought to be) appointed for the spouse's benefit, that person can create the trust if he or she has the legal authority to do so without Court Order, or alternatively he or she can petition the court either to grant the Conservator the authority or to have the court create the trust. Again, in this situation the supported spouse must be under age 65 to qualify under 42 USC 1396p(d)(4)(A).

[6] 42 USC §1396p(d)(4)(A)

3. If there is no one available to create the SNT under 42 USC 1396p(d)(4)(A), and the supported spouse is under the age of 65, the supported spouse can establish her own Pooled Trust subaccount under 42 USC 1396p(d)(4)(C). If the supported spouse is over the age of 65, the question of whether or not the supported spouse can create a Pooled Trust Subaccount is dependent on where the supported spouse resides. Some states permit funding of Pooled Trust Subaccounts by persons over the age of 65 under certain circumstances, others do not. [7]

4. **Funding the SNT With Spousal Support/Alimony**

A. Spousal Support Must Be Irrevocably Assigned to a SNT

1. As noted above, spousal support is unearned income and as such, is considered income for SSI purposes unless it is assigned to a SNT and that assignment is "irrevocable."[8]

2. It would appear that the most appropriate way (if not the only way) for the assignment of the spousal support to be considered "irrevocable" is for there to be a court order in the divorce proceedings ordering the supporting spouse to make the spousal support payments to the SNT.

3. Where the parties have resolved their issues by way of a Marital Settlement Agreement and that Agreement contains the provisions regarding

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[7] 42 USC §1396p(d)(4)(C). See Stuart D. Zimring, Rebecca C. Morgan, Bradley J. Frigon, Craig C. Reaves, Fundamentals of Special Needs Trusts §1.05[2] (Lexis/Nexis 2014).

[8] POMS SI 01120.200.G.1.d.

spousal support, it is critically important that those provisions be incorporated in a court order, and that order indicate that while it may be incorporating the terms of the Marital Settlement Agreement by reference, that the provisions regarding spousal support are irrevocable.

B. Modification of Spousal Support

1. The POMS states that in order for spousal support to be assignable to a SNT, the assignment must be irrevocable. It says nothing about a modification of the amount of support. Thus, in the author's opinion, if the Order reads something like:

> "The spousal support payments Supporting Spouse shall pay to Supported Spouse (including any subsequent modifications of the amount of said support) are hereby irrevocably assigned to the 2015 Supported Spouse SNT and are to be made payable to the Trustee of said SNT."

Thus, while the amount of spousal support may change from time-to-time, the irrevocable nature of the assignment remains unaffected.

C. Educating Family Law Counsel

1. In a perfect world, the Family Law attorney is going to coordinate her efforts with SNT counsel well in advance of the filing of a Petition or Stipulation regarding the payment of spousal support into a SNT. However, as those of us who regularly draft SNTs in personal injury cases know, that kind of forward

planning rarely happens and the more frequent fact pattern is the 11th hour crisis call at the end of the day with the hearing set for tomorrow.

2. SNT attorneys have made great inroads in educating PI and MedMal counsel regarding the advantages (often the necessity) of building an SNT into their case. We did this by educating the plaintiff's Bar and we need to do the same thing in the Family Law arena as well.

3. In addition to the "usual" forums of Family Law sections of Bar Associations, SNT attorneys should consider seeking legal aid organizations that specialize in assisting low-income women in handling Family Law related issues such as the Harriet Buhai Center for Family Law in Los Angeles.[9] While organizations such as Harriet Buhai utilize volunteer attorneys to represent their clients, these volunteers are all private practitioners who have other clients in need of your expertise.

4. Where there is a distinct Family Law division or set of departments within the SNT attorney's court system, consider arranging with the Presiding Judge to make a presentation to the group as a whole about the utility of SNTs in Family Law matters.

5. Finally, do not ignore the "collaborative law" movement which was originally created with divorce in mind. Seek out the attorneys and mediators who are specializing in this area and educate them regarding the benefits of SNTs to their clients...

[9] www.hbcfl.org.

D. Procedure

1. Because the practice of law is becoming (or has become) more area-focused and in many jurisdictions the courts themselves have been divided into subject-specific departments, it is not uncommon to find that not only the lawyers but the judges as well are not aware of the availability of SNTs in the spousal (and child) support context.

2. Thus, the appropriate pleadings, especially if the Order is going to be pursuant to a Stipulation or a Marital Settlement Agreement, should go into sufficient detail and cite the relevant statutes, regulations and POMS to support the requested Order. In states where there is a statutory mechanism for creating a SNT such as California's Probate Code §§3600 *et seq.*, the SNT attorney can utilize that procedure as a way of giving the judge a "comfort level" from the outset that the Orders being sought in this proceeding are within the mainstream.

3. SNT attorneys who regularly work with the Plaintiff's Bar in creating court ordered SNTs should have no trouble modifying their templates to adapt to a Family Law context.

5. Funding the SNT With Property

In the right circumstances (whatever they may be), there is no reason that the supported spouse could not contribute property received as a result of the division of marital property into a SNT. Property received as a result of a court-ordered division of property or a Marital Settlement Agreement is no

different than any other property and the rules regarding transfer of assets apply.[10]

6. Funding the SNT With Retirement Assets

A. Introduction

1. The treatment of a retirement asset which is distributed to the supported spouse depends to a certain extent on the type of retirement asset being distributed.

2. The list of income benefits that cannot be assigned is set forth in the POMS, section SI 1120.201.J.1.c. It states:

> Certain payments are not assignable by law and, therefore, are income to the individual entitled to receive the payment under regular income rules. They may not be paid directly into a trust, but individuals may attempt to structure trusts so that it appears that they are so paid. Important examples of non-assignable payments include:
>
> ·Temporary Assistance for Needy Families (TANF);
>
> ·Railroad Retirement Board-administered pensions;
>
> ·Veterans pensions and assistance;
>
> ·Federal employee retirement payments (CSRS, FERS) administered by the Office of Personnel Management;
>
> ·Social Security Title II and SSI payments; and

[10]See Zimring, Morgan, Frigon & Reaves, Fundamentals of Special Needs Trusts §3.06 (Lexis/Nexis 2014).

·Private pensions under the Employee Retirement Income Security Act (ERISA)(29 U.S.C.A. section 1056(d)).”[11]

3. As a result, payments pursuant to a Qualified Domestic Relations Order (QDRO) are not assignable to a SNT.[12]

B. IRAs

1. On the other hand, since IRAs (in any form - conventional, Roth, SEP, etc.) are not listed as non-assignable under the POMS, there is no reason that an IRA that is being divided (or whose distributions are being directed) cannot be ordered paid into a SNT.

[11] POMS SI 1120.201J.1.c

[12] See PS 07-179 SSI-Michigan - Review of Peggy Special Needs Trust and Pension Benefits for a discussion of this specific issue.

2. If an IRA is going to be distributed to a SNT, the treatment of the distributions from the IRA must be considered. Under most circumstances, the SNT should probably contain language allowing the SNT to accumulate the distributions in a manner that does not run afoul of the SSI rules or the IRA distribution taxation rules.[13]

7. **Estate Recovery Issues**

As noted at the outset, SNTs in the context of a divorce are always going to be first party SNTs and therefor any assets remaining at the time of death of the SNT beneficiary are subject to the usual Estate Recovery claims as any other first party SNT. However, since most SNTs in this area will have been drafted to receive spousal support, it is unlikely that such SNTs will have much in the way of assets remaining at the time of the supported spouse's death.

On the other hand, if assets are also contributed to the SNT, some thought should be given to the Estate Recovery issue before contributing such assets. They may well not be available to other family members when the supported spouse dies. In those cases where the supported spouse has a shortened life expectancy due to the nature of the disability, this can be a particularly relevant issue.

8. What About Child Support?

While the subject of child support is often closely allied with spousal

[13]See Zimring, Morgan, Frigon & Reaves, Fundamentals of Special Needs Trusts, chapter 12 (2014 Lexis/Nexis) for a discussion of the proper way to handle IRA distributions.

support, in reality it is a totally different item since it is the property of the supported child, not the custodial parent, the custodial parent's perceptions and wishes often notwithstanding. As such, it is beyond the scope of this paper. However, since the two are so often linked together, at least in the client's perception, we will touch on it briefly.

A. The Federal Perspective

1. Since child support is not one of the items of income listed as not assignable under the POMS, from a Social Security/Medicaid perspective, child support, like spousal support, can be assigned to a SNT so long as the assignment is irrevocable.[14]

2. Since child support payments belong to the child, a SNT created to receive such payments would have to be a First Party SNT.

B. The State Perspective

1. While the POMS does not prohibit assignment of child support payments to a SNT, the question really is whether the particular State permits such assignments. And again, the question really may be posed in the negative, *i.e.* does the State prohibit such assignments. If not, the methodology for crafting Petitions and Orders assigning child support payments to a SNT should be virtually the same as for spousal support.[15]

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[14]POMS SI 1120.201.J.1.c

[15]For an excellent discussion of funding SNTs with child support payments see Thomas D. Begley Jr. And Angela E. Canellos, Special Needs Trust Handbook, §6.03[C],

9. **Liability of the SNT for Spousal/Child Support Obligations**

It is sometimes easy to forget that First Party SNTs are not "creditor protection" trusts and afford no protection to the beneficiary from her creditors. All they do is shield the assets in the SNT for purposes of public benefit eligibility.

Therefore, it should come as no surprise (but sometimes does), that a supported spouse with an enforceable judgment for back spousal or child support can execute that judgment against the supporting spouse's First Party SNT just like any other creditor.

In fact, in a number of jurisdictions the assets of third party trusts with spendthrift provisions (whether SNTs or not) that shield the trust corpus from the beneficiary's regular creditors can be subject to attachment for enforcement of child support.[16]

As more and more jurisdictions begin to focus on filial responsibility and dust off filial responsibility statutes that may have lain dormant for many years, we may see much more action in this regard in the future.[17]

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[16]See Ventura County Dept. Of Child Support Svcs v Brown, 11 Cal. Rptr. 3d. 489 (2004 Ct. App). See also Mencer v. Ruch, 928 Atlantic Reptr. 2d 294 (Pa. 2007) in which in a child support action the appellate court held that the trial court has misapplied the law by failing to include distributions made for the benefit of the father by a SNT established for his benefit in determining what the father's income really was.

[17]See Donna S. Harkness, "What Are Families For? Re-evaluating Return to

Filial Responsibility Laws," 21 The Elder Law Journal 306 (2013) and Craig C. Reaves, "Where Child Support Meets Special Needs – A Survey of the Law", Special Needs Trusts – The National Conference 2013.

Finally, the issue arises as to whether or not a Court Order directing the Trustee of a First Party SNT to make child support payments on behalf of the beneficiary (i.e. the supporting spouse) violates the "sole benefit rule?" Thomas Begley and Angelo Canellos report that the Dallas Social Security office has taken this position, but also cite Ken Brown of the SSI Policy Section as stating that if the Trustee is required to make the child support payments due to a legal obligation, such payments would not affect the beneficiary's eligibility nor would it make the SNT a countable resource.[18]

10. **Conclusion**

In an era where over 50% of all marriages end in divorce and more and more individuals are in need of some form of public benefit assistance, I have found it absolutely fascinating how many Family Law practitioners have no idea that under the right circumstances their clients can receive spousal support and either maintain or obtain public benefits. The opportunity we as Elder Law and Special Needs attorneys have to educate the Bar, the Judiciary and the public about the available techniques and resources is a prime example of "doing well by doing good.

[18] Begley & Canellos, Special Needs Trust Handbook §6.03[F].

Additional Resources

In addition to the cited materials, readers may find the following articles of interest:

Susan L. Goldring, *"The Use of Trusts in Divorce When Planning for the Disabled Spouse or Child,"* New Jersey Lawyer - The Magazine, 265 Aug. N.J. 34 (2010).

Micah H. Huff and Martha C. Brown, *"Structuring A Divorce When A spouse or Child is Disabled,"* 46 Fam. L.Q. 199 (2012).

Neal A. Winston, *"Divorce American Style - Divorce, Child Support, and SNTs, The Sequel,"* Special Needs Trusts - The National Conference, 2008.

For Better or for Worse; In Sickness & In Health - Divorce & the Spouse With Special Needs

The Rules

- Spousal Support is:
- • "... an allowance for support made by a court from the funds of one spouse to the other spouse in connection with a suit for separation or divorce.
- • Alimony and spousal support payments are cash or in-kind contributions to meet some or all of a person's needs for food and shelter.
- • Payments may be court-ordered or voluntary."

The Rules

- Spousal Support is:
  - Unearned income
  - Countable
  - Assignable to a SNT

The SNT

- 1st Party or 3rd Party?
- Can you use a Pooled SNT?

What Kind of 1st Party SNT?

- (d)(4)(A)?
- (d)(4)(C)?

Funding the SNT With Spousal Support

- Support must be "assigned" to the SNT
- Assignment must be "irrevocable"
- Must there therefor be a Court Order?
- What about modification?

Funding the SNT With Spousal Support

- "The spousal support payments Supporting Spouse shall pay to Supported Spouse (including any subsequent modifications of the amount of said support) are hereby irrevocably assigned to the 2015 Supported Spouse SNT and are to be made payable to the Trustee of said SNT."

Issues Resulting from Mediation or Collaborative Law Approaches

- Must be irrevocable
- Must be part of the Court Order

Funding the SNT With Property

- Why not?
  - Limited distribution standard
- Estate Recovery issues

Funding the SNT With Retirement Assets

- Distributions from ERISA Plans apparently not assignable
- IRAs are OK

What About Child Support

- Different than spousal support – the money belongs to the child, not the custodial parent.
- The Federal perspective
  - Child support into a SNT not prohibited under the POMS
- State Perspective –
  - It depends on your jurisdiction

Liability of A SNT for Spousal or Child Support

- SNTs are NOT creditor protection trusts
- Open question as to whether Trustee of a SNT can be ordered to pay spousal/child support
- Growing attention to filial responsibility statutes


Getting the Word Out
Educate:
Family Law Attorneys
Mediators/Collaborative Law specialists
Judiciary

Special Needs Trusts National Conference

Friday, October 16, 2015

Breakout Session 2
2:05 P.M. – 3:00 P.M.

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

Presenter:
J. Whitfield Larrabee
Attorney at Law
Law Offices of J. Whitfield Larrabee
Brookline, MA

- Materials
- PowerPoint

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

Center for Excellence in Elder Law

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STRATEGIES FOR MAINTAINING PUBLIC HOUSING AND SECTION 8 ELIGIBILITY FOR PEOPLE WITH SPECIAL NEEDS TRUSTS

Presentation:

By J. Whitfield Larrabee, Esq.

October 16, 2015

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

WHAT IS THE SECTION 8 PROGRAM?

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

To use the program, tenants must find private landlords renting homes in the community who are willing to participate. Once the tenant finds a cooperating landlord, the tenant generally pays 30% of her income towards the rent; this portion of the payment is called the Total Tenant Payment (TTP). 24 C.F.R. §5.628(a). The local PHA supplements the remaining rent by issuing a check directly to the landlord so that the landlord is paid the "fair market rent." 24 C.F.R. §888.111.

The tenant must remain qualified to participate in the voucher program. The PHA must re-certify the tenant's eligibility no less regularly than annually. 24 C.F.R. §5.628(b). Among other things the PHA calculates any changes in the tenant's monthly income and adjusts the TTP if necessary. 24 C.F.R. §5.657 (2000).

IMPORTANT CASES INVOLVING INCOME ELIGIBILITY AND SPECIAL NEEDS TRUST EXPENDITURES

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

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

1. Lump sum settlements, although excluded from income if not placed in a special needs trust, are included in a Section 8 participant's annual income if expended through a special needs trust, unless they are excluded by another exclusion set forth in HUD regulations.

2. The cost of the purchase of an automobile, where the trust retained title to the vehicle, should not be included in a Section 8 participant's annual income in determining the participant's Total Tenant Payment;

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

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

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

Finley and *DeCambre* are in conflict with regard to the treatment of lump sums expended through special needs trusts.

WHAT ARE THE SECTION 8 INCOME ELIGIBILITY LIMITS?

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

Upper limits for income eligibility are as follows:

1. **Extremely Low Income - initial admission**

   75% of families initially admitted to a PHA's Section 8 program in any one year must be extremely low income families, which is defined as not more than 30% of an area's median income for a family.

   EXAMPLES:

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

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

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

   EXAMPLES:

   2015 Mobile Alabama - Family of 3 = $24,000
   2015 Orlando Florida - Family of 3 = $26,250
   2015 Boston Massachusetts - Family of 3 = $44,350

3. **Low Income - continuously assisted families**

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

EXAMPLES:

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

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

TIP NUMBER 1!

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

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

WHAT COUNTS AS INCOME?

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

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

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

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

NOTE: Section 8 Eligibility Is Determined by Income. Unlike Medicaid and SSI, There Is No Asset Limit**.**

WHAT IS EXCLUDED FROM INCOME?

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

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

TIP NUMBER 2!

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

APPLICATION OF SPECIFIC EXCLUSIONS

LUMP-SUM ADDITIONS TO FAMILY ASSETS

24 CFR 5.609(c)(9) excludes:

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

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

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

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

Importantly, not all distributions are counted, only "income" that is distributed is counted. Id. Income includes, among other things, “interest, dividends, and other net income of any kind from real or personal property.” 24

C.F.R. § 5.609(b)(3). In *DeCambre*, it is contended by the plaintiff, that lump-sum settlements that are deposited a irrevocable special needs trust did not meet this definition. The lump sum settlements, at the time they were deposited in the trust, are assets, not income. Both the Court in Finley and DeCambre recognized that, the beneficiaries could have taken their personal injury settlement and placed it under their mattresses from which they could have freely used it for any purpose without reporting her expenditures as Section 8 income.

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

The construction of § 5.603(b)(2), to exclude from income lump sums distributed from a trust, is consistent with 24 C.F.R. § 5.609(b)(3), because the

placement of the lump sum asset in a trust involves the investment of the money in a trust within the meaning of HUD's regulations. Under § 5.609 (b)(3), "Any withdrawal of cash or assets from an investment will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested by the family." The plaintiff in *DeCambre* contends that trust expenditures were merely a re-imbursement of cash that was invested by her, and should not have been included in her income.

TIP NUMBER 3!

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

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

If the PHA indicates that they do not follow *Finley*, the beneficiary has the option of pursuing litigation to try to establish the *Finley* rule in their jurisdiction. If a split occurs within federal jurisdictions, the case might have some promise for review by the U.S. Supreme Court.

At least one housing authority, in Lincoln Nebraska, appears to have decided not to include any expenditures from Special Needs Trusts in income, regardless of whether they are made regularly.

http://portal.hud.gov/hudportal/documents/huddoc?id=LINCOLNFY15PLAN.pdf

TEMPORARY, NONRECURRING OR SPORADIC INCOME

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

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

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

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

EXAMPLE # 1

FROM RENTAL HOUSING INTEGRITY IMPROVEMENT PROJECT

> Sam Daniels receives Social Security Disability and occasionally works as a handyman. He claims he only worked a couple of times last year but has no documentation. However, regular or steady jobs count as income.
>
> The regulation, 24 CFR 5.609(c)(9), does not define temporary or sporadic income. Therefore, PHAs must determine what is considered temporary or sporadic income, and define it in their policies. Generally, amounts that are neither reliable nor periodic are considered sporadic, and should be excluded from annual income.

http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/rhiip/faq_gird

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

Examples of possible expenditures that might fall into the temporary, nonrecurring or sporadic income exclusion are:

- Occasional Travel and Vacation Expenses;
- Occasional Purchase of Clothing, Appliances, Electronics, other gifts;
- Occasional Purchase Household Furnishings;
- One time payment for a root canal; (also may be excluded as a medical expense)

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

LOANS AS NONRECURRING OR SPORADIC INCOME

EXAMPLE # 2
FROM HUD FAQ

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

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

http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/rhiip/faq_ris

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

MEDICAL EXPENSES AND REASONABLE ACCOMMODATIONS

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

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

Because disabilities are often or always the result of medical conditions, § 5.609(c)(4) provides a bridge between the United States Housing Act of 1937, 42 U.S.C. § 1437f (o)(2)(A)(i) ("The Housing Act"), which established the Section 8 program, and protections from disability discrimination contained in section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("§ 504"), section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 ("ADA"), the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604 ("FHA").

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

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

LEGAL REQUIREMENTS FOR A REASONABLE ACCOMMODATION

To prevail on a claim for denial of reasonable modifications under Title II of the ADA and § 504, a plaintiff generally bears the burden of establishing: (1) that the defendant is a "public entity"; (2) that the plaintiff is a person with a

"disability"; (3) that the plaintiff is "qualified" to participate in or receive the benefits of the defendant's services, programs, or activities; (3) that the plaintiff informed the defendant of his or her disability and requested a modification of the defendant's rules, policies or practices (or that the plaintiff's disability and need for a modification was obvious); (4) that the requested modification was "reasonable"; (5) that the defendant nonetheless refused; and (6) that, as a result, the plaintiff was not able to "to participat[e] in" or enjoy "the benefits of the [defendant's] services, programs, or activities," or was otherwise "subjected to discrimination." 42 U.S.C. §§ 12102, 12131, 12132; *Kiman v. N.H. Department of Corrections*., 451 F.3d 274, 283 (1st Cir. 2006); *Reed v. LePage Bakeries, Inc*., 244 F.3d 254, 258 (1st Cir. 2001) (Title I "reasonable accommodation" case); *Higgins v. New Balance Athletic Shoe, Inc*., 194 F.3d 252, 265 (1st Cir. 1999) (Title I "reasonable accommodation" case); *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 152 (1st Cir. 1998).

STRATEGIES TO EXCLUDE EXPENDITURES BASED ON REQUESTS FOR REASONABLE ACCOMMODATIONS

To be completely safe, a trustee can ask the PHA to excluded an anticipated expenditure as a reasonable accommodation. Although there are no “magic words” or any specific form required for a reasonable accommodation request,

many housing authorities have a specific form where a physician can certify that a reasonable accommodation is necessary. Since physicians are often busy, it can be helpful for the beneficiary's trustee/attorney to fill out the request for reasonable accommodation, specifying in detail what the accommodations are and that they are needed "because of" the beneficiary's disability or disabilities, and to then have the beneficiary bring the completed form to the physician for the physician to sign.

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

TIP NUMBER 4!

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

TIP NUMBER 5!

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

New England

U.S. Department of Housing and Urban Development

Office of Public Housing
Boston Hub
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street
Boston, Massachusetts 02222-1092

New England PIH Advisory Letter # 07 – 05
April 18, 2007

Subject: **Special-Needs Trusts (SNT) Disbursements**

Dear Executive Director,

This advisory letter is provided to clarify the treatment of Special-Needs Trusts a/k/a Supplemental-Needs Trusts and their affect on income and rent calculations in our Office of Public Housing programs. Please apply this discussion to all of the programs administered through this office.

A Special-Needs Trust a/k/a a Supplemental-Needs Trust is a trust established to provide supplemental income for a disabled beneficiary who is receiving or may be eligible to receive government benefits. This type of irrevocable trust is often used by parents or guardians of disabled children to ensure the beneficiary's eligibility or continued eligibility for government benefits.

SNT as an asset

Pursuant to HUD regulations at 24 CFR 5.603(b)(2), the corpus (principal) of an applicant's or participant's SNT is not considered an asset.

SNT distributions as income

Distributions from the trust will be counted when determining annual income under 24 CFR 5.609. Annual income under 24 CFR 5.609 includes all amounts, both monetary or not, received by the applicant or made on the applicant's behalf, which is not excluded under 5.609(c) or deducted from annual income under 24 CFR 5.611.

Annual income includes the full amount, before any payroll deductions, of wages and salaries, overtime pay, commissions, fees, tips and bonuses, and other compensation for personal services; the net income from the operation of a business or profession; interest, dividends, and other net income of any kind from real or personal property. For a complete listing of items that are included in annual income please refer to 24 CFR 5.609(b).

Annual Income does not include items such as income from employment of children (including foster children) under the age of 18 years; payments received for the care of foster children or foster adults (usually persons with disabilities, unrelated to the tenant family, who are

unable to live alone); 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. For a complete listing of items that are excluded from income please refer to 24 CFR 5.609(c).

Under HUD's current regulations some expenditures should be counted as income, while others may fall under an income exclusion or deduction.

SNT distributions excluded or deducted

Not all distributions from a SNT should be counted towards an applicant's annual income. The regulations at 24 CFR 5.609(c) and 24 CFR 5.611 allow several types of expenditures, such as unreimbursed attendant care expenses exceeding three percent of the applicant's annual income and temporary or sporadic payments, to be excluded or deducted from the applicant's annual income for eligibility or continued eligibility purposes. Those amounts and 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. Unlike Medicaid, 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.

SNT distributions can come in many categories including: trust administration fees, taxes, attendant care expenses, rent payments, and various non-food and non-shelter expenditures made on behalf of the beneficiary. Some of these expenditures should be counted as income, while others may fall under an income exclusion or deduction.

Example

For example, any expenditure made for one-time trust administrative fees such as costs related to the set-up of the SNT would likely be excluded from annual income under 24 C.F.R. §5.609(c)(9), because they are a nonrecurring payment. Whereas, expenditures made for regularly occurring administrative fees, such as the trustee's compensation, would count as annual income. Additionally, expenditures made to pay taxes and rental payments would be counted towards annual income, because they were made on beneficiary's behalf[1] and do not fall under any exception or deduction. The expenditures made for attendant care expenses, on the other hand, are deductible from income to the extent they meet the requirements of §5.611(a)(3)(ii).

The 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. Further, more complete information about some expenditures may be necessary for an accurate determination. To the extent that a beneficiary may be rendered ineligible for rental housing by certain trust expenditures, such as the trust expenses that are required as a matter of law, you may pursue a waiver request with our office.

[1] See 24 C.F.R §5.609(a)(1).

Please share this important information with your housing authority occupancy staff so that they can make proper determinations of how to treat disbursements from Special Needs Trusts.

Sincerely,

Donna J. Ayala
Director

1APH Official
1APH Chron

1APH Schindler 1APH Cwieka

No. 15-1458, No. 15-1515

United States Court of Appeals for the First Circuit

KIMBERLY P. DECAMBRE
Plaintiff - Appellant/Cross-Appellee

v.

BROOKLINE HOUSING AUTHORITY;
MATTHEW S. BARONAS; JANICE MCNIFF; CAROLE BROWN
Defendants - Appellees/Cross-Appellants

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF PLAINTIFF-APPELLANT KIMBERLY DECAMBRE

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Dated: September 28, 2015

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to L.R. 34.0, Plaintiff-Appellant Kimberly DeCambre ("DeCambre") requests oral argument. The question of whether lump sums expended through special needs trusts are included in the income of Section 8 participants has not been decided by any federal or state appellate court. In light of the importance of this issue, the complexity of the factual record and DeCambre's multiple liability theories, oral argument will assist the Court's review.

STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. §1343 (civil rights). It also had pendant or ancillary jurisdiction over DeCambre's state law claims under 28 U.S.C. § 1367.

Appellate jurisdiction rests on 28 U.S.C. § 1291 over the final decision of the lower court as well as on 28 U.S.C. § 1292(a)(1) with regard to denial of DeCambre's request for a preliminary injunction.

On March 25, 2015, Judge William G. Young rendered a final decision in favor of the Defendant-Appellee Brookline Housing Authority ("BHA") on Counts 1, 2, 3, 4 and 7 of the Amended Complaint. Joint Appendix 485-525 ("App."). On March 26, 2015, the lower court entered a final judgment ordering that DeCambre's motion for a preliminary injunction was denied and that her appeal of her Section 8 eligibility was remanded to the BHA. App. 526. It also ordered the cased to be closed on March 26, 2015. App. 1.

DeCambre filed her notice of appeal on April 14, 2015. App. 527.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the BHA violated regulations of the United States Department of Housing and Urban Development ("HUD") in determining DeCambre's income by including expenditures from her special needs trust that originated as lump sum settlements, and by failing to exclude certain other trust property and expenditures in calculating her Annual Income.

2. Whether the lower court erred in failing to find that the BHA's incorrect calculation of DeCambre's annual income and resulting incorrect determination of her Total Tenant Payment ("TTP") violated the rent ceiling provision of the Housing Act, and, if so, whether the court erred in failing on the basis of this violation to render a judgment for DeCambre under 42 U.S.C. § 1983.

3. Whether the lower court erred in failing to find that the BHA discriminated against DeCambre by reason of her disability in violation state or federal anti-discrimination laws by denying DeCambre's requests for reasonable modifications of its rules, policies, practices, procedures and methods of administration so as to exclude expenditures from her special needs trust in determining her income, TTP and Section 8 benefits.

4. Whether the lower court erred in failing to find that the BHA violated state or federal anti-discrimination laws by imposing or applying eligibility criteria

that screened out or tended to screen out DeCambre and other similarly situated people with disabilities who utilize special needs trusts that are funded with lump sums from fully and equally enjoying housing and the Section 8 program.

5. Whether the lower court erred in basing its decision on the wrong eligibility criteria taken from the BHA's website.

6. Whether the lower court erred in denying DeCambre's requests for a preliminary injunction or for a permanent injunction or mandamus restoring her Section 8 benefits.

STATEMENT OF THE CASE

This is an appeal of the district court's judgment in favor of the defendant BHA on DeCambre's claims for 1) deprivation of rights under the United States Housing Act of 1937, 42 U.S.C. § 1437f (o)(2)(A)(i) ("The Housing Act") in violation of 42 U.S.C. § 1983 ("§ 1983"), 2) disability discrimination violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("§ 504"), violation of section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 ("ADA"), violation of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604 ("FHA"), and violation of G. L. ch. 93 § 103, Massachusetts Equal Rights Act ("MERA"), and, 3) denial of DeCambre's request for a preliminary injunction,

a permanent injunction and other equitable relief restoring her Section 8 benefits. App. 85. This is also an appeal of DeCambre's request for review under state law.

On May 27, 2014, the BHA held an informal hearing to review its decision of December 18, 2013 increasing DeCambre's TTP, as of February 1, 2014, from $435.00 per month to $1,560.00 per month (the full contract rent), thus eliminating her Section 8 subsidy. App. 553-356 (hearing officer's decision). On June 9, 2014, the hearing officer at the BHA rendered his decision, affirming the BHA's calculation DeCambre's rent contribution. *Id*. He also opined that the BHA correctly denied DeCambre's reasonable accommodation request. *Id*. On June 27, 2014, DeCambre dual-filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") and HUD against the BHA and its employees alleging disability discrimination. App. 360; Dkt. # 12, p. 33. DeCambre filed suit in the Norfolk Superior Court challenging the BHA's actions on or about July 9, 2014. Dkt. # 1; Dkt. # 12, p. 33. The BHA removed the case from state court on August 21, 2104. *Id*. On September 4, 2014, the parties agreed to submit the matter to the court for judgment as a case stated on the issue of liability. App. 221, n. 1. Argument was heard on September 19, 2014. App. 3. On March 25, 2016, the Court entered its Memorandum of Decision, Findings of Fact and Rulings of Law, rendering a judgment in favor of the BHA on

DeCambre's claims for violation of § 1983 (Count 1), disability discrimination (Count 2), Breach of Lease (Count 3) and Interference with Quiet Use and Enjoyment (Count 4). App. 485-525. The Court denied DeCambre's motion for a preliminary injunction restoring her Section 8 benefits, and it ordered that DeCambre's appeal of her Section 8 eligibility be remanded to the BHA for reconsideration in light of the court's findings. *Id*. On March 26, 2016, the Court entered an order of remand, denying DeCambre's motion for a preliminary injunction and ordering that DeCambre's appeal of her Section 8 eligibility be remanded to the BHA. App. 526. The court also terminated DeCambre's case in the district court on March 26, 2016, closing the case. App. 1. On April 14, 2015, DeCambre appealed the Court's judgments of March 25, 2016 and March 26, 2015. App. 527. The BHA filed its notice of cross appeal on April 27, 2015. App. 528. The BHA declined to reconsider its decision on DeCambre's eligibility as instructed by the lower court in its remand order. App. 591, ¶ 8. DeCambre refiled her case against the BHA in the lower court, seeking enforcement of the remand order. Add. 4; Add. 5. The lower court declined to act in the case, and ordered it administratively closed, subject to being reopened upon the appeal being withdrawn or exhausted or a mandate being issued. *Id*. On July 8, 2015, the lower re-opened the instant case for the limited purpose of considering

DeCambre's Motion For Entry of Judgment under Rule 54(b) and Motion For Entry of Judgment On Separate Document under Rule 58. Dkt. # 44. The Court allowed the DeCambre's motions. Dkt. #s 45 and 46. The parties submitted proposed judgments. Dkt. #s 47 and 48.

STATEMENT OF THE FACTS

DeCambre participated in the Section 8 Housing Choice Voucher Program administered by the BHA from 2005 to 2014. App. 222, ¶ 5. The BHA administers the Section 8 program on behalf of HUD under federal law. App. 221, ¶ 1.

DeCambre was and is a person with disabilities who derives her income primarily from Supplemental Security Income ("SSI"). App. 222, ¶ 8. She received $835.39 per month from SSI at the time of the case stated hearing in the lower court and even less at the time of her re-certification in August of 2013. App. 486; App. 237. DeCambre's disabilities include kidney disease, medullary sponge disease and/or Gittlemen's syndrome, severe hypokalemia, post traumatic stress disorder, torn labrum in hips and shoulder, elbow injuries, arthritis and a history of depression. App. 361, ¶¶ 1, 4 and 5; App. 377-379; App. 379; App. 485, pp. 4-5 (Memorandum of Decision).

In 2010, DeCambre became the beneficiary of a special needs trust established by Suffolk Superior Court pursuant to 42 U.S.C. § 1396p(d)(4)(A). App. 222, ¶ 7. The trust was funded by settlements for personal injuries and property losses obtained by DeCambre. *Id*. In the fall of 2013, the BHA reviewed DeCambre's trust expenditures as part of a periodic re-certification. App. 223, ¶ 9. As of December 1, 2013, DeCambre's contribution to her, known as her "Total Tenant Payment," ("TTP") was $435.00, and the BHA paid a "Housing Assistance Payment" ("HAP") of $1,125.00. App. 241. On January 11, 2014, DeCambre received "Notice of Rent Adjustment," indicating the HAP, paid by the BHA on behalf of HUD, was reduced to $0.00, and DeCambre's TTP was increased to $1,560.00, the full contract rent. App. 255. In a letter that accompanied the "Notice of Rent Adjustment," the BHA indicated that the increase was based on expenditures from DeCambre's special needs trust. App. 257. DeCambre timely appealed the "Notice of Rent Adjustment" *Id*., App. 259. DeCambre and J. Whitfield Larrabee ("Larrabee"), her trustee and attorney, repeatedly took steps to notify the BHA that: 1) DeCambre is a person with disabilities, 2) that the assets and expenditures of DeCambre's special needs trust were excluded from income under HUD regulations, 3) that, by including trust expenditures in DeCambre's income, the BHA was discriminating against DeCambre by reason of her disability

in violation of state and federal law, and, 4) that DeCambre requested reasonable accommodations excluding her special needs trust expenditures so that she could participate in the Section 8 program and because of the physical and mental limitations resulting from her disabilities. App. 237; App. 245; App. 267-268; App. 282-283; App. 285; App. 288; App. 290; App. 430-432. As part of the re-certification process, on November 12, 2013, Larrabee notified the BHA that DeCambre was a recipient of SSI, that she was a person with a disability, and that the trust expenditures should not have any effect on her Section 8 benefit. App. 245. On February 7, 2014, Larrabee specifically requested reasonable accommodations, asking that the BHA exclude all trust expenditures in calculating DeCambre's income, and that it specifically exclude the cost of her car, which was needed as protection from heat due to her medical conditions. App. 267-268, ¶¶ 11-14. Larrabee stated: "the automobile was needed to prevent Mrs. DeCambre from overheating in the summer." *Id*. On March 14, 2014, Larrabee made a more detailed request for reasonable accommodation, supported by letters from DeCambre's physicians describing her disabilities and need for accommodations. App. 282-283; App. 288; App. 290. In March 2014, DeCambre's physician verified that she has "numerous medical conditions that require her to have access to heat and central air conditioning to ensure temperature regulation" and that

require her to have access to cell phones and a lifeline in case of emergency. App. 290. Also on March 14, 2014, Larrabee offered to allow the BHA to inspect over 500 pages of medical records detailing DeCambre's medical problems and disabilities. App. 387. On July 17, 2014, Larrabee submitted on DeCambre's behalf a Certification of Need For Reasonable Accommodation that he signed. App. 367-387. On July 18, 2014, the BHA notified Larrabee that it required additional medical or expert certification of DeCambre's need for reasonable accommodation by August 7, 2014. App. 390. In response, on August 6, 2015, Larrabee provided a certification from DeCambre's physician that the requested accommodations were needed "because of" her disabilities. App. 428-432. Her physician certified that she needed the following reasonable accommodations because of her disabilities: 1) exclusion of trust expenditures that have enabled her to have automobiles and therefore avoid heat and cold; 2) exclusion of trust expenditures for her cell phone that she needs to call for help in case of an emergency when she is away from home; 3) exclusion of trust expenditures for her landline so that she can use lifeline and have access to help in case of an emergency at home; 4) exclusion of trust expenditures so as to enable her to participate in the Section 8 Program; 5) exclusion of expenditures on treatment, care and boarding of cats as they provide emotional support to DeCambre and help

her in coping with the limitations resulting from her disabilities. App. 430-432. The BHA failed to make any accommodations in accordance with those identified as necessary by her physician. App. 213, ¶ 30.

On May 27, 2014, the BHA held a hearing on DeCambre's appeal. App. 353. The hearing officer limited the appeal to DeCambre's appeal of her "rent calculation" in accordance with the notice of rent adjustment. App. 353; Accordingly, only the income between December 1, 2012 and November 30, 2013 was considered. App. 188, n. 10; App. 124; App. 224, ¶ 14; App. 227, ¶ 23; App. 248-253; App. 255. DeCambre presented evidence and argument that the expenditures from the special needs trust should be excluded from her family's annual income as a reasonable accommodation for her disabilities and based on HUD regulations, excluding trust assets, lump sum settlements and "temporary, nonrecurring or sporadic income" from annual income. App. 248-253; App. 353. DeCambre presented undisputed evidence that $37,601 of the 2013 expenditures was for acquisition of automobiles to which the trust held title. App. 251; App. 267, ¶ 11; The BHA argued that DeCambre's requests for a reasonable accommodation to exclude as income the trust's vehicle, cell phone and landline expenses, and expenditures for her cats were not reasonable. App. 353, p. 3. DeCambre also presented undisputed evidence that the trust was exclusively

funded with her lump sum settlements for personal injuries and property losses. App. 266, ¶ 7. The undisputed evidence was that distributions from the trust were solely of principal, and that there was no substantial interest income in the trust. *Id*. The BHA argued that, based on a 2007 New England HUD advisory letter and an email from a HUD employee, the lump sum settlement exclusion did not apply and that DeCambre's other trust expenditures did not fall within the exclusions set forth at 24 C.F.R. § 5.609(c). App. 452; App. 353. On June 9, 2014, the hearing officer upheld the BHA's rent adjustment, based in part on the New England HUD advisory letter and email, and also determined that the BHA correctly denied DeCambre's reasonable accommodation request. App. 353, pp. 4-5.

On July 8, 2014, Larrabee sent an email to BHA's attorneys renewing her requests for reasonable accommodation excluding all SNT expenditures, requesting the BHA to reconsider its decision because of potential liability under "federal anti-discrimination laws." App. 365. The BHA's Administrative Plan provides that a hearing officer's decision is not binding on the housing authority if it "[i]s contrary to HUD regulations or requirements, or otherwise contrary to federal, State or local law." App. 315. The Administrative Plan also allows the housing authority to overturn a hearing that was "upheld" if the reason for the termination was discretionary. *Id*.

With the loss of her Section 8 subsidy on February 1, 2014, DeCambre fell behind on her rent and received a notice to quit in March of 2014. App. 463, ¶ 2. App. 464. By borrowing and depleting family assets, she was able to pay her rent but again fell behind on her rent in August and received another notice to quit. App. 463, ¶ 3; App. 466. It was undisputed that, because of the lack of funds, DeCambre cut back on food purchases and did not have enough money for food, clothing, rent, utilities, drug co-payments, medical supplies, charges for over the counter drugs and other necessities. App. 464, ¶ 7; App. 465-466.

The lower court independently consulted the website of the BHA and based its findings of fact and conclusions of law on income limits set forth on the website related to person's eligibility for admission to the Section 8 program. App. 492; App. 524. DeCambre, who was a continuing participant in the Section 8 program, and was not applying to be admitted to the program, was not subject to the eligibility limits identified by the court. App. 222, ¶ 5; App. 237-240.

SUMMARY OF THE ARGUMENT

The BHA wrongly counted distributions of DeCambre's lump sum settlement money as "income" simply because she put the lump sum settlements into a special needs trust. Under the BHA's logic (upheld by the lower court), had DeCambre not used a trust, and simply spent the money, the expenditures would

not have been counted, and DeCambre would still be eligible to receive her full Section 8 subsidy. As the lower court stated, "DeCambre could have taken her personal injury settlement and placed it under her mattress,... from which she could have freely used it for any purpose without reporting her expenditures as Section 8 income." App. 503-504. As explained below, a lump sum settlement remains a lump sum settlement when put into trust, and HUD regulations exclude lump sum settlements from income, whether they are put under a mattress, deposited in the bank, or placed in a special needs trust. 24 C.F.R. § 5.609(c)(3).

People with disabilities such as DeCambre, who receive lump sums, must use special needs trusts in order to remain eligible for Supplemental Security Income ("SSI"). App. 221, ¶¶ 7-8. Under the Social Security Act, only people who have assets less than $2,000 or $3,000 can qualify for SSI. 20 C.F.R. § 416.1205. However, under § 1396p(d)(4)(A), individuals with disabilities are permitted to place their assets in a special needs trust and avoid this asset limitation. 42 U.S.C. § 1396p(d)(4)(A). Accordingly, when DeCambre received a series of lump settlements as part of civil suit, she followed the procedure established by Congress in creating a special needs trust and she then lawfully placed the settlement funds in the trust so that she could continue receiving SSI. App. 222, ¶ 7.

By excluding DeCambre from the Section 8 programs because of DeCambre's use of a special needs trust, the BHA engaged in disability discrimination in violation of the ADA, § 504, the FHA and G.L. ch. 93 § 103. 28 C.F.R § 35.130(b)(8). The lower court found that, under the interpretation given to HUD regulations by the BHA, "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." App. 503. The BHA failed to consider the unique dependence individuals with disabilities have on special needs trusts, and the BHA's practices denied DeCambre equal access to the Section 8 program and to housing in violation of state and federal law. App. 255; App. 257; App. 358.

The BHA further erred by failing to provide DeCambre reasonable accommodations. Although DeCambre supplied medical proof of her need for reasonable accommodations excluding trust expenditures that were medically necessary on account of her physical and mental limitations, and she even provided her physician's certification that the accommodations were needed "because of" her disabilities, the BHA denied her requests. App. 353; App. 430-432. The lower court erred in failing to conduct an individualized assessment of the DeCambre's right to reasonable accommodations and in failing to find that the

BHA violated the ADA, § 504, the FHA and G.L. ch. 93 § 103. 28 C.F.R § 35.130(b)(7).

Two other factors, one occurring at the BHA, and another in the lower court, caused this case to go awry. The first error occurred when the BHA, without explanation, decided to include the cost of the DeCambre trust's acquisition of two automobiles for $37,601, in DeCambre's income, even though the trust held title to the automobiles. App. 353. Nothing in HUD regulations allows trust principal of this sort to be included in a participant's income. The lower court recognized this obvious error in holding that the automobile expenditure should not be included in DeCambre's income. App. 521. The second error resulted from the lower court independently gathering facts by visiting the website of the BHA. App. 492. The lower court took judicial notice of the eligibility criteria from the BHA website. *Id*. In doing so, the lower court selected eligibility criteria for admission to the Section 8 program, 30% of the area's median income. *Id*. As a continuing participant in the Section 8 program, DeCambre was subject to higher eligibility criteria, 80% of the area's median income. 24 C.F.R. § 5.603(b); App. 222, ¶ 5; App. 237-240. Based on its selection of the wrong eligibility criteria, the lower court incorrectly found that DeCambre was not eligible for the Section 8 program, even with the exclusion of the cost of the automobiles. App. 492, App.

521, App. 523. On the basis of these findings, the lower court incorrectly concluded that the BHA did not violate the rent ceiling contained in the Housing Act and it ruled against DeCambre on her claims under § 1983. App. 485-526.

ARGUMENT

I. STANDARD OF REVIEW

A. Review of the Case Stated

The standard for appellate review of the lower court's decision on the parties' case stated is one for clear-error; that is, the district court's factual inferences should be set aside only if they are clearly erroneous, but, the court's legal conclusions are reviewed de novo. *United Paperworkers Intern. Union v. Intern. Paper*, 64 F.3d 28, 31-32 (1st. Cir. 1995).

B. Review Of Denial of Requests For Preliminary and Permanent Injunctions.

Review of the denial of DeCambre's requests for preliminary and permanent injunctive relief is for abuse of discretion. *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir.1996). The district court's answers to abstract questions of law are subject to de novo review. *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 71 (1st Cir.), cert. denied, 537 U.S. 974, 123 S.Ct. 434, 154 L.Ed.2d 330 (2002). An error of law is always an abuse of discretion. *Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 221 (1st Cir.2003).

C. Review Of The Hearing Officer's Decision.

In deciding DeCambre's cause of action under § 1983, the hearing officer's findings of fact in the lower court are reviewed under the "substantial evidence" standard. *Ang v. Gonzales*, 430 F.3d 50, 54 (1st Cir.2005); Cf. G. L. ch. 30A, § 14(7)(e) (applying substantial evidence standard to review of state agency decisions); 5. U.S.C. § 706(2)(E) (applying substantial evidence standard to review of federal agency decisions).

Questions of law, including interpretation of federal regulations, are subject to de novo review, both in the lower court and in this court, without deference to the conclusions of the local hearing officer. *Seavey v. Barnhart*, 276 F. 3d 1, 9 (1st Cir. 2001). No deference should ever be afforded a local agency's interpretation that is contrary to a federal statute or regulation. *Ritter v. Cecil County Office of Hous. & Community Dev.*, 33 F.3d 323, 328 (4th Cir.1994). The decision of a hearing officer at a local agency interpreting federal statutes and regulations is not entitled to the deference afforded a federal agency's interpretation of its own statutes or regulations. *Orthopaedic Hosp. v. Belshe*, 103 F. 3d 1491, 1495 (9th Cir. 1997). The court should not defer to the local hearing officer's interpretations of federal law and regulations because neither the hearing officer nor the BHA are subject to Congressional oversight and they lack expertise

in interpreting and implementing federal law. *Amisub (PSL), Inc. v. State of Colorado Dept. of Social Services*, 879 F.2d 789 (10th Cir.1989), cert. denied, 496 U.S. 935, 110 S.Ct. 3212, 110 L.Ed.2d 660 (1990); *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 316 (9th Cir. 1988), cert. denied, 491 U.S. 905, 109 S.Ct. 3187, 105 L.Ed.2d 695 (1989). Furthermore, giving deference to local hearing officers' interpretations of federal regulations will inevitably result in a lack of coherent, uniform and consistent construction of federal law and regulations nationwide. *Turner v. Perales*, 869 F.2d 140, 141 (2nd Cir.1989). Deference to local housing agencies' interpretations of federal law and regulations will also necessarily lead to inconsistent application between different localities within the states.

The lower court erred in using an excessively deferential standard of review in evaluating the BHA's interpretation of HUD regulations. In deferring to the BHA, the Court cited *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). It specifically quoted *Chevron* as follows:

> 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. *Id*.

The lower court erred in giving the interpretation of the hearing officer *Chevron* deference because the BHA is not the administrator of HUD, and there is no indication that Congress has explicitly left a gap for a local officials to fill. It is not the purview of a local hearing officer to interpret federal law and regulations. The case by case determinations made by the staff of a local housing agency have none of the stature afforded regulations and other interpretive guidelines issued by cabinet level leaders of federal agencies and other ranking federal policy-makers.

The lower court, in applying the *Chevron* rule to the decision of the BHA, erred in concluding that the BHA's interpretation was reasonable. App. 504. *Chevron* only prohibits the court from substituting its own construction for the interpretation made by the agency if it is "reasonable." *Id*. While much of the remainder of this brief explains why the BHA's decision was not reasonable, the lower court itself listed a number of concerns that lead to the conclusion that including distributions of lump sum settlements forming the principal of self-settled special needs trusts in the income of Section 8 participants is quite unreasonable. The lower court:

- acknowledged the underlying problem of losing housing benefits due to use of a special needs trust designed to protect needs-based benefits;

- acknowledged that if DeCambre had put her lump sum settlements under her mattress, the withdrawal of them would not be counted as income, and,
- held that "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.

App. 502-503.

II. THE BHA VIOLATED HUD REGULATIONS IN DETERMINING DECAMBRE'S ADJUSTED ANNUAL AND MONTHLY INCOME.

A. Lump Sum Settlements Were Not Excluded from DeCambre's Annual Income

HUD specifically excludes lump sum additions to family assets in the calculation of Annual Income. HUD regulations provide in relevant part: Annual income does not include the following:...(3) 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). 24 C.F.R. § 5.609(c)(3). Except for de minimus interest, all of the funds contained in the DeCambre SNT were derived from "lump sums received as part of her personal injury and property damage suit" and therefore fall within the

exclusion set forth at 24 C.F.R. 5.609(c)(3). App. 266, ¶ 7; App. 490.

The lower court erroneously concluded that the BHA could include DeCambre's lump sum settlements in her annual income based on 24 C.F.R. § 5.603(b)(2), which provides:

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

In making its determination, the lower court erred in failing to draw a distinction between assets, principal and income. App. 502. Although the trust fund is not considered an asset, "any income distributed from the trust fund shall be counted..." Id. Importantly, not all distributions are counted, only "income" that is distributed is counted. Id. Income includes, among other things, "interest, dividends, and other net income of any kind from real or personal property." 24 C.F.R. § 5.609(b)(3). The lump sum settlements deposited in the DeCambre's trust did not meet this definition. App. 266, ¶ 7; App. 302, ¶ 7. The lump sum settlements, at the time they were deposited in the trust, were assets, not income. The lower court recognized this in holding, "DeCambre could have taken her personal injury settlement and placed it under her mattress, Finley Op. 6, from

which she could have freely used it for any purpose without reporting her expenditures as Section 8 income." App. 503-504. The hearing officer also concluded that DeCambre's settlements were assets that were excluded from income. App. 353. Because the funds were not income when placed in the trust, the funds were not income when they were disbursed from the trust as that term is intended under § 5.603(b)(2).

The logical purpose of § 5.603(b)(2) is to ensure that income that is simply passed through a irrevocable trust shall be included in annual income and that any interest and dividends produced by the trust should be included in annual income. *Id*. Accordingly, to the extent that DeCambre's Trust produced and distributed interest or dividends, or that DeCambre tried to pass other money that met the definition of income under § 5.609 through the trust, the BHA was required to include this in income under HUD regulations. 24 C.F.R. § 5.609(b)(3), *Finley v. The City of Santa Monica, et. al.*, Superior Court of California, BS127077 (2011); App. 271. Here, however, the un-rebutted evidence was that "[b]ecause Mrs. DeCambre had no substantial interest income on the trust, all of the disbursements were from the principal and none can be counted as income...." App. 266, ¶ 7.

The construction of § 5.603(b)(2), to exclude from income lump sums distributed from a trust, is consistent with 24 C.F.R. § 5.609(b)(3), because the

placement of the lump sum asset in a trust involves the investment of the money in a trust within the meaning of HUD's regulations. Under § 5.609 (b)(3), "Any withdrawal of cash or assets from an investment will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested by the family." *Id*. DeCambre's trust expenditures were merely a re-imbursement of cash that was invested by DeCambre, and should not have been included in DeCambre's income.

B. A Lump Sum Is Not Converted To Income Simply By Being Placed In A Trust

The hearing officer erroneously concluded that the lump sum settlements ceased being lump sums when they were "converted" into a special needs trust, despite the fact that none of the relevant HUD regulations provide or make reference to property being "converted" in these circumstances. App. 355. This concept that lump sums are "converted" when placed in a trust was invented out of whole cloth by the BHA hearing officer. *Id*. In addition to being baseless, the theory that property placed in a trust is "converted" in this manner is illogical. Things do not normally lose their inherent properties simply by being moved into a trust. An automobile placed in a trust remains an automobile. A stock certificate placed in a trust remains a stock certificate. For the same reason, a "settlement for personal injury or property losses" placed in a trust remains a

"settlement for personal injury or property losses" under § 5.609(c)(3), and is excluded from income. 24 C.F.R. § 5.609 (c)(3). The lower court's ruling for the BHA, based on the lack of "regulatory support" that DeCambre's "Trust corpus remained a lump-sum settlement" was not reasonable. App. 510. Whether a property is a settlement relates to its origin to a recipient. Because the origin of a settlement to a recipient does not change, it is not reasonable to assume that it changes when placed in a trust, where, as here, HUD regulations are silent on the matter.

C. It Was Clear Error To Include Trust Expenditures In DeCambre's Income Where They Did Not Satisfy The Definition Of Income Under § 5.609(a)

In a well reasoned decision, a California court concluded that a distribution of principal from a irrevocable trust is not annual income as defined by § 5.609(a) where the principal, composed of a lump sum settlement, is excluded from annual income under § 5.609(c)(3). *Finley*, *supra*; App. 335. In order for trust expenditures to qualify as income to DeCambre, § 5.609(a) requires that the expenditures "Go to, or on behalf of, the family head or spouse (even if temporarily absent) or to any other family member…and" are "not specifically excluded in paragraph (c) of this section." 24 C.F.R. § 5.609(a)(1) and § 5.609(a)(3). While the expenditures satisfied the requirement of § 5.609(a)(1), in

that they benefitted DeCambre, they did not satisfy the requirement of § 5.609(a)(3) because they fell under the exclusion set forth at § 5.609(c)(3). Because both requirements were not met, it was error for the hearing officer to uphold BHA's inclusion of trust expenditures in DeCambre's income and it was error for the lower court to affirm the hearing officer's determination. *Finley*, *supra*.

In construing § 5.603(b)(2) , the lower court erroneously concluded that the lump sum settlement exclusion under § 5.609(c)(3) was inapplicable because "nothing in the regulations instruct that certain exclusions prevail over income inclusions." App. 502. Contrary to the lower court's conclusion, the definition of annual income set forth in § 5.609(a) does provide that the exclusions in § 5.609(c) prevail over what would otherwise be considered income. The regulation's specification that annual income is all amounts that benefit the family members and that are not excluded under 24 C.F.R. § 5.609(c) indicates that the exclusions prevail over monetary amounts received. 24 C.F.R. § 5.609(a)(1) and § 5.609(a)(3). The judge in *Finle*y was able to easily reconcile § 5.603(b)(2) with § 5.609 by concluding that expenditures of principal under a special needs trust "must be 'counted' in the annual income calculation as funds benefitting the

family head under § 5.603(b)(2), but they remain excluded under section 5.609(c)." *Finley*, supra; App. 343.

D. HUD Guidance Did Not Provide A Basis For The BHA's Decision

The hearing officer's decision cannot stand because it was based on an erroneous reading of HUD guidance as set forth in an advisory letter and email from the New England HUD office. The hearing officer concluded that "the BHA followed HUD regulations and guidance regarding SNTs as stated in New England PIH Advisory Letter dated April 18, 2017 (sic) and in HUD Portfolio Management Specialist, Benjamin Palmer 's April 20, 2012 correspondence to Carole Brown..."[1] App. 355. While the 2007 Advisory Letter states, "Distributions from the trust will be counted when determining income under 24 CFR 5.609," it also states that "[n]ot all distributions from a SNT should be counted toward an applicant's annual income." App. 452-453. In particular, the advisory letter, which is exclusively focused on "Special-Needs Trusts (SNT) Disbursements," states that "Annual Income does not include items such as income from....Lump-sum additions to family assets, such as...settlement for personal

[1] The Benjamin Palmer letter does not address the issue of excluding settlements from income and does not seem to provide any guidance on this issue beyond that contained in the New England PIH Advisory Letter. App. 351; App. 452-454.

injury or property losses." *Id*. The reference to the § 5.609(c)(3) exclusion, in context letter focused on "Special-Needs Trusts (SNT) Disbursements," indicates that the exclusion does apply to disbursements from a Special needs trusts, as there is no other reason to mention the exclusion in this context. App. 452-453. Based on the record evidence, was error for the lower court to affirm the unfounded and erroneous conclusions of the hearing officer.

The lower court erred in concluding that, "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." App. 507. The lower court looked to a statement in the New England HUD advisory letter, which states that "Unlike Medicaid, 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." App. 506-507. While this distinction might provide a reason for HUD to treat some SNT expenditures differently than Medicaid would, it provides no reason whatsoever for the HUD to target individuals who happen to use special needs trusts or other irrevocable trusts for less favorable treatment than other individuals who receive lump sums. Reliance on this distinction is speculative and unreasonable.

E. The BHA Violated HUD Regulations by Including "Temporary, Nonrecurring or Sporadic Income (Including Gifts)" in Decambre's Income.

The BHA erred in failing to exclude numerous "temporary, nonrecurring or sporadic" expenditures made by DeCambre's trust from her annual income as required by the income exclusion set forth at 24 C.F. R. §5.609(c)(9). In the year under review, there were two travel expenses for DeCambre, $3,875.12 on February 13, 2013, and $2,366.80 on March 26, 2013, that should have been excluded as sporadic income. *Id*; App. 250-251. Excepting a $50 reimbursement for a luggage fee on April 10, 2013, related to the earlier travel, there no other expenditures for travel in the record. App. 250. These expenditures, which were irregular, scattered, isolated, occasional and infrequent, met the common understanding of the sporadic and were thus improperly included in DeCambre's income.

DeCambre had sick cats that required cancer treatment. App. 249. In his affidavit submitted to the BHA, DeCambre's trustee stated, "DeCambre's pet required emergency veterinary treatment. By its nature, veterinary treatment is temporary." App. 267, ¶ 9. There was no evidence that the veterinary care was more than temporary. The $3,806.21 in expenditures on the cats should have been excluded as temporary. *Id*; 24 C.F. R. §5.609(c)(9). The automobile purchase

occurred on one date, May 29, 2013, and was effectuated by a single $37,601 check payment. App. 251; App. 267, ¶ 11. Since the expenditure did not recur, and it was not shown that it was likely to recur in 2014, the expenditure fell under the exclusion for nonrecurring income or sporadic income set forth at 24 C.F. R. §5.609(c)(9). According to the New England HUD office, "[t]hose amounts and 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 toward annual income." App. 453. As the automobile expenditure was not the type of payment that either recurred or was likely to recur, it was unreasonable to presume that it would be available for housing expenses, and consequently this type of expenditure is excluded from annual income by HUD. 24 C.F. R. §5.609(c)(9). There was a single $3,549 expenditure on automobile insurance on June 19, 2013. App. 251. This expenditure should also have been excluded as non-recurring and sporadic. *Id*. Although the trial court ordered the BHA to reconsider many of these expenditures, the BHA has evaded complying by with the Court's instructions by appealing this order and refusing to reconsider. App. 528; App. 591, ¶ 8. DeCambre submits that the BHA must not only be compelled to comply with the Court's order, but that the Court must find that the improper inclusion of

these expenditures in DeCambre's income resulted in a violation of the rent ceiling set forth at 42 U.S.C. § 1437f(o)(2).

F. The BHA Violated HUD Regulations by Including Necessary Medical Expenses in Decambre's Income.

The inclusion of trust expenditures for the trust's automobile purchase, for DeCambre's cell phone and landline, and for the care and support of DeCambre's pets violated 24 C.F. R. § 5.609(c)(4). § 5.609(c)(4) excludes from annual income: "Amounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member." *Id*. This exclusion of income under The Housing Act overlaps with DeCambre's requests for reasonable accommodation under state and federal anti-discrimination laws, as discussed, infra. Reasonable accommodations required by state and federal laws prohibiting discrimination against individuals with disabilities fall within the exclusion for medical expenses in the instant case. 24 C.F. R. § 5.609(c)(4).

III. THE BHA IS LIABLE UNDER 42 U.S.C. §1983 FOR VIOLATING THE RENT CEILING SET FORTH AT 42 U.S.C. § 1437f(o)(2).

A. The Basis for Decambre's Claim That the BHA Violated § 1983

In order for DeCambre to prevail, on her claims under 42 U.S.C. § 1983, against the BHA, she must show that the BHA, acting under color of law, deprived her of a right secured by a federal statute. *Wright v. Roanoke Redevelopment and*

Housing Authority, 479 US 418, 423-424 (1987)(by violating the rent ceiling for public housing tenants set forth in the Brooke Amendment of the Housing Act, the defendant violated § 1983.) "[P]rivate individuals may bring lawsuits against state actors under 42 U.S.C. § 1983 to enforce not only constitutional rights but also rights created by federal statutes." *Johnson v. Housing Authority of Jefferson Parish*, 442 F. 3d 356, 359 (5th Cir. 2006)(referring to *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980)). However, to enforce a violation of a federal statute by means of § 1983, the statute must "unambiguously give rise to privately enforceable, substantive rights." *Johnson v. Housing Authority of Jefferson Parish*, *supra*.

The BHA violated DeCambre's unambiguous right under 42 U.S.C. § 1437f(o)(2) not to be required to pay more than 30% of her adjusted family income in rent in violation of the "rent ceiling" set forth at § 1437f(o)(2)(A)(i), and this gives rise to an enforceable claim under 42 U.S.C. § 1983. The Fifth Circuit has found that when a housing authority violates the rent ceiling set forth at § 1437f(o)(2), tenants have an unambiguous right under the Housing Act that they may enforce by means of a private suit under § 1983. *Johnson v. Housing Authority of Jefferson Parish*, *supra*. Furthermore, the Supreme Court has found that public housing tenants, under the similar provisions of 42 U.S.C. § 1437a(a), have a private right of action under § 1983 for violations of the rent ceiling

provisions set forth in the Brooke Amendments. *Wright ,* 479 U.S. 418. Other court's have reached similar outcomes in analogous circumstances. *Daniels V. Housing Auth. Of Prince George's Cty.*, 940 F. Supp. 2d 248, 259 (Dist. Maryland 2013)(right to properly calculated subsidy found under the Homeownership Option of the Housing Choice Voucher Program at 42 U.S.C. § 1437f(y)); See Also, *Farley v. Philadelphia Housing Authority*, 102 F. 3d 697 (3rd Cir. 1996) (§ 1983 held to be appropriate means to enforce right to rent abatement and repair of apartment under the Housing Act, 42 U.S.C. § 1437d(k)) .

In addition to incorrectly including expenditures of trust principal as income, the BHA violated the rent ceiling by improperly including trust property in DeCambre's income (automobiles), and by failing to exclude trust expenditures from income as required by exclusions set forth at 24 C.F.R. § 5.609(c). The BHA's erroneous inflation of DeCambre's annual income resulted in the elimination of DeCambre's Section 8 subsidy and the requirement that she pay more than 30% of her monthly adjusted family income in rent, in violation of the rent ceiling imposed by § 1437f(o)(2) and the regulations of the Department of Housing and Urban Development (HUD) implementing the Section 8 Program. 24 C.F.R. § 5.628.

B. The BHA Improperly Included Trust Property (Automobiles) In DeCambre's Annual Income With The Result That It Violated The Rent Ceiling.

The lower court correctly found that the DeCambre trust's $37,601 automobile purchase should not be included in DeCambre's income because title was held by the trust as an asset. App. 521-522. It was plainly erroneous and inconsistent with HUD regulations for the BHA to include the value of automobiles owned by DeCambre's SNT in her income. 24 C.F.R. §§ 5.603 (b)(2), 5.609(a), 5.609(c)(3), 5.609(c)(4), 5.609(c)(9); App. 353-356. No HUD regulation provides for the inclusion of any part of the principal of a non-revocable trust in the income of Section 8 participants, and the regulations defining income do not encompass trust principal. In relevant part, 24 C.F.R. § 5.603(b)(2) provides: "income distributed from the trust fund shall be counted when determining annual income under § 5.609." *Id*. On May 29, 2013, the trust obtained title to two automobiles by payment of $37,601 by check. App. 251; App. 267, ¶ 11. One automobile was sold, with the funds of the sale returned to the trust bank account. App. 11, ¶ 2. The money expended by the trust to acquire ownership of the automobiles was neither "income" as that word is defined by HUD, nor was it "distributed from the trust" within the meaning of § 5.603 (b)(2), and therefore, it should not have been included in DeCambre's income. 24 C.F.R.

§§ 5.603 (b)(2); 24 C.F.R. § 5.609(a). The exchange of money for an automobile involves a distribution within the trust, not a distribution "from the trust." In purchasing the automobiles, money was taken out of the trust, but commodities of equal value were returned. No value was distributed from the trust to DeCambre in this situation. The term "annual income" is defined as all amounts, monetary or not, which: (1) Go to, or on behalf of, the family head. . . and (3) which are not specifically excluded in section 5.609(c). 24 C.F. R. §5.609(a). Because the value of the automobile and title to it remained within the trust, and did not move from the trust to DeCambre, it did not "go to" DeCambre. Because the value of the automobile did not "go to" DeCambre, it was not income within the meaning of §5.609(a). *Id*. Where one automobile remains an asset of the trust, and proceeds from the sale of the other automobile are held in the trust bank account, the expenditure on the automobiles does not fit within the definition of income under §5.609(a). 24 C.F.R. § 5.609 (a).

Based on the erroneous inclusion of the value of automobiles in DeCambre's income, the rent ceiling was violated. 42 U.S.C. § 1437f(o)(2). With the exclusion of $37,601 for the automobile purchase from DeCambre's income, the maximum TTP allowable under § 1437f(o)(2), 30% of DeCambre's adjusted

monthly family income, was $930.62. *Id.*[2] By establishing DeCambre's TTP at $1,560, the BHA set her TTP at more than 50% of her family's adjusted monthly income, thereby violating the rent ceiling. The lower court erred in failing to conclude, based on its own findings and conclusions that the cost of the automobiles were excluded from DeCambre's income, that the BHA violated the rent ceiling and § 1983.

C. By Failing To Exclude Lump Sums, Medical Expenses, and Temporary, Sporadic or Nonrecurring Income (Including Gifts) From DeCambre's Annual Income, The BHA Violated The Rent Ceiling.

As previously discussed, the BHA unlawfully failed to exclude lump sums, medical expenses, and temporary, sporadic or nonrecurring income (including gifts) from Decambre's annual income. The BHA's failure to exclude all trust expenditures under 24 C.F. R. § 5.609(c)(3) as lump sums resulted in a 350% increase in DeCambre's rent contribution, and an obvious violation of the rent

[2] Based on the lower court's findings, DeCambre's TTP could not be higher than $930.62 calculated as follows: $12,397.00 (annual income) - $400 (deduction for disabled family under 24 C.F.R. § 5.611(a)(2)) + $62,828.99 (amount of trust expenditures and assets attributed to DeCambre's income by the BHA) - $37,601 (automobile purchase) = $37,224.99 (adjusted annual family income) ÷ 12 = $3,102.08 (adjusted monthly family income) × .30 = $ 930.62.

ceiling.[3] In combination with its erroneous inclusion of trust property in DeCambre's income, the unlawful inclusion of medical expenses, and temporary, sporadic or nonrecurring income in her income inflated her annual income and caused her to pay more than 30% of her monthly income in rent in violation of the rent ceiling. 24 C.F. R. § 5.609(c)(4); 24 C.F. R. § 5.609(c)(9).

IV. THE LOWER COURT ERRED IN CONDUCTING AN INDEPENDENT INVESTIGATION, WITHOUT NOTICE TO THE PARTIES, AND IN TAKING JUDICIAL NOTICE OF THE WRONG INCOME ELIGIBILITY LIMITS

The lower court erred when, in writing its decision, it independently consulted the website of the BHA, took judicial notice of the wrong eligibility criteria from the site, and based its findings of fact and conclusions of law on the wrong criteria. Citing the web page of the BHA, the lower court found that "the BHA's yearly gross household income limit for a two-person household is $22,600." App. 492; http://www.brooklinehousing.org/sect8.html.[4] Based on the eligibility limit for initial admission to the Section 8 program set forth on the

[3] If all trust expenditures were excluded from DeCambre's annual income based on the lump sum exclusion, DeCambre's TTP should not have exceeded $299.92, calculated as follows: $12,397.00 (annual income) - $400 (deduction for disabled family under 24 C.F.R. § 5.611(a)(2)) = $11,997.00 (adjusted annual family income) ÷ 12 = $999.75 (adjusted monthly family income) × .30 = $299.92.

[4] The BHA was incorrect when it stated on the website the $22,600 eligibility limit for admission to the Section 8 program was the "very low income" limit. DeCambre contends this is the "extremely low income" limit.

website, the lower court concluded "that DeCambre's income, as calculated by the BHA, exceeded the outlined limits of Section 8 housing eligibility." App. 524. DeCambre was subject to the eligibility limit for families "continuously assisted" in the Section 8 program. 24 C.F.R. § 982.201(b)(1)(ii); 24 C.F.R. § 5.603(b); App. 222, ¶ 5; App. 237-240. This limit is set by HUD at 80% of area median income, or according to HUD, $52,400 for Brookline in 2014. 24 C.F.R. § 5.603(b); 24 C.F.R. § 982.201(b)(1)(ii); Economic and Market Analysis Division, HUD, *FY 2014 Income Limits Summary For Brookline, Massachusetts*, http://www.huduser.org/portal/datasets/il/il14/index.html (HUD's online tool at this URL provides eligibility limits by area); Quadel Consulting Corp., *Housing Choice Voucher Program Guidebook* § 5.2, (2001). http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11749.pdf. The lower court's factual findings and conclusions based on the wrong eligibility limit were clearly erroneous and were improperly based on incorrect information that was outside of the agreed upon record. Errors of this sort "invariably" have been held to be "reversible error." *Gordon v. United States*, 178 F. 2d 896, 901 (6th Cir. 1949). The lower court missed the crux of the issue in the case, violation of the rent ceiling, and was led astray, by its unnecessary focus on the eligibility limit, a matter that was not even addressed in the informal hearing. App. 353-356.

V. THE BHA DISCRIMINATED AGAINST DECAMBRE BY REASON OF HER DISABILITY

A. The Basis For DeCambre's Claims of Discrimination

DeCambre's claims of disability discrimination are based in particular on two theories of liability: 1) that the BHA unlawfully denied of her requests for reasonable modification of its rules, policies, practices, and methods of administration with the result that it, a) excluded her from the Section 8 program, b) denied her the full and equal benefits of the Section 8 program, and, c) denied her an equal opportunity to use and enjoy housing, and, 2) that the BHA imposed or applied eligibility criteria that, by reason of her disabilities, unlawfully excluded her from the Section 8 program, denied Section 8 benefits, and deprived her of equal use and enjoyment of housing . 42 U.S.C. §§ 12131(2), 12132; 28 C.F.R § 35.130(b)(7); 28 C.F.R § 35.130(b)(8); 42 U.S.C. § 3604.

More generally, DeCambre contends that the BHA violated three distinct clauses in Title II's core anti-discrimination provision that protects people with disabilities from being 1) "excluded from participation in . . . the services, programs, or activities of a public entity"; (2) "denied the benefits of the services, programs, or activities of a public entity"; and (3) "subjected to discrimination" by a public entity. See 42 U.S.C. § 12132. The third "catch-all" clause can fairly be read to cover discrimination against a recipient of "services, programs, or

activities" offered by a public entity, and tends to broaden the breadth of the statute. *Currie v. Group Insurance Commission*, 290 F.3d 1, 6-7 (1st Cir. 2002). It is undisputed that the BHA discriminated against DeCambre based on her use of a special needs trust. App. 353-355. Discriminating soley the basis of an individual's use of a special needs trust by definition discriminates by reason of disability; for it is the fact of an individual's disability that is required for a person to have a special needs trust. 42 U.S.C. § 1396p(d)(4)(A).

This case concerns Title II, commonly referred to as the public services portion of the ADA. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. § 12131(2), in pertinent part, defines a "qualified individual with a disability" as:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices...meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. Id. (emphasis added).

In addition to her claims for disability discrimination in violation the ADA, DeCambre has brought claims for violation of § 504, the FHAA, G.L.ch. 151B and G.L. ch. 93 §103. Except as explicitly indicated in this brief, DeCambre contends

that these statutes can be analyzed in tandem, and that a violation of any one of the statutes amounts to a violation of all the statutes. *Cox v. New England Telephone & Telegraph Co.*, 414 Mass. 375, 382 (1993)(in the area of disability discrimination, the court looks to decisions under § 504, and analysis of a discrimination claim under state and federal law is essentially the same).

In the case of Massachusetts anti-discrimination laws, DeCambre asserts that the BHA is liable for violating G. L. ch. 93 § 103 ("MERA"), or, in the alternative, G. L. ch. 151B. G. L. ch. 93 § 103; G.L. ch. 151B §§ 4(3C), 4(7A)(2), 4(10); Lopez v. Commonwealth, 463 Mass. 696, 715 (2012). MERA, more readily than ch. 151B, encompasses the plaintiff's claims in the present case, because it incorporates Article 114 of the Amendments to the Massachusetts Constitution, which provides: "No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth." G. L. ch. 93 § 103; art. 114 of the Amendments to the Constitution of the Commonwealth. Article 114 mirrors § 504. MERA and ch. 151B potentially provide more expansive remedies, including punitive damages and damages for emotional distress, than do some of DeCambre's federal claims. G.L. ch. 151B § 9; G.L. ch. 93 § 103.

In disability discrimination cases, a plaintiff "may proceed under any or all of three theories: disparate treatment, disparate impact, and failure to make reasonable Accommodation." *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 48 (2d Cir. 2002). DeCambre proceeded under all three theories at trial, and now does so on appeal. App. 23; App. 85-86, App. 105-106.

B. The BHA Discriminated Against DeCambre By Reason Of Her Disabilities By Failing To Make Reasonable and Necessary Modifications To Its Policies, Practices, Methods of Administration, Rules and Procedures

The BHA, in failing to make modifications to its rules, policies, methods of administration and practices, has unfairly and unnecessarily excluded DeCambre from the Section 8 program because of her disability, it has unfairly relegated her to an inferior status in society, it has caused her economic disadvantage, and it has caused her psychological harm, contrary to the purposes of the ADA, § 504, the FHAA, G.L.ch. 151B and G.L. ch. 93 § 103. App. 463-466; App. 360-363.

The Attorney General, at the instruction of Congress, has issued regulations implementing Title II. 42 U.S.C. § 12134(a). The Title II regulation that sets forth the duty of a public entity to reasonably accommodate the disabled provides:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.
>
> 28 C.F.R. § 35.130(b)(7).

Failure to grant a request for a reasonable modification is an independent basis for liability under Title II, § 504, the FHA, ch. 151B and ch. 93 § 103. *Nunes v. Massachusetts Dept. Of Correction*, 766 F. 3d 136, 145 (1st Cir. 2014); *Alexander v. Choate*, 469 U.S. 287, 301 (1985). DeCambre's right to reasonable accommodation under state law arises under the Massachusetts Equal Rights Act, G. L. Ch. 93 § 103, and G.L. ch. 151B §§ 4(3C), 4(7A)(2), 4(10); *In re McDonough*, 457 Mass. 512, 522 (2010). App. 86-87; App. 105-106 (Amended Complaint).

To prevail on a claim for denial of reasonable modifications under Title II of the ADA, ch. 151B, § 504 and ch. 93 § 103, a plaintiff generally bears the burden of establishing: (1) that the defendant is a "public entity"; (2) that the plaintiff is a person with a "disability"; (3) that the plaintiff is "qualified" to participate in or receive the benefits of the defendant's services, programs, or activities; (3) that the plaintiff informed the defendant of his or her disability and requested a modification of the defendant's rules, policies or practices (or that the

plaintiff's disability and need for a modification was obvious); (4) that the requested modification was "reasonable"; (5) that the defendant nonetheless refused; and (6) that, as a result, the plaintiff was not able to "to participat[e] in" or enjoy "the benefits of the [defendant's] services, programs, or activities," or was otherwise "subjected to discrimination." 42 U.S.C. §§ 12102, 12131, 12132; *Kiman v. N.H. Department of Corrections*., 451 F.3d 274, 283 (1st Cir. 2006); *Reed v. LePage Bakeries, Inc*., 244 F.3d 254, 258 (1st Cir. 2001) (Title I "reasonable accommodation" case); *Higgins v. New Balance Athletic Shoe, Inc*., 194 F.3d 252, 265 (1st Cir. 1999) (Title I "reasonable accommodation" case); *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 152 (1st Cir. 1998).

1. The BHA Is a Public Entity Subject to State and Federal Anti-discrimination Laws.

It is undisputed that the BHA is a public entity and recipient of federal funds that is subject to both the ADA and § 504. App. 221, ¶ 1; App. 85, ¶ 3 (Complaint); App. 210, ¶ 3 (Answer); App. 488.

2. Decambre Is a Person with a Disability.

It is agreed that DeCambre is a person with a disability and that the primary source of her income is Supplemental Security Income ("SSI") which she receives from the Social Security Administration as a person with disabilities. App. 222, ¶ 8.

3. DeCambre Is "Qualified" To Participate In The Section 8 Program Administered By The BHA.

DeCambre is "qualified" because she met "the eligibility requirements for ...for the receipt of services or the participation in programs or activities provided by" the BHA with or without reasonable modifications to its rules, policies, or practices. 42 U.S.C. § 12131(2). When DeCambre existed only on her meager income from social security, about $835.39 per month, she was permitted to participate in the Section 8 program as administered by the BHA for many years. App. 222, ¶ 8; App. 488. The basis given by the BHA hearing officer for upholding the decision to raise DeCambre's TTP and thereby terminate her subsidy was the expenditures from the special needs trust. App. 355-356. Accordingly, but for the expenditures from her special needs trust, her TTP would not have been increased, her subsidy would not have been terminated, and she would not have been rendered ineligible for the Section 8 subsidy. *Id*.; App. 358.

4. DeCambre Informed The BHA of Her Disabilities and Repeatedly Requested Modifications.

Based on DeCambre's numerous written requests, the undisputed evidence establishes that the BHA knew of DeCambre's disabilities and her requests for reasonable modifications of its rules, policies, practices and procedures. App.225, ¶ ¶ 18-20, App. 225-226, ¶ 22 App. App. 229, ¶ 28- 31; App. 245-246, App. 266-

269; App. 282-283; App. 290; App. 369-370; App. 372; App. 377-394, App. 428-432.

5. The Modifications Requested By DeCambre Were Reasonable.

In order to meet her burden to a proposed "reasonable" modification, a plaintiff must show that the proposed modification would enable her to have access to the services, activities or programs provided by the public entity and "at least on the face of things, it is feasible for the [the public entity] under the circumstances."[5] *Reed*, 244 F. 3d at 259. (addressing the burden of an employee under Title I of the ADA).

The factual findings of the lower court established that many of the accommodations requested by DeCambre were feasible and reasonable. App. 519-522. The lower court found that several of the accommodations requested by DeCambre, such as excluding expenditures for the care of her emotional support animals, seemed to have been made in accordance with HUD's handbook or regulations, and should have been excluded from the BHA's calculation of her income. App. 520-522. The lower court found that the acquisition of automobiles

[5] Under the Fair Housing Act, a reasonable accommodation is a change in a rule, policy, practice, or service that may be necessary to allow a person with a disability the equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(B).

by the trust could not be included in income under HUD regulations. App. 521. The lower court also found that expenditures for costs to maintain a telephone line, internet connection and cable television "seem to fall under acceptable expenditures." Id. The judge identified DeCambre's travel costs as expenditures that "could also fall within allowable SNT expenditures" which would exclude it from annual income. App. 520-522. The requested accommodations were feasible and reasonable because the lower court found grounds by which the BHA could lawfully exclude most or all of the trust expenditures, and the requested accommodations were of a type ordinarily made in the run of cases. *Id*., *Reed*, 244 F. 3d at 259 (1st Cir. 2001); *U.S. Airways v. Barnett*, 535 U.S. 391, 401-402 (2002).

While the lower court made some assessment of whether expenditures were excluded under 24 C.F.R. § 5.609(c)(9) as temporary, nonrecurring or sporadic income, it appears to have given very little consideration to the question of whether DeCambre's requests for accommodations were reasonable. App. 516-518. It is "essential" that a court make an "individual assessment of the facts" in determining whether a requested accommodation is reasonable. *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F. 3d 638, 647 (1st Cir. 2000); see also, *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001). In determining that "the BHA did not

act in a discriminatory manner and that DeCambre's discrimination claims against the BHA cannot stand," the lower court failed properly consider in its opinion whether DeCambre's requests for modification were reasonable or whether a reasonable modification of the BHA's rules, policies, practices or activities would have enabled her to equally participate in the Section 8 program or have equal opportunity in housing. App. 516-518.

The exclusion of expenditures necessary to accommodate DeCambre's disabilities were feasible and were required by HUD regulations promulgated pursuant to the Housing Act, § 504 and the FHAA. 24 C.F.R. § 5.609(c)(4); 24 C.F.R. §100.204(a); 24 C.F.R. § 8.4, et. cet., 24 C.F.R. § 8.33. HUD regulations exclude from annual income: "Amounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member." 24 C.F.R. § 5.609(c)(4). The BHA explicitly recognized that medically needed expenditures were excluded from income when it excluded the $169.99 expended by the trust on air conditioner. App. 224, ¶ 14. Expenditures necessary to accommodate her disabilities were medical expenses because they were based on her "numerous medical conditions." App. 290. In her requests for reasonable accommodation, DeCambre described the medical necessity of the requested accommodations, and she supported those descriptions with

certifications and other medical documentation from her physicians. App.225, ¶ ¶ 18-20, App. 225-226, ¶ 22 App. App. 229, ¶ 28- 31; App. 245-246, App. 266-269; App. 282-283; App. 290; App. 369-370; App. 372; App. 377-394, App. 428-432. HUD regulations, promulgated pursuant to § 504, provide: "A recipient shall modify its housing policies and practices to ensure that these policies and practices do not discriminate, on the basis of handicap, against a qualified individual with handicaps" unless the modifications would result in a fundamental alteration of the program or an undue administrative burden. 24 C.F.R. § 8.33. HUD regulations promulgated under the FHAA provide: "It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas." 24 C.F.R. §100.204(a). By denying DeCambre's request that it exclude her trust expenditures as a reasonable accommodation for her disabilities, The BHA not only violated HUD regulations, but it also violated the Housing Act, § 1983, § 504, the FHAA, the ADA and G.L. ch. 93 § 103. The lower court erred in disregarding these violations and in finding for the BHA on these claims.

The costs for the care and support of DeCambre's cats were necessary medical expenses that should have been excluded as a reasonable accommodation. See *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995); *United States v. California. Mobile Home Park Management. Co.*, 29 F.3d 1413, 1417 (9th Cir.1994). Courts have concluded under the FHA and § 504 that an emotional-support animal may be a reasonable accommodation when the animal is necessary for a person with a disability to enjoy equal housing rights.[6] *Majors v. Housing Authority of DeKalb County.*, 652 F.2d 454, 457-58 (5th Cir. Unit B Aug. 1981) (reversing grant of summary judgment to housing authority on Rehabilitation Act claim concerning emotional-support animal for person with a disability, and remanding for trial on factual issues); *Fair Housing of the Dakotas, Inc. v. Goldmark Prop. Mgmt., Inc.*, 778 F. Supp. 2d 1028, 1035-36 (D.N.D. 2011); *Overlook Mut. Homes, Inc. v. Spencer*, 666 F. Supp. 2d 850, 858-61 (S.D. Ohio 2009). Furthermore, at least in the context of public housing projects, HUD requires public housing authorities not to apply or enforce any policies "against animals that are necessary as a reasonable accommodation to assist, support, or

[6] The expansive regulations that HUD has issued under § 504 encompass disability discrimination by public entities administering HUD programs and also explicitly prohibit the most or all of the types of housing discrimination forbidden by the FHA. 24 C.F.R. § 8.4, et. seq.

provide service to persons with disabilities." 24 C.F.R. § 5.303(a); see also 24 C.F.R. § 960.705 (stating that regulations authorizing public housing agency to charge pet deposit in public housing does not apply to animals "necessary as a reasonable accommodation to assist, support or provide service to persons with disabilities"). The lower court found, "[t]he HUD Occupancy Handbook covers the cost of 'assistance animal and its upkeep' as a deductible medical expense." Add. 522. Under HUD guidelines, a "housing provider may not require the applicant to pay a fee or a security deposit as a condition of allowing the applicant to keep the assistance animal." Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Accommodations Under the Fair Housing Act*, p. 9, ¶ 11. (May 14, 2004), http://www.hud.gov/offices/fheo/ library/huddojstatement.pdf. By including the expenditures for the care and support of DeCambre's emotonal-support animals in DeCambre's income, the BHA discriminated against her by diminishing her subsidy and penalizing her for keeping the animals. App. 355-356. The lower court's conclusion, that the BHA did not act in a discriminatory manner with regard to its treatment of DeCambre's pet expenses, is contradicted by its own findings and was error. App. 522-523.

Although DeCambre's automobiles were owned by the trust and could not be considered income, and she had an obvious medical need for the an automobile as protection against heat and cold because of limitations on her ability to regulate her body temperature, the BHA unreasonably refused to grant DeCambre's request that automobile purchase and insurance be excluded from income. Based on the uncontradicted evidence, DeCambre's mobility was significantly impaired due to hip injuries, impairments regulating her body temperature, and consequent intolerance for heat and cold. App. 229-230, ¶ 31; App. 267-268, ¶ 11. App. 332-33; App. 392-385; App. 430-432; Courts have frequently recognized that accommodations for people with disabilities involving mobility impairments are reasonable. *Astralis Condominium Ass'n v. Secretary, HUD*, 620 F. 3d 62 (1st Cir. 2010)(finding the plaintiffs, who were handicapped because of their "significant mobility problems" where entitled to a designated parking space). The requested accommodation excluding the cost of the automobiles and insurance from income entailed no expense to the BHA and it was reasonable. The lower court erred in failing to find disability discrimination based on the BHA's denial of this request.

DeCambre's requests for exclusion of expenses for her cell phone and landline as accommodations were reasonable in light of the undisputed medical documentation provided and other undisputed explanations of this need provided

in her requests for accommodation. App.225, ¶ ¶ 18-20, App. 225-226, ¶ 22 App. App. 229, ¶ 28- 31; App. 245-246, App. 266-269; App. 282-283; App. 290; App. 369-370; App. 372; App. 377-394, App. 428-432. Her physician certified that she required these accommodations because of her disability in case of emergency to that she can get help while at home, by means of lifeline, and while away from home by means of her cell. App. 332-333; App. 430-432: App. 377-378. The lower court favorably cited to arguments and case law that support "excluding these payments from annual income." App. 520. Plaintiff contends that these accommodation requests were reasonable because they were shown to be medically necessary because of her disabilities in that they provided her with access to potentially life saving help in the event of an emergency. App. 332-333; App. 430-432: App. 377-378.

6. The BHA Refused To Grant DeCambre's Reasonable Requests For Modifications.

It is undisputed that the BHA refused to grant DeCambre the modifications she requested, except for the exclusion of less than $175.00 from her income for the cost of an air conditioner. App. 213, ¶ 30; App. 192-193; App. 356-357.

7. Decambre Was Not Able to Participate in or Enjoy the Benefits of the BHA's Services, Programs or Activities Because of the Denial of Her Requests for Reasonable Accommodation.

It is undisputed that DeCambre's subsidy was eliminated and that she was completely excluded from the Section 8 program because of the denial of her requests for reasonable accommodations. App. 254; App. 257; App. 353-356; App. 358.

C. The BHA Waived the Fundamental Alteration Defense and Failed to Demonstrate That Making the Requested Modifications Would Fundamentally Alter the Nature of the Service, Program, or Activity.

The BHA waived any defense it may have had under § 35.130(b)(7), "that making the modifications [requested by DeCambre] would fundamentally alter the nature of the service, program, or activity," by failing to raise this affirmative defense in its answer. 28 C.F.R § 35.130(b)(7); Fed. R. Civ. P. 8(c); App. 218-219. "A claim that a requested accommodation would constitute an undue burden is an affirmative defense." *Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir.1998). Generally, affirmative defenses are required to be raised in a pleading. Fed. R. Civ. P. 8(c)." *Fair Housing of the Dakotas v. Goldmark Property*, 778 F. Supp. 2d 1028, 1039, note 3 (Dist. N. Dakota 2011). *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603-604 (1999) (Ginsburg, J., plurality opinion) (discussing the reasonable modification regulation as the State's "fundamental-alteration defense"); id. at 607, 119 S.Ct. 2176 (Stevens, J., concurring) (explaining that a "state may assert, as an affirmative defense, that the

requested modification would cause a fundamental alteration of a State's services and programs").

Even if the BHA did not waive the "fundamental alteration defense," it failed to meet its burden of establishing this defense. *Ward v. Massachusetts Health Research Institute, Inc.*, 209 F.3d 29 (1st Cir.2000) (reversing summary judgment in an ADA case where the employer had produced no evidence of undue hardship); *Garcia-Ayala v. Lederle Parenterals, Inc*., 212 F. 3d 638, 649 (1st Cir. 2000) (after case stated trial where employer did not contest reasonableness of accommodation, and presented no evidence of undue hardship, judgment was entered for the employee); *Popovich v. Court of Common Pleas Domestic Relations Div*., 227 F.3d 627, 639 (6th Cir. 2000), rev'd on other grounds, 276 F.3d 808 (6th Cir.2002) (en banc). The arguments of BHA's attorney, that the modifications would fundamentally alter the program, were not evidence, and did not meet the BHA's burden. App. 192-193; *US v. Torres-Galindo*, 206 F. 3d 136, 142 (1st. Cir. 2000). It is very well established that "the statements and arguments of counsel are not evidence," as this is a standard jury instruction. *Id*.; *Arrieta-Agressot v. US*, 3 F. 3d 525, 529 (1st. Cir. 1993). Except for the arguments of defense counsel, there was no basis in the record that the modifications requested by DeCambre would result in a fundamental alteration.

The Court's finding, that "DeCambre could have taken her personal injury settlement and placed it under her mattress....from which she could freely have used it for any purpose without reporting her expenditures as Section 8 income," demonstrates that exclusion of the trust expenditures as requested by DeCambre would not "fundamentally alter" the program. App. 503-504. The BHA's action, in excluding from DeCambre's income the trust expenditure on the air conditioner, demonstrated that the exclusion of other trust expenditures because of DeCambre's medical conditions/disabilities would not fundamentally alter the program. 24 C.F.R. § 5.609(c)(4); App. 224, ¶ 14. Because DeCambre's disabilities are medical conditions, the expenses associated with accommodating her disabilities are medical expenses. As the exclusion provided for by § 5.609(c)(4) is part of the Section 8 Program, applying it to DeCambre's trust expenditures results in no fundamental alteration. There was no evidence of any disruption of BHA operations or undue administrative burden falling upon the BHA if it were to grant DeCambre the requested accommodations. *Toledo v. Sanchez*, 454 F. 3d 24, 39-40 (1st Cir. 2006).

D. The BHA Discriminated Against Decambre by Unnecessarily Imposing or Applying Eligibility Criteria That Excluded Decambre from Fully and Equally Enjoying the Section 8 Program Because She Is an Individual with Disabilities.

The policy, practice and method of administration of the BHA to include expenditures of lump sums in the annual income of Section 8 participants who use special needs trusts is unlawful because the practice falls more harshly on people with disabilities and was not justified by necessity. *Hazen Paper Co. v. Biggins*, 507 US 604, 609 (1993). Unlike other people with revocable trusts, the beneficiaries of Special needs trusts have disability related needs for SSI, SSDI and Medicaid that Congress recognized in enacting 42 U.S.C. sec. 1396p(d)(4)(A). Where a practice imposes a burden on people with disabilities that is "different and greater" than for others, it violates the ADA. *Crowder v. Kitagawa*, 81 F. 3d 1480, 1484 (9th Cir. 1996). Because of their unique dependence on special needs trusts, individuals with disabilities are effectively denied equal access to the Section 8 program by the policy or practice of a housing authority that includes the expenditure of lump sums in their income simply because of their use of special needs trust.

The BHA violated the regulations of the Attorney General in the present case by relying on a disability-linked classification, the use of a special needs trust, to unfairly disadvantage, deny benefits to and exclude DeCambre from the Section 8 program. 28 C.F.R § 35.130(b)(8); App. 485-486; App. 353-356, 16-34. Pursuant to regulations promulgated under Title II:

> 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 C.F.R § 35.130(b)(8).

§ 35.130(b)(8) "prohibits the unnecessary exclusion of disabled individuals" from public services, programs and activities. *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1310 (Dist. Alabama 2012); see also, 24 C.F.R. 9.130(b)(4). The BHA violated § 35.130(b)(8) by 1) imposing or applying discriminatory eligibility criteria, and 2) by refusing to modify this discriminatory practice and method of operation when asked to do so by DeCambre.

In order to establish a violation of § 35.130(b)(8), DeCambre had the burden of showing that 1) the BHA was a public entity, 2) she was a person with a disability, 3) the BHA imposed or applied eligibility criteria to her that screened out or tended to screen her out from fully and equally enjoying any service, program, or activity, or, the BHA imposed or applied eligibility criteria to her that screened out or tended to screen out any class of individuals with disabilities from fully and equally enjoying any service, program, or activity. 28 C.F.R § 35.130(b)(8). The parties stipulated that DeCambre was disabled and that the

BHA was a public entity, thus satisfying the first two elements. App. 221-222, ¶¶ 1, 8. It is undisputed that the BHA imposed or applied eligibility criteria and that DeCambre was excluded from the Section 8 program. App. 228, ¶ 25; App. 485; App. 490-491; App. 495; App. 508. The lower court found, "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." App. 503. As all (100% of) special needs trust beneficiaries are disabled, the court could have more precisely stated that "disabled individuals 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." *Id*.; 42 U.S.C. 1396p(d)(4)(A). Based on the undisputed facts in the present case, DeCambre established that she was screened out from fully and equally enjoying the Section 8 program because of the BHA's use of eligibility criteria that screen out the class of disabled people who use special needs trusts.

In concluding that the BHA did not violate § 35.130(b)(8), the lower court erred in equating DeCambre's circumstance with "beneficiaries of all non-revocable trusts, including non-disabled persons." App. 516-517. The comparison was inapt, in the context of the present case, because people without a disability usually have no need for an irrevocable trust. Furthermore, they never

require, and are ineligible for, a special needs trust under 42 U.S.C. sec. 1396p(d)(4)(A).

Although § 35.130(b)(8) would permit the BHA to use eligibility criteria that exclude people with disabilities if "such criteria can be shown to be necessary for the provision of the service, program, or activity being offered," the BHA waived this defense. 28 C.F.R § 35.130(b)(8); App. 218-219, ¶¶ 94-103. Fed. R. Civ. P. 8(c). "The law is clear that if an affirmative defense is not pleaded pursuant to Fed.R.Civ.P. 8(c)'s requirements, it is waived." *Society of Holy Transfiguration v. Gregory*, 689 F. 3d 29, 58 (1st Cir. 2012). The BHA did not plead the affirmative defense in its answer. App. 218-219, ¶¶ 94-103.

Even if the BHA did not waive the necessity defense, it failed to offer any evidence in support of such a defense. 28 C.F.R § 35.130(b)(8). App. 221-466. Because DeCambre satisfied her burden under § 35.130(b)(8), the BHA had the burden of showing that the criteria were "necessary for the provision of the service, program or activity being offered." 28 C.F.R § 35.130(b)(8); *Bowers v. National Collegiate Athletic Ass'n*, 9 F. Supp. 2d 460, 478 (Dist. New Jersey 1998). The BHA offered no such evidence, and the record evidence established that the BHA's inclusion of distributions from the SNT were not necessary. With regard to expenditures on automobiles in particular, the Court found that "the fact

that title [to the automobile] is held by her Trust as an asset should preclude it from being counted towards income." App. 521-522. Where the BHA's policy of counting the automobiles owned by the trust in DeCambre's income was contrary to HUD regulations, it was not necessary. *Id*. Furthermore, HUD regulations recognized that "The value of necessary items of personal property such as furniture and automobiles shall be excluded" in determining net family assets. 24 C.F.R. § 5.603(b)(1). Allowing DeCambre the benefit of using the trust's automobiles without having them counted as income was in no way necessary for the provision of the Section 8 subsidy, and the BHA offered no evidence supporting such a claim in the case stated.

VI. THE LOWER COURT ERRED IN DENYING DECAMBRE'S REQUESTS FOR A PRELIMINARY INJUNCTION AND FOR A PERMANENT INJUNCTION OR MANDAMUS RESTORING HER SECTION 8 BENEFITS.

For the reasons previously set forth in this brief, DeCambre has established that she should prevail on the merits of her case. 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 trial judge erred in denying DeCambre's request for

injunctive relief based on its conclusion that she failed to show a likelihood of success on the merits of her § 1983 and discrimination claims. App. 523-524. DeCambre submitted a 20 page brief detailing her need for injunctive relief, and she requested a permanent injunction in her Amended Complaint that was implicitly denied by the judge. App. 8-84; App. 110-111. It was undisputed that, with the loss of her subsidy, she was threatened with eviction, and she cut back of food purchases and did not have enough money for food, clothing, rent, utilities, drug co-payments, medical supplies, charges for over the counter drugs and other necessities. App. 463-466. She also demonstrated an ongoing violation of her rights not to be subjected to excessive rent in violation of the rent ceiling set forth in the housing act. These are the sort of injuries that are needed to support a preliminary injunction. *Rio Grande Community Health Center, Inc. v. Rullan*, 397 F. 3d 56, 76 (1st Cir. 2005)(falling eight or nine months behind on a mortgage and facing imminent foreclosure proceedings were the sort of irreparable injury needed to support a preliminary injunction). The balance of hardships and the public interest also tended to favor the plaintiff. The provision of subsidies for low income people serves a variety of state interests, including the prevention of poverty. "Should an eligible tenant be wrongfully evicted, some frustration of these interests will result." *Caulder v. Durham Housing Authority*, 433 F.2d 998,

1003 (4th Cir.1970). DeCambre is in a class of people who cannot afford acceptable housing, and she faced extreme deprivation without her Section 8 subsidy and grievous loss were she to be evicted. Id.

CONCLUSION

The District Court's decision granting judgment to the BHA on the plaintiff's claims for disability discrimination and violation of § 1983 should be reversed and judgment should be granted to DeCambre. The District Court's decision denying DeCambre's requests for preliminary and permanent injunctions should be reversed and DeCambre should be granted preliminary and permanent injunctive relief restoring her Section 8 benefits.

Dated: September 28, 2015

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE
REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains no more than 13,992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the Wordperfect X3 program.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Wordperfect X3 version 2005 in 14 point Times New Roman.

/s/ J. Whitfield Larrabee
J. Whitfield Larrabee

Dated: September 28, 2015

CERTIFICATE OF SERVICE

I, J. Whitfield Larrabee, certify that on September 28, 2015, the document(s) filed through the ECF system will be sent electronically to the below registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

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2015 Special Needs Trust National Conference

STRATEGIES FOR MAINTAINING PUBLIC HOUSING AND SECTION 8 ELIGIBILITY FOR PEOPLE WITH SPECIAL NEEDS TRUSTS

J. Whitfield Larrabee, Esq.
Brookline, Massachusetts
October 16, 2015

GOALS OF THE PRESENTATION

1. Learn about and discuss HUD income and exclusions for the Section 8 program and for tenants of federally supported public housing as they relate to special needs trusts.
2. Learn about and discuss recent cases interpreting income and exclusions under HUD regulations.
3. Learn about and discuss strategies for communicating with Public Housing Agencies (PHAs) during the certification and re-certification process.
4. Learn about and discuss techniques for requesting reasonable accommodations under the ADA and the Fair Housing Act.
5. Learn about and discuss strategies for responding to an unfavorable determination from a housing authority either increasing a tenant's rent contribution or determining the tenant is ineligible for assistance due to special needs trust expenditures.

THE DECAMBRE SAGA

1. How I came to know about these rules and regulations.
2. Kimberly DeCambre and the Brookline Housing Authority.

Some PHAs can be hostile toward people with special needs trusts.

Rattlesnake - Crotalus Cerastes

DeCambre v. Brookline Housing Authority, *Massachusetts Federal District Court, No. 14-13425-WGY (2015)(appeal pending, 1st Cir., No. 15-1458)*

Larrabee, HUD Section 8 /Public Housing Eligibility & SNTs

KIMBERLY DECAMBRE V.
THE BROOKLINE HOUSING AUTHORITY

1. In *DeCambre*, the Court found that it was a reasonable interpretation of HUD regulations for a Public Housing Agency to decide not to exclude all distributions from a special needs trust funded with lump sum personal injury settlement from a family's annual income.

   As a result, DeCambre received no benefit from the lump-sum exclusion.

Larrabee, HUD Section 8 /Public Housing Eligibility & SNTs

KIMBERLY DECAMBRE V.
THE BROOKLINE HOUSING AUTHORITY

2. The court found that the cost of the purchase of an automobile used by the SNT beneficiary, where the trust retained title to the vehicle, should not be included in a Section 8 participant's annual income in determining the family's annual income and Total Tenant Payment.

Larrabee, HUD Section 8 /Public Housing Eligibility & SNTs

KIMBERLY DECAMBRE V.
THE BROOKLINE HOUSING AUTHORITY

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

   Because the *Lewis* decision was a case involving Social Security, not HUD regulations, it is unclear whether the District Court's decision on this issue in *DeCambre* will be respected by other court's or by the First Circuit in the pending appeal.

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KIMBERLY DECAMBRE V. THE BROOKLINE HOUSING AUTHORITY

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

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Finley v. The City of Santa Monica

In *Finley*, the Court found that all distributions from a special needs trust funded with a lump sum personal injury settlement are excluded from annual income.

Finley v. The City of Santa Monica, Superior Court of California, BS127077 (2011)

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SECTION 8 AND PUBLIC HOUSING

1. The Housing Choice Voucher Program, ("Section 8" or "HCV" Program) and federally supported public housing both rely on the same HUD regulations to determine annual income. However, income eligibility limits for admission and continued assistance differ between Section 8 and public housing.

2. Under the Section 8 program, tenants must find private landlords renting homes in the community who are willing to participate. Once the tenant family finds a cooperating landlord, the tenant generally pays 30% of their income towards the rent; this portion of the payment is called the Total Tenant Payment (TTP). 24 C.F.R. §5.628(a). The local PHA supplements the remaining rent by issuing a check directly to the landlord so that the landlord is paid the "fair market rent." 24 C.F.R. §888.111.

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SECTION 8 AND PUBLIC HOUSING

3. Both Section 8 and public housing programs have a rent ceiling, which generally limits the rent paid by a family to no more than 30% of their adjusted monthly family income . Where a Public Housing Agency requires a family to pay more than 30%, tenants can sue the PHA for violation of their civil rights under 42 U.S.C. § 1983. Johnson v. Housing Authority of Jefferson Parish, 442 F. 3d 356 (5th Cir. 2006); Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987).

4. At least annually, PHAs review tenant's income to determine their eligibility and to determine their rent contribution.

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IT IS ALL ABOUT INCOME!

Unlike Supplemental Security Income (SSI) and Medicare, which have resource limits, HUD is only concerned with income. There is no resource limit, although some assets valued at over $5,000 can result in actual or assumed interest income.

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WHAT ARE THE INCOME ELIGIBILITY LIMITS?

1. Extremely Low Income (30% of area median)
   At least 75% of initial admissions to Section 8.
2. Very Low Income (50% of area median)
   Remainder of initial admission to Section 8.
3. Low Income (80% of area median)
   Continuously assisted families in Section 8, and initial admission and continuing assistance for federally supported public housing

24 C.F.R. 5.603(a) and 24 C.F.R. § 982.201(b)(1)

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WHAT ARE THE INCOME ELIGIBILITY LIMITS?

Examples of annual income limits for continuously assisted Section 8 families:

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

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

24 C.F.R. 5.603(a) and 24 C.F.R. § 982.201(b)(1)

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TIP NUMBER 1!

Generally, as long as special needs trust expenditures do not cause family income to exceed the low income limit for beneficiaries who are continuously assisted, Section 8 clients will remain in the program.

However, trust expenditures that count as income will result in a reduction in their subsidy, 30% for every dollar increase in their income.

Possible Exception. If the family's income is so high that the subsidy is completely eliminated for six consecutive months, this may result in exclusion from the Section 8 program. HUD regulations mandate that if the PHA does not make subsidy payments for six consecutive months, the Section 8 Housing Assistance Payment contract is automatically terminated. See 24 C.F.R. 982.455.

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WHAT IS INCOME?

In order for trust expenditures to qualify as income to a family, 24 CFR § 5.609(a) requires that the expenditures :

1. "Go to, or on behalf of, the family head or spouse (even if temporarily absent) or to any other family member...and"
2. are "not specifically excluded in paragraph (c) of this section." 24 C.F.R. § 5.609(a)(1) and § 5.609(a)(3).

The first part of the definition of income generally seems to follow closely with what the IRS considers to be income.

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WHAT IS INCOME? continued

Income includes wages, salary, commissions, tips, bonuses, business income, interest, dividends, social security payments, unemployment insurance payments, pensions, disability or death benefits. Interest income on cash or "net family assets" over $5,000 is either actual interest or the "passbook savings rate" as determined by HUD.

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NEW ENGLAND HUD ADVISORY LETTER ON SPECIAL NEEDS TRUSTS

A 2007 advisory letter from the New England HUD office concerning special needs trusts states: "Those amounts and 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." If funds seem expended from a special needs trust seem to fall under an exclusion and are not likely to be available in the following year, it follows that they should be excluded from income.

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IN DETERMINING INCOME IN RELATIONS TO SPECIAL NEEDS TRUST EXPENDITURES, ITS ALMOST ALL ABOUT THE EXCLUSIONS!

- There are 17 exclusions set forth at 24 CFR § 5.609(c). Exclusions include things such as income from employment of children under 18, payments received for the care of foster children or foster adults, income of a live-in aide, medical expenses, temporary income, sporadic income, nonrecurring income, lump-sum additions to family assets, including insurance payments, inheritances, capital gains, and settlements for personal injuries and property losses.
- Unexpended assets of a special needs trust are not normally part of income under *DeCambre, Finley and HUD regulations.*

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TIP NUMBER 2!

It can be helpful in limiting income for the trust to retain ownership of as many assets as possible, allowing the beneficiary the use of the assets. For Social Security Treatment of Trust owned homes, see POMS Section SI 01120.200F. See also, Section 8/Homeownership Option, 24 CFR 982.625-982.643. This could include a car, a computer, a television, a cell phone and other property. When a trust retains ownership of property used by the beneficiary, it is more difficult or impossible for the Public Housing Agency to establish that the trust asset is income.

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LUMP SUM ADDITIONS TO FAMILY ASSETS

24 CFR 5.609(c)(9) excludes:

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

Whether the exclusion of lump-sum additions to family assets applies to expenditures of lump-sums made through a special needs trust is an unsettled area of the law at present, but may be decided by the First Circuit in DeCambre, most likely by September 2016.

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LUMP SUM ADDITIONS TO FAMILY ASSETS

24 C.F.R. § 5.603(b)(2), provides:

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

The Courts in *Finley* and *DeCambre*, and the local Public Housing Agencies, have disagreed whether § 5.603(b)(2) is an appropriate basis to include lump sums in a Section 8 family's annual income.

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TIP NUMBER 3!

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

In fact, there is no restriction on asking in advance about the treatment of any special needs trust expenditure.

A request for disclosure of the PHA's treatment of SNT expenditures can be framed as a request for reasonable accommodation under the ADA, Sec. 504 and the Fair Housing Act.

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TEMPORARY, NONRECURRING OR SPORADIC INCOME

24 CFR 5.609(c)(9) excludes "temporary, nonrecurring or sporadic income (including gifts)" from annual income.

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SPORADIC INCOME

EXAMPLE # 1
FROM RENTAL HOUSING INTEGRITY IMPROVEMENT PROJECT

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

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

http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/rhiip/faq_gird

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SPORADIC INCOME

One definition from Webster's Dictionary describes sporadic to mean "occurring occasionally, singly, or in irregular or random instances and cannot be reliably predicted."

Sporadic also tends to mean irregular, scattered, isolated, occasional and infrequent.

Example of usage:

Public Housing Agency's only apply the sporadic exclusion sporadically.

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SPORADIC INCOME

Examples of possible expenditures that might fall into the temporary, nonrecurring or sporadic income exclusion are:

- Occasional Travel and Vacation Expenses;
- Occasional Purchase of Clothing, Appliances, Electronics, other gifts;
- Occasional Purchase Household Furnishings;
- One time payment for a root canal; (also may be excluded as a medical expense).

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LOANS AS NONRECURRING OR SPORADIC INCOME

EXAMPLE # 2
FROM HUD FAQ

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

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

http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/rhiip/faq_rfi

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

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MEDICAL EXPENSES AND REASONABLE ACCOMMODATIONS

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

Because disabilities are often or always the result of medical conditions, § 5.609(c)(4) provides a bridge between the United States Housing Act of 1937, 42 U.S.C. § 1437f (o)(2)(A)(I) ("The Housing Act"), which established the Section 8 program, and protections from disability discrimination contained in section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("§ 504"), section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 ("ADA"), The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604 ("FHA").

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DISABILITY DISCRIMINATION

HUD is an administrator of § 504 and the FHA, and has promulgated detailed regulations prohibiting discrimination against persons with disabilities in housing and in the provision of public services. 24 C.F.R. § 8.4. The ADA, which is enforced by the Department of Justice, also has numerous regulations providing protection to the disabled that are applicable to Section 8 participants. 28 C.F.R , part 35.

Denial of a reasonable accommodation by a PHA when one is requested is disability Discrimination under the ADA, the FHA and § 504.

Also, the use of eligibility criteria that tend to exclude an individual with a disability or a class of individuals with disabilities from equally participating in a PHA's programs is disability discrimination under the ADA. 28 C.F.R , part 35.

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DISABILITY DISCRIMINATION

In addition to ordinary medical or dental expenses that might be covered by a trust, the PHA probably must exclude from annual income trust expenditures on items such as hearing aids, care and support of assistance or emotional support animals, eye glasses, wheelchairs, medical equipment, physician or drug co-payments and heated pools needed for arthritis or joint problems.

By requesting that these items be excluded as a reasonable accommodation, the PHA is on notice that it might be discriminatory to include these expenses.

Majors v. Housing Authority of DeKalb County, 652 F.2d 454, 457-58 (5th Cir. Unit B Aug. 1981)(disfavoring emotional support animals may be discriminatory); Fair Housing of the Dakotas, Inc. v. Goldmark Prop. Mgmt., Inc., 778 F. Supp. 2d 1028, 1035-36 (D.N.D. 2011) (emotional support animals); 24 C.F.R. § 5.303(a); see also 24 C.F.R. § 960.705.

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TIP NUMBER 4!

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

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TIP NUMBER 5!

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

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TIP NUMBER 6!

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

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Special Needs Trusts National Conference

Friday, October 16, 2015

Breakout Session 2
2:05 P.M. – 3:00 P.M.

How to Lay the Groundwork to Appeal to a State Court the Specific Issue of Funding a (d)(4)(C) Pooled Trust Account by Someone over 64

Presenter:
Ron M. Landsman
Attorney at Law, Ron M. Landsman, PA
Rockville, MD

- Materials
- Attachments 1-6

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HOW TO LAY THE GROUNDWORK TO APPEAL TO A STATE COURT THE SPECIFIC ISSUE OF FUNDING A (d)(4)© POOLED TRUST ACCOUNT BY SOMEONE OVER 64

By Ron M. Landsman, CAP

I. LITIGATION GENERALLY – LAW, FACTS OR TABLE - WHICH DO YOU POUND?

The old joke about pounding the facts, the law, or the table is truer than some may care to admit, but that does not mean you can always just pound the table. Indeed, having a winning legal theory or knock 'em dead facts reduces the burden on the other two, but of course you won't know until you get a final decision what worked so you need to work all three angles. *See Draper v. Colvin*, 779 F.3d 556 (8th Cir., 2015).

Choosing your law or facts are not independent of each other, rather the contrary. You start with the facts you cannot avoid, see what the law requires or prohibits, and to the extent you can, have your client pursue the course – make the facts – that work. Or, if you are selecting which client with which to pursue the claim, you select with those facts and considerations in mind.

II. **PROCEDURAL SETTING**

Although this presentation was advertised as a presentation on preparing for appeal to a state court, it is worth noting the ways to go directly to state or federal court as alternatives.

The two familiar options for a claim arising under Medicaid are a (1) direct appeal by the individual from his or her denial or termination of benefits; or (2) a direct action by the applicant/beneficiary in trial court against the state Medicaid agency. The latter might be either (a) in state court, depending on exhaustion and other administrative requirements, or (b) in federal court, as a Section 1983 (42 U.S.C. § 1983) action.[1]

Direct appeal. A primary attraction is that all procedural issues, including standing, are resolved in your favor and do not require briefing or present any risk of not getting to the merits. You will also have someone who likely has some understanding of special needs trusts and Medicaid, although whether he or she will be reasonably sympathetic or not is a different matter. Also, depending on the attorney's trial experience, evidentiary and other rules are very much relaxed. The

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[1] The issue might come up in other ways, ***viz.,*** by an action brought by pooled trust to prevent the state Medicaid agency from recovering where benefits were paid in error (as far as the agency was concerned). *Center for Special Needs Trust Administration, Inc., v. Olson,* 676 F.3d 688 (8th Cir. 2011).

primary drawback is that the fact-finder will be an agency employee rather than an independent judge. A further problem is that even with a reasonably sympathetic ALJ, you may – depending on state agency procedure – be subject to peremptory review by the agency with authority to reverse the decision. If not, then the last level of internal administrative review is likely a non-professional board that views its task as correcting procedural errors and occasionally providing ***de facto*** hardship relief.

On the whole, working on the assumption that the agency is going to fight you, what is important is your ability to make the record you need. The other drawbacks – agency overruling, or limited board review – are less significant; your ability to get the witnesses and record you want is more important. Moreover, little if any of the evidence should be too sensitive to credibility issues, ***viz.***, the client is 85 years old and the trust plans to spend $5,000 per year on certain care expenses.

Finally, consider time and delay. If you want a final order requiring the state to change policy, direct appeal, through two levels of administrative appeal before you get to court, will likely take the better part of a year.

Judicial attack. Direct judicial attack is available in both state and federal court, but under quite different rules.

State court. If you want to pursue a state court claim, the threshold question is whether you have a requirement to exhaust administrative remedies; if you do and it

cannot be avoided, then other than bringing your federal claim in state court, this is not an option. Even states with a general policy in favor of exhaustion, however, may authorize direct challenges to state agency regulation or agency action pursuant to unadopted rules, if either would apply.

Federal court. If you want to pursue a federal court claim, you have to have a cause of action under 42 U.S.C. § 1983, which the Supreme Court has been narrowing in Medicaid and other "Spending Clause" cases to require "unambiguous rights-creating language ... phrased in terms of the persons benefitted" showing an intent "to create not just a private right but also a private remedy." *Gonazga University v. Doe*,

536 U.S. 273, 284 (2002).[2] If you survive that, among the advantages is that there is no exhaustion requirement.

While going to federal court is in theory faster than direct agency review, unless you have a basis for a preliminary injunction, you should assume that the initial response will be a motion to dismiss for failure to state a claim under Section 1983, full briefing and a decision – easily six months or more.

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[2] Your jurisdictional claim may be affected by your legal theory. If you are proceeding under Theory 1, the broadest claim that PSNT accounts are not subject to any transfer rules, then your cause of action has to arise under § 1396p(d)(1), which controls "determining an individual's eligibility for ... benefits under a [Medicaid] State plan," and which is "subject to paragraph (4)," which in turn provides that the trust rules "shall not apply to" a pooled SNT under § 1396p(d)(4)©. The clearer "rights-creating" language of 42 U.S.C. § 1396p(c)(2)(B) ("an individual shall not be ineligible for [Medicaid] ... to the extent that .... the assets ... were transferred to ...") is not helpful because your claim is that that provision does *not* apply. On the other hand, the problem with the other theories starts with the fact that the transfer rules first refer only to what the State plan must provide, which is not normally considered rights-creating language. That provision contains the reference to fair market value, so you might try to get in through a side door, as it were, the prohibition of denying eligibility based on a transfer where "the individual shall not be ineligible ... to the extent that ... a satisfactory showing is made ... that (I)the individual intended to [get] fair market value, or other valuable consideration ..." 42 U.S.C. § 1396p(c)(2)©.

III. STATUTORY APPROACHES TO ELDERLY FUNDING POOLED SNTs WITHOUT PENALTY

Decide in advance which legal theory or theories you will use. On the issue of funding a pooled special needs trust by an elderly person (over 64 years of age), you have three primary choices, and you can plead them in the alternative. If you can think of others, more power to you.

1. ***Pure statutory construction***: ***Everyone Can Fund*** -- The broadest claim that is the least fact-sensitive: Federal law does not allow *any* limitation on the right of a person, of any age, to fund a pooled SNT account. A statement of that theory is appended as Attachment 1.

2. ***Default statutory construction and general theory about trusts. All PSNT Accounts Give FMV*** -- You are required to show the receipt of fair market value and you can show that someone funding a pooled special needs trust account *always* gets full fair market value, so that there is no penalty (or its duration is 0 days) (to paraphrase one of the favorable decisions, "changing legal to equitable title does not change the value to the owner").

3. ***Default statutory construction and specific facts about value - spending plans*** -- You are required to show the receipt of fair

market value and you can show that the specific proposed funding in your case is designed to meet the transferor's reasonably foreseeable needs during his or her lifetime, perhaps with some room to spare, and so provides full fair market value.

You should draft your trial brief as the ***first*** step in preparing your case. Your trial brief will of course have a summary of the facts you intend to show, or have shown, and then explain why those facts are sufficient under your theory.

IV. THE FACTS TO SUPPORT AN OVER-64 PSNT ACCOUNT FUNDING.

A. Facts in General - the Rosa Parks Theory of Litigation

If you have a paying client who wants to pursue a claim, you might well go ahead and proceed even if facts are far from ideal, but where you are breaking new ground, the attorney must exercise judgment about the ways in which the other, non-dispositive facts of the case, not technically relevant to your legal theory, will affect decision-makers. Some examples from experience:

1. Suit to challenge State Medicaid program's failure to re-set "average cost of private pay" nursing home care sufficiently frequently.

Ideal case: Disabled or elderly client who gave money to needy but non-exempt relative spent remaining assets on care, and then applied. *Really*

good client if change in calculation results in eligibility more or less exactly when he or she ran out of money.

Unsuitable case: Client whose affluent doctor/lawyer son-in-law as agent transferred substantial assets immediately after parent-client was admitted to nursing facility, where there are other signs of Medicaid planning, such as home in LE w/o powers or income-only trust.

2. **Suit to challenge authority of D.C. Probate Court to require D.C.- based pooled special needs trust to pay court-appointed attorney's fees.**

Ideal case: Younger client, regular life expectancy, with modest funds who gets benefits under a waiver program and has significant other expenses for food and shelter, who can benefit from entertainment or education, and who requires – but benefits from – significant on-going case management not paid for by Medicaid.

Unsuitable case: Elderly nursing home resident with no other expenses than monthly co-pay who has inherited $1,000,000, with expensive, high risk litigation to protect her from financially-abusive neighbor.

Both pairs of clients in each case may have the exact same legal claim but no disinterested person is going to ignore the context, motives of the client, and other equitable factors.

B. **Fact patterns**

1. **Appropriate Facts for Any Case**

The facts that you might attempt to show in any case involving funding a d-4-C trust account fall into a few categories:

a. *Personalize the client and the case* – This is about a *person*, after all – with needs and wants and cares, perhaps like your parent – not an abstraction. Name, age, family, work history (former history professor who wrote some interesting books? fireman who won three awards for valor?), activities, occupations, medical condition. Don't over do it, but try to make the person more than a generic "old person." *Cf.*, Donald L. Coburn, *The Gin Game* (play).

b. *Particularize the needs*. Are there medical/personal/care needs not adequately or fully met by Medicaid/care facility? Can the person benefit in ways that will enrich his or her life – music, art, physical activities? Does the person need attention at night, at a facility, when staff is low, by paying for an aide, or an aide who can prevent wandering or make it safe, to avoid harsher, less "friendly" restrictions?

c. *Identify the limit on other resources.* Other resources, or lack of them. This is the obverse of the previous section – why are these needs not met unless there are funds in a trust like this?

d. *Show the client's purity of heart*. Show, likely by negative implication, that the client has not engaged in aggressive Medicaid planning – no transfers, no life estate without powers deeds, no income-only trusts, etc. By "negative implication," I mean that you will show how he or she came to be in the present predicament, which will plainly not be the result of giving away $500,000 sixty-one months ago. Even a power of attorney of the client, if it refers specifically to Medicaid planning, should not go into the record if not required.

e. *How this situation came to be.* Aside from Medicaid planning, there are a lot of other ways by which a person comes to needing Medicaid and a PSNT account. To the extent they are benign or sympathetic, show them – long career as schoolteacher who did not earn too much; widowed with kids; already spent $500,000 on long term or other medical care; recent inheritance.

These facts are not relevant to the ultimate legal decision, but they will nonetheless matter to many people. See the facts in "Facts from Laurie Hanson Case," Attachment 4, including that client:

- Retired on disability, now age 73, developed unrelated lymphatic condition at age 65 that caused severe swelling, which resulted in loss of ability to live independently
- Was recovering under plan to move back to independent living when she sufferent tort injury (dropped by ambulance crew), resulting in further injury, for which she recovered a modest amount – $55,000.
- Plans to use funds to move back into the community; funds used to date for clothing, personal care.

2. **Facts for Theory That Any Person with a Disability Can Fund a PSNT account**.

a. *'Rosa Parks' Redux.* In theory, all you ***need*** to show is that the client who wants to fund the trust is alive, disabled, and over age 64, and that the pooled trust is in fact a pooled trust. The theory says it does not matter how much he or she might benefit from the trust, if at all, nor are there any contribution limits. Limits like those were sought to be imposed by Pennsylvania for all PSNT

accounts, but are prohibited by federal law. *See Lewis v. Alexander*, 685 F.3d 325 (3rd Cir., 2012), ***cert. denied,*** 184 L.Ed.2d 724 (2013). But that is not your concern and does not help you much; you are trying to persuade someone that a statute should be read in a certain way. Just because the agreed-upon meaning (someone under 65 *can* fund such a trust) is subject to abuse (in the view of a hostile decision-maker) will not help you carry the day in extending that privilege to people over age 64.

b. *What you should try to show.*

(1) All of the factors that make your client sympathetic without being pathetic, outlined in the previous section, are appropriate.

(2) If the facts fit, you should definitely have a spending plan of the Colorado type; see further discussion below.

(3) I don't think it would hurt to put into evidence testimony that *all* PSNT accounts are fair market value.

c. *Fact patterns to avoid.* No matter how attractive your potential client may be in many ways, there are a few aspects you should recognize as very unhelpful:

(1) Too much money - far beyond what a person might ever need. Somewhat age sensitive - $1,000,000 for 90 year old, but maybe acceptable for an otherwise healthy, active 65 year old; $2,000,000 for otherwise healthy 65 year old woman with 19+ year life expectancy.

(2) Absolutely no foreseeable need – ***e.g.,*** proposed beneficiary is comatose in nursing home.

(3) Aggressive Medicaid planning or other "cutting it close" activities.

(4) 100% Retention by PSNT. Depending on PSNT policy, consider requesting waiver of retention in the case.

3. **Facts for Theory that All PSNT Accounts Are FMV**

This is the approach that Laurie Hanson in Minnesota has been so successful with.

The relevant facts, including the "fact" of legal obligations or duties, centers on the sole benefit aspect of the account. That has both a negative implication - that no one else can benefit - but also a positive one – that the funds ***should*** be used as requested unless it creates a problem for public benefits. See *Affidavit of James*

McGill, pp. 1-2; *Affidavit of Saul Goodman*, Attachment 6,. I would be a tad concerned – especially for SSI beneficiaries – of pushing too much further on the trustee's obligation to follow the wishes of the beneficiary, but there is plenty of room to establish benefit to be received.

4. **Facts for Theory Spending Plan Can Show FMV**

This is the Colorado approach that Megan Brand was successful with – until recently, when the Colorado Medicaid agency changed its mind. This theory turns to some extent on the CMS notion that value is measured by expenditure (but in CMS' view, value is not received until expenditure is made).

A spending plan should show specific needs, anticipated expenditures (including administrative and legal fees and expenses), with exhaustion of the account, or close to it, within the beneficiary's actuarial life expectancy. An excellent plan for a 65 year old woman is shown in Attachment 3; another, perhaps more creative, for an 80 year old, is shown in Attachment 5, with an explanation in Attachment 6. It shows expenditures for case management, dental care, wheelchair maintenance/replacement, accessible van lift costs, and alternative therapy, in addition to PSNT costs and attorney's fees. It also reports her life expectancy and the period within which the funds would be exhausted - well less than her life expectancy. Other needs to consider:

a. *All medical costs not covered by Medicaid*. Depending on your state, podiatry, eyeglasses, dental care, other ameliorative therapies, alternative therapies, psychotherapy, and possibly medical care by non-Medicaid providers where there is some history or indication that that would in the client's best interests.

b. *Other normal living expenses not covered by Medicaid/LTC.* Among others, clothing, haircuts/salon, household goods.

c. *Entertainment, education, and edification*. Books, magazines, newspapers, e-books, television services (cable), telephone, computer and computer services, hobby expenses, and the like - obviously, if the client would put them to use, otherwise not.

d. *Travel outside of facility (for nursing home residents), or travel in by others*. For social activities, movies or theater, family visits; visits by agent, fiduciaries.

e. *On-going religious expenses.* Membership, cost of attending, special services tickets, etc.

f. *Whatever else your imagination can identify that is reasonable, not exotic or excessive, and improves the life experience of the client.*

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ATTACHMENTS:

1. “Condensed Statement - Statutory Analysis of 42 U.S.C. §§ 1396p(c)(2) and (d)(4)©.

2. Statement, “Whether Congress intended that a transfer penalty be imposed for funding a pooled trust account by an individual over age 64.”

3. Colorado Fund for People with Disabilities - Assessment and Plan (redacted).

4. Facts from Laurie Hanson Case.

5. Fair Market Value Assessment - Pooled Trust sub-account for Walter White.

6. Affidavit of James McGill; Affidavit of Saul Goodman.

End of Landsman, Groundwork for d-4-C Over 64 PSNT Funding Case

Attachment to
Landsman, How to Lay the Groundwork to Appeal to a State Court the Specific Issue of Funding a (d)(4)(C) Pooled Trust Account by Someone over 64
Attachment 1-A

Condensed Statement – Statutory Analysis of 42 U.S.C. §§ 1396p(c)(2) and (d)(4)(C).

In an earlier memo, copy attached, we noted that the Medicaid statute in 42 U.S.C. § 1396p(d)(4)(A)-(C) excludes three types of ***self-settled*** special needs trust from the rules governing trusts for Medicaid eligibility purposes. These trusts are not explicitly subject to penalty. ***Third-party funding*** of a trust, including some that would otherwise be self-settled, is excluded from the anti-transfer rules in some cases, ***e.g.,*** transfers by a parent for the benefit of a child, ***see*** 42 U.S.C. § 1396p(c)(2)(B)(3), or for the benefit of anyone else, if under age 65, ***see*** 42 U.S.C. § 1396p(c)(2)(B)(4). Some, including courts, have inferred from the exclusion that funding self-settled trusts must be covered by the anti-transfer rules and must otherwise be subject to penalty. But the provision upon which they rely does not support that conclusion. The very same provision appears in the exclusion for funding a trust for a disabled child of the transferor, but that can ***never*** be a first-party trust. Rather, the clause in the anti-transfer rule only indicates that pre-existing excluded self-settled trusts are the kind of trust that can be funded without penalty by a third party.

That same provision presents another reason why the statute should be read to exempt all non-countable special needs trusts as exempt from the anti-transfer rules. It treats so-called ***Miller v. Ybarra*** (746 F. Supp. 19 (D.Colo. 1990)) trusts under 42 U.S.C. § 1396p(d)(4)(B) the same as pooled trust accounts under 1396p(d)(4)(C), and funding the former must be exempt to serve the purpose of enabling people to obtain nursing home benefits. To be sure, CMS got to the same result – the excluded treatment of funding (B) trusts – by a complicated explanation of how such trusts operate, but that does not really speak to what the statute was intended to do, and there is no reason to think anyone had in mind that kind of convoluted explanation.

The statute does address when funding a first-party trust is subject to penalty. There are three categories:

(1) Where trust assets ***are*** available, ***see*** 42 U.S.C. § 1396p(d)(3)(A)(I) and (ii) and (3)(B)(I)(I), there is no discussion of transfer penalties because there is no transfer.

(2) Where payments are made to third parties, 42 U.S.C. § 1396p(d)(3)(A)(iii), (B)(I)(II), and (B)(ii), the standard penalty for transfers to third-parties applies. 42 U.S. § 1396p(c)(1).

(3) Where no payment may be made to or for the benefit of the individual, 42 U.S.C. § 1396p(d)(3)(A)(iii), (B)(I)(II), and (B)(ii), the standard penalty for transfers to third-parties again applies.

It beggars the imagination to think that the statute was intended, ***sub silentio,*** to subject exempt trusts to the same penalties and restrictions as the most disfavored trusts. Congress discourages the use of the non-exempt trusts by the imposition of transfer penalties. It is totally incongruous to think it would encourage the use of special needs trusts, as it does, and then impose on their use the same penalty it applies to highly disfavored trusts. Fundamental notions of statutory construction recognize that such silence respecting penalizing funding SNTs speaks loudly.

We think it fair to say that many elder law attorneys – myself and my colleagues among them – accepted unthinkingly the view that funding PSNT accounts by the elderly was subject to penalty. But close examination has convinced us of the wrongness of that view.

Re: Whether Congress intended that a transfer penalty be imposed for funding a pooled trust account by an individual over age 64

Our purpose in this memorandum is to provide you with the legal basis for a more nuanced view of what Congress said with respect to the eligibility of individuals over the age of 64 to fund pooled trust accounts without penalty.

CMS Regional State Letters. In 2008, CMS issued a series of letters to its regional offices addressing the transfer of assets into pooled trust accounts by individuals age 64 and older. In these letters, CMS advised (in pertinent part) that:

> 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 for transferring 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 fund 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 pooled trust sub-accounts "established for disabled individuals age 64 or younger are exempt from application of the transfer of assets penalty provision* (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.*[1]

Application of the transfer rules by state agencies was not consistent before these letters were issued, but the regional letters did not clarify the issue and in fact may have caused more confusion. Some states that allowed transfers then do not allow them now and, conversely, some states that did not allow them before do so now. Transfer policy differs dramatically state-to-state; someone over age 64 in one state may be treated very differently than someone over age 64 in a neighboring state. Based on an informal survey of lawyers and pooled trust administrators, we believe eighteen states allow transfers by individuals over the age of 64 without penalty; twenty seven states consider such a transfer to be uncompensated ***per se*** and impose a period of ineligibility without considering whether the individual transferring assets to such accounts has received fair market value; five states permit the transfer in some circumstances but not in others.

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[1] *See, e.g.,* Chicago Regional Letter, July 2008, attached as exhibit A (emphasis added).

States that allow the transfer without penalty have analyzed the interplay between the transfer and trust provisions of the statute and determined that no penalty should be applied because the statute does not call for a transfer penalty when funds are transferred into an exempt trust.[2] States penalizing the transfer ***per se***, however, would appear to be relying on the 2008 CMS regional letter. For example, despite two district court decisions requiring fair market value analysis,[3] the Minnesota state agency continues to maintain that it need not conduct a fair market value inquiry "because [as] CMS noted, individuals who make transfers to trusts *generally do not receive anything of comparable value in exchange*."[4] Legislators are unwilling to overrule their state agencies since the 2008 Regional Letter threatens them with being out of compliance with federal law.

STATUTORY ANALYSIS. ***Background.*** The beginning point of any discussion is of course the amendments introduced into the Social Security Act by the Omnibus Reconciliation Act of 1993 (OBRA '93). Congress sought to stop divestment of assets into irrevocable trusts by wealthy individuals seeking to qualify themselves for Medicaid long-term care (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

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[2] ***See*** January 22, 2009 letter from Karen E. Timberlake, Secretary, Wisconsin Department of Health Services, to WisPact, Inc., a Wisconsin pooled trust, attached hereto as exhibit B.

[3] ***Peittersen v. Minnesota Dep't of Human Services***, 19-HA-CV-11-5630 at page 7 (Minn. Dist. Ct. Dakota Co. Oct. 2, 2012) attached hereto as exhibit C.; ***Dzuik v. Minnesota Dep't of Human Services***, 21-CV-09-1074 (Minn. Dist. Ct. Douglas Co. Dec. 15, 2009), discussed below and attached as exhibit D.

[4] See email from Scott Leitz, Minnesota Assistant Commissioner of the Department of Human Services, to Laurie Hanson dated April 4, 2013, attached as exhibit E.

settlor under "any circumstances."[5] As part of the trust rules, OBRA '93 made sure that an individual with disabilities could fund a special needs trust on condition the trust contains a "payback" clause.

OBRA '93 reflects a consistent and fully thought-through solution to the problem of the affluent using trusts to game Medicaid.[6] It sets out a comprehensive set of rules for the treatment of trusts, making virtually all of the ones with which Congress was concerned available, subject to transfer penalty, or exempt. At the same time, it tightened the rules respecting transfers to, or to trusts for the benefit of, third parties. Congress left no gaps.

Eligibility for MA-LTC

is limited, based on categories (aged, blind, and disabled, with a specific need for long term care services), wealth (resource limits with some state-to-state variation and exclusions, and special rules for married individuals), income (some states have caps on income but most have "medically needy" programs), and the absence of disqualifying

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[5] 42 U.S.C. § 1396p(d)(3)(B)(I). And this was so regardless of the purpose for which the trust was established, whether the trustees have or exercise any discretion, or restrictions on distributions or the use of distributions. ***Id.***, (d)(2)(C)(I)-(iv).

[6] To be sure, some provisions (***e.g.***, not allowing individuals to establish their own (d)(4)(A) trust, while they can open (d)(4)(C) accounts) are widely viewed as scrivener's errors. That may have caused many to think that sloppy thinking and analysis infected the entire product. Some Elder Law attorneys were no doubt among those who thought the statute as a whole was carelessly put together. They were wrong.

transfers. With respect to both wealth and income, after first making trusts almost impossible to use in Medicaid planning by imposing availability rules and transfer penalties, Congress in OBRA '93 made special provision for individuals with disabilities whose assets would fund trusts for their own benefit.

Prior to 1993, Section 1396p(c) dealt with transfers to third parties. In OBRA '93, Congress further elaborated on those rules and their exceptions. At the same time, it added 1396p(d) to deal with self-settled trusts comprehensively, as to availability as well as to transfers to and from them. Once this dichotomy is recognized, all of the other details fall into place – neatly, cleanly, and clearly. There are cross references between the two subsections, which reinforce this dichotomy.

Section 1396p(c). Congress in Section 1396p(c) penalizes transfers for less than fair market value by a denial of MA-LTC, based on the amount transferred and the state or local cost of long term care.[7] It then excepts from penalty some transfers based on the nature of the asset (the home) and the recipient,[8] or based only on the recipient. The latter, 42 U.S.C. §1396p(c)(2)(B), as amended also refers to trusts, including those in the new exempt categories:

> (2) 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,*

[7] 42 U.S.C. § 1396p(c)(1).

[8] 42 U.S.C. § 1396p(c)(2)(A).

> 2.were transferred from the individual's spouse or to another for the sole benefit of the individual's spouse,
>
> 3.. 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
>
> 4.. 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 noted, this section plainly ***does*** apply to transfers to third parties and to trusts for third parties. But nothing in it suggests let alone requires that it address transfers to first-party trusts, that is, trusts for the benefit of the transferor.

This sense arises first from the flow of the statute: Section 1396p(c)(2)(B) concerns assets of ***the*** applicant or recipient and provides that no period of ineligibility will be imposed if the individual applicant or recipient funds a trust for the sole benefit of ***the*** individual's wife or ***the*** individual's disabled or minor child or for the sole benefit of ***an*** individual who is disabled and younger than age 65.[9]

To be sure, the sub-clause refers to self-settled trusts by its cross-reference to the (d)(4)[10] trusts, but those are third-party trusts to the extent someone else makes a contribution, as (d)(2)(B) plainly contemplates.[11] It indicates that such trusts are the kind of sole benefit trusts whose funding merit exclusion from the anti-transfer rule for the transferor, but that is a long way from saying that funding such trusts would be subject to

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[9] *Id.*

[10] Throughout the rest of this memo, references to (c) and (d) and their subdivisions will mean 42 U.S.C. § 1396p(c) and (d) unless the context indicates otherwise.

[11] Where a trust "includes assets of an individual [and] of any other person..., the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual." 42 U.S.C. § 1396p(d)(2)(B).

penalty but for the exclusions in (c)(2)(B). Indeed, subclause (iii) governing transfers to the individual's child ***also*** refers to d(4) trusts, but those ***must*** be third party trusts. "A term appearing in several places in a statutory text is generally read the same way each time it appears." ***Ratzlaf v. U.S.***, 510 U.S. 135, 143, 114 S.Ct. 655, 660 (U.S. 1994). Plainly, then, the reference in (iv) to (d)(4) trusts cannot, by itself, support an inference that (c) applies to (and is necessary for the exclusion of) transfers to first-party trusts.[12]

If nothing internally requires that (c)(2)(B)(iv) refer to self-settled trusts, then that inference could only come from the subsection devoted to self-settled trusts, (d).

Section 1396p(d). This section establishes the exclusive rules governing treatment of assets held in self-settled[13] trusts when "determining an individual's eligibility for, or amount of, benefits under a state plan...,"[14] including not only their availability or exclusion, but when transfers to or from such trusts are to be penalized.[15]

The statute implicitly establishes three categories of assets: they are available, not available, or exempt. The corpus of a revocable trust is always available to the individual, so no provision applies transfer rules to funding such a trust. In the case of an irrevocable

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[12] ***Cf. Center for Special Needs Trust Administration v. Olson***, 676 F.3d 688, 702 (8th Cir. 2012)(wrongly infers from (c)(2)(B)(iv) reference to (d) trusts that it [(c)(2)(B)(iv)] must include trusts created by the beneficiary).

[13] In this context, it means trusts with assets of the settlor/beneficiary.

[14] 42 U.S.C. § 1396p(d)(1).

[15] 42 U.S.C. §1396p(d)(1). That the definition of assets already included the assets of a spouse (***see*** (c)(1)(A)) does not affect this analysis; Congress had already decided to treat spouses as an economic unit, as in federal estate tax, under Spousal Impoverishment, 42 U.S.C. § 1396r-5, and treating their assets this way for trust purposes was necessary to maintain the integrity of that policy.

trust, the corpus of the trust is available if, under the terms of the trust, payment from the trust could be made to or for the benefit of the individual under any circumstances.[16] Again, Congress did not refer to transfer rules respecting such trusts because there was no need to.

Where there are no circumstances under which payment could be made from corpus or income,[17] that is, the resources are unavailable, then there is a transfer of assets and a penalty may be imposed. Even this provision does not impose a penalty ***per se***, but only subjects the transfer to analysis under subsection (c). If the individual could show it was not covered by the provision, because he or she got full fair market value,[18] or any of the affirmative defenses listed in (c)(2)(C) and (D) -- intent (to get fair market value), return (of the full value of the assets transferred), or undue hardship (arising from imposition of the penalty) -- no penalty should be imposed.

Subsection (d) does not penalize any other transfers to self-settled trusts. Those where no payment can be made are subject to penalty. Those that are always available are not penalized because they have not been transferred.

That leaves the (d)(4) trusts. These are trusts that, but for (d)(3), might not be available under existing law because the trustee has sufficient discretion so that the

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[16] 42 U.S.C. §1396p(d)(3)(B). That is, this is an aspect of state trust law that Congress is electing to over-ride as a matter of Medicaid policy. ***Lewis v. Alexander***, 685 F.3d 325 (3rd Cir., 2012), *cert. denied*, 184 L.Ed.2d 724 (2013).

[17] "[A]ny portion of the trust from which ... no payment could be made ... shall be considered ... to be assets disposed [of] by the individual for purposes of subsection (c) ..." The (uncompensated) value of the disposal includes "the amount of any payments made from such portion of the trust after [the date of establishment]."
42 U.S.C. § 1396p(d)(3)(B)(ii).

beneficiary cannot compel distributions for cash, medical care and, if on SSI, food or shelter.

Congress did not explicitly say they are exempt from being counted. Nor did it specifically address their treatment under the transfer rules, as it did for unavailable trusts under (d)(3)(B)(ii). As to the former, availability, CMS from the beginning recognized that Congress was not just excluding these trusts from the rule of inclusion. In Transmittal 64, CMS recognized that Congress intended to render all of the assets of a (d)(4) "exception trust" as unavailable, even though it (Congress) did not specifically say so. The Third Circuit in ***Lewis v. Alexander***, 685 F.3d 325 (3rd Cir., 2012), ***cert. denied,*** 184 L.Ed.2d 724 (2013), similarly recognized Congress' intent to exclude the (d)(4) trusts generally, seeing it as part of a decision to establish two regimes, as it were, the trusts that ran afoul of Medicaid and those that were exempt.

The precise issue in ***Lewis*** was whether states were allowed to impose a range of restrictions on the use of pooled trust accounts beyond those in the federal statute, including barring all individuals age 65 and above from having such accounts. Pennsylvania justified its statute prohibiting people 65-and-over from having pooled SNT accounts and imposing other severe limits by arguing that the exclusion from the strict rules of (d)(1)-(3) only meant they were not to be treated as harshly, leaving states free to regulate them as they wished. In rejecting that argument, the court looked to the statute as a whole to discern Congress' intent:

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[18] 42 U.S.C. § 1396p(c)(1)(A)(penalty only for "dispos[al] for less than fair market value").

> In enacting the trust provisions of OBRA 1993, Congress provided a comprehensive system for dealing with the relationship between trusts and Medicaid eligibility. [It] made a deliberate choice to expand the federal role in defining trusts and their effect on Medicaid eligibility. Evidence of this can be found throughout the Medicaid statute. ...
>
> Congress made a specific choice to expand the types of assets being treated as trusts and to unambiguously require States to count trusts against Medicaid eligibility. Its 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 trusts from impacting Medicaid eligibility.[19]

After reviewing some of the detailed interplay, the court concluded, "It seems clear that Congress intended to create a purely binary system of classification: either a trust affects Medicaid eligibility or it does not."[20]

The statutory problem the court addressed is that Congress never said that the (d)(4) trusts ***were*** to be exempt under Medicaid counting rules. All it said was that they would be exempt from being counted under the new, all-inclusive trust rules.

The statute presents the same problem with respect to transfers to self-settled trusts. Section (d)(3) addressed when funding a self-settled trust would be a transfer subject to penalty. Section (d)(4) exempted the "exception trusts" from all of (d)(3). If (d)(3) is the exclusive basis for when self-settled trusts are subject to penalties, then the exclusion means they are not penalized, just as the exclusion from the counting rule means they are generally exempt.

Perhaps the clearest manifestation in the statute itself of Congress' understanding that funding an exempt self-settled trust would itself be exempt is that it nowhere provided an exemption for funding a (d)(4)(B) trust. There can be not the slightest doubt

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[19] 685 F.3d at 343.

that Congress intended funding such trusts to be exempt from the anti-transfer rules. Those trusts are based on the ***Miller*** case and they would fail to serve their intended – indeed only – purpose as a case by case solution to nursing home cost in excess of income in income cap states if every act utilizing the trust resulted in a denial of eligibility. Since this involved nursing home care, and most of the people affected are well over 64, the (c)(2)(B) exemption for trusts for people under 65 would not do the job.

CMS recognized the conundrum it had under the analysis it adopted in 1993 and thus had to explain why funding such a trust is exempt, but without opening the door to funding over-64 pooled trust accounts (assuming as it did that that was Congress' intent). Its solution was to find that the beneficiary got fair market value by funding the trust, but only later, ***when*** – meaning "at the time that" – funds were spent to purchase goods or services. "An individual cannot be considered to have received fair market value for funds placed in a trust ***until*** payments for some item or service are ***actually*** made." SMM, § 3259.7.C.3, p. 3-3-109.36 (emphasis added). While this is almost[21] the case most of the time, the trustee is never required specifically to spend or disburse the personal needs allowance. It seems at least odd that Congress intended that (B) trusts be immune to funding penalty only when its income is spent. An applicant ***always*** gets value back when money he or she has given away has been spent on his or her care; requiring

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[20] 685 F.3d at 344.

[21] The trustee might always retain an amount equal to the personal needs allowance. The income that funds the trust still counts as income for post-eligibility treatment of income in the month received. Thus, it has to be spent on cost of care, medical insurance premiums, spousal or family allowance, or other non-covered medical expenses, but need not be spent to the extent of the personal needs allowance.

that element as the means for finding the return of value in the trust context leaches the notion of a trustee with fiduciary duties of all substance.

Three further comments on this statutory approach. First, it does not violate CMS' entirely correct rule that in general the various rules governing income and assets still apply. Funds distributed by the trustee of a special needs trust are still subject to the requirements of the SSI rules (or their 209(b) equivalents). If the trustee is giving the beneficiary cash, then it is income when received (even if it is not income for tax purposes[22]), the same as if it came from parents. Non-assignable income is still income for eligibility and spend down purposes, even if then turned over to a trustee. ***Wong v. Doar***, 571 F.3d 247 (2nd Cir. 2009); ***Reames v. Oklahoma***, 411 F.3d 1164 (10th Cir. 2005), ***cert. den.,*** 546 U.S. 1225 (2006). The difference from present practice is simply to recognize that the transfer rules do not apply to the funding of (d)(4) trusts because Congress so intended.

Second, there is no gainsaying that ***Lewis*** is not the only relevant case and that others are contrary; indeed, ***Lewis*** itself in ***dicta*** is contrary on this specific point. As to ***Lewis***, the issue of over-64 transfer was not before it, and neither party argued that transfers to pooled trusts by individuals over age 64 were exempt. The issue the court had to decide was whether Pennsylvania could prohibit people over age 64 from even having pooled SNT accounts, among other restrictions, and that was struck down. The Eighth

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[22] That would be the case if the distributions exceeded the trust's own net income; then the trustee is distributing principal, which is not taxable income.

Circuit, in ***Center for Special Needs Trust Administration***,[23] although it correctly attempts to read the statute as a whole, ultimately rests on the (B)(iv) cross reference to the (d) trusts to show that it includes first as well as third party transfers – even though the presence of the same cross reference in (B)(iii) shows that it cannot not mean that at all, as noted above.[24]

Third, Congress' treatment of self-settled trusts was thorough; there are no gaps. Having made all discretionary trusts either available or exempt, Congress left nothing else to do. Within the look back period, a person has to give up all control of his or her resources; anything that retains control will be brought back as available under these rules. To re-state the rule somewhat, if the person can get nothing from the trust, it is subject to the transfer rule; if the person can get anything from the trust, under any circumstance, it is either available or exempt. In the first case, the asset is unavailable and so treated as transferred; in the latter, the asset is treated as available (and thus not transferred) or exempt. Congress has created an elegant and in some ways simple system for coordinating public benefits and private wealth.

Finally, the legislative history confirms that Congress intended the (d)(4) exclusion to be complete, covering transfers as well as availability. The conference committee report first reviewed the new transfer rules (what would become 1396p(c))

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[23] ***Supra***, 676 F.3d at 702.

[24] ***See also In re Pooled Advocate Trust***, 813 N.W.2d 130, 2012 S.D. 24 (2012).

and then the trust rules, 1396p(d), and discussed the (d)(4) exceptions immediately after discussing when transfers to self-settled trusts are to be penalized:

> Sets forth rules [regarding] assets of an individual placed in trust by or on behalf of an individual are treated, for purposes of Medicaid eligibility, as resources available to the individual .... Specifies that, for purposes of applying transfer of assets prohibitions, the look back period with respect to trusts i[s] 60 months. Provides exceptions for trusts containing the assets of a disabled individual under age 65, specified income trusts in certain States, and "pooled" trusts for disabled individuals.

H.R.Rep. 103-213, 103rd Cong., 1st Sess., at 834, reprinted in 1993 U.S.C.C.A.N. at 1523. This discussion of the (d)(4) exclusions as exceptions to the transfer rules reflects the distinct application of (d)(4), and not (c)(2), to transfers to self-settled trusts.

FAIR MARKET VALUE ANALYSIS.

But at worst, people over age 64 who transfer funds to a pooled trust account should be allowed to show the receipt of fair market value. If not exempt impliedly or otherwise, the transfer is either disqualifying ***per se*** or it is subject to the regular transfer analysis, including the affirmative defenses that include showing fair market value.

Whether someone funding a pooled SNT should have the opportunity to show receipt of fair market value should require little discussion. Even those courts that reject the view that funding is impliedly exempt apply a fair market value analysis, even if they find a lack of fair market value.[25] There is no judicial basis for the position taken by 27 states that funding a PSNT is a disqualifying transfer ***per se***. The courts that have gone

[25] ***Pooled Advocate Trust***, 813 N.W.2d at 146.

into the issue after hearings (as opposed to ***dicta*** or abstract discussions) have all concluded that transferors do receive fair market value.

The grantor does not lose value because of the change from legal to equitable owner. The grantor of a pooled trust account receives fair market value upon creation of the account because no value is lost when legal title is exchanged for equitable title.[26] The beneficiary is not divesting himself or herself of the assets; rather he or she becomes the equitable owner[27] of the assets in the trust, so that fair market value is retained, and the change should not incur a penalty [28]:

> . . . 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.[29]

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[26] ***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.

[27] ***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).

[28] ***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.)

[29] ***Ruby Beach v. State of Tennessee, Dep't of Human Services***, No. 09-2120-III (Tenn. Chancery Ct. 2010), p. 29. In this case, the court reversed the Tennessee Department of Human Services' decision to impose a penalty on the transfer of funds into a pooled special needs trust by a 91-year-old beneficiary.

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. 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.

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 settlor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract."[30] 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."[31] 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 grantor agrees to deposit his money subject to the terms and conditions and fees of the non-profit managing the trust. For consideration received, the

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[30] 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").

[31] ***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.")

non-profit agrees to conserve and distribute the funds solely for grantor'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.[32] An individual placing funds in a special needs pooled trust sub-account is receiving market-value consideration: funds will be protected for his or her present and future needs. 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 lifetime 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 the distributions do not replace, reduce or substitute government benefits. [33] 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.[34] Not only must the trustee abide by the terms of

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[32] A sample Joinder Agreement is attached as exhibit F, along with a care plan like those typically prepared for PSNT beneficiaries.

[33] ***See e.g.*** The Lutheran Social Service Minnesota Pooled Trust Agreement, attached as exhibit G and ***Peittersen v. Minnesota Dep't of Human Services***, exhibit C, supra at page 7.

Ms. Peittersen, 73, a disabled MA-LTC recipient, placed 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.

[34] ***Peittersen*** Exhibit C at page 3.

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.

Burden of proof – agency failed to rebut applicant's showing of value – rejection of a per se rule. Two Minnesota courts[35] have rejected the state agency's reliance on a ***per se*** rule in the face of evidence of fair market value. In ***Dzuik v. Minnesota Dep't of Human Services,***[36] 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. Dzuik received adequate compensation when he placed assets into a pooled trust sub-account.[37] On remand for further proceedings on that factual question,[38] even absent any evidence regarding the lack of fair market value, the Commissioner ruled that a penalty should be imposed because Mr. Dzuik was over 64.[39] On the second appeal, the court reversed the

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[35] Besides ***Dzuik***, discussed in this subsection, the other was the *Peittersen*, discussed in the previous subsection respecting PSNT obligations as contracts.

[36] ***Dzuik v. Minnesota Dep't of Human Services,*** 21-CV-09-1074 (Minn. Dist. Ct. Douglas Co. Dec. 15, 2009). Attached hereto as exhibit D.

[37] ***Id., Dzuik.*** at 3. Mr. Dzuik has multiple sclerosis and requires complete care due to his multiple sclerosis but he is active mentally. At the hearing Mr. Dzuik 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."

[38] ***Id.***

[39] 1-CV-09-1074 (Minn. Dist. Ct. Douglas Co. Feb. 7, 2012). Attached hereto as exhibit H.

Commissioner's decision imposing a penalty.[40] 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."[41]

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.[42]

CONCLUSION.

It would not be rational for Congress to punish PSNT account funding while it only subjects to the usual transfer analysis under (c)(1) funding trusts plainly being used for gaming Medicaid. That has been the effect of the 2008 memo, transforming funding PSNT accounts by people over 64 from "not exempt" to "always penalized."

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[40] ***Id.***

[41] ***Id.***

[42] ***Peittersen***, Exhibit C at 6

Colorado Fund for People with Disabilities
Assessment and Plan

Date: 07/18/13

Trust No. 837

Beneficiary: [redacted]
Mailing Address: c/o C. [redacted], Conservator
9725 East Hampden Avenue #102
Denver, CO 80231

Home Address: Kindred Cherry Hills Healthcare
3575 S. Washington Street, Room 212
Englewood, CO 80231

Phone: (303) 755-1845

D.O.B: 1/31/1948 **Life Expectancy:** 20.19 yrs

SS#: 521-72-8831

Benefits: SSDI: $2,139.90, Pension: $1,130.63

Medicaid #: Application pending

Initial Deposit: $15,000.00

Next of Kin: [redacted], Guardian & Boyfriend
3300 S. Washington St. #109
Englewood, Co 80113

Background Information:
[redacted] age 65, was born in Germany to [redacted] and [redacted]. She lived with her aunt until her death, when [redacted] was age 9, and then she moved to the United States with her mother and step-father. Her step-dad was in the military, so they lived several different places, including Mexico and Alaska. [redacted] came to Denver at age 16 at which point she was abandoned by her mother and step-father. [redacted] used to be married, but now is divorced. She has two children, a son and daughter, neither of whom she is in contact with. Her son lived in Commerce City last she knew and her daughter was in Arizona. During [redacted]'s illness her son pushed for her feeding tube to be removed, and this is the main reason they are not in contact any more. [redacted] met Daniel at work, and they have been together for 25 years.

[redacted] joins the trust with funds from the liquidation of personal assets. In attendance at this meeting were [redacted] and [redacted] (Guardian).

Housing:
[redacted] has lived in this nursing home since the end of 2005. Previous to that she was in the hospital for a few months. She has a roommate, but [redacted] does not spend much time in her room. She doesn't really like the nursing home, but it is close to her doctors, which is convenient.

Medical:
[redacted] sustained anoxic encephalopathy in August 2005, which resulted in quadriplegia and a decrease in her cognitive skills, especially memory. This brain injury was due to an overdose of morphine given by her doctor for her fibromyalgia. [redacted] was initially unable to speak, but after a year she began to improve. In 2006 she had a baclofen pump put in, which has helped with her ability to eat orally and to move her arms. The baclofen pump was recently replaced. [redacted] takes a medication for depression. She considers herself to be in fairly good health.

Mobility:
[redacted] is unable to stand or walk, so uses a wheelchair at all times.

Dental:
[redacted] needs regular dental check-ups, but otherwise has no dental needs at this time.

Social:
[redacted] enjoys painting, watching movies, listening to polka music, going to casinos, and going to the park to see the flowers.

Education:
[redacted] graduated from Arapahoe Community College with an associate's degree that was business related.

Employment:
[redacted] worked as a hair dresser and later was a project manager for a computer related business.

Transportation:
[redacted] provides all of [redacted]'s transportation. He has an accessible van which he uses to transport her.

End of Life Plans:
[redacted] has a plan set up with Homesteaders Life Company. She wanted to her body to be taken to Germany to be buried near her aunt, but they were unable to arrange this. She may want to use her trust for this additional expense, if it can be arranged.

Summary:

[redacted] would like to use her trust for alternative therapies, legal fees (to CS Advocare & Moser & Silver, LLP) furniture, clothing and van maintenance. The van has a lift, which currently needs repaired. [redacted] relies on the van for all of her transportation. The expected trust expenses listed below are only estimates.

<u>One Time Expenditures:</u>	
Deposit Fee 2%:	$300.00
Set Up Fee:	$250.00
Assessment & Plan Fee	$200.00
Furniture	$800.00
Conservatorship Fees	$2,000.00
Attorney Fees	$800.00
Total, One Time Expenditures:	**$4,350.00**
Additional Deposit	$14,684.57
Trust balance after One Time Expenditures	**$19,034.57**
<u>Ongoing Expenditures:</u>	
Case Management Fee $40/month x 12	$480.00 / year
Bookkeeping Fee $10/month x 12	$120.00 / year
Dental Care	$300.00 / year
Wheelchair Maintenance or Replacement	$500.00 / year
Accessible Van: Lift Maintenance & Repairs	$1,000.00 / year
Alternative Therapy $50/month x 12	$600.00 / year
Estimated Yearly Ongoing Expenses:	**$3,000.00 / year**

Based upon these estimates [redacted]'s supplemental needs trust will be spent down in approximately 6.34 years and within her actuarial lifetime of 20.19 years.

Written By: Brenda Parris Date: 8/28/13

Reviewed: Megan Brand Date: 9/5/13

FACTS FROM LAURIE HANSON CASE

Client is 73 years old and was certified as a "person with a disability" by the Social Security Administration prior to turning age 65 due to a shattered femur and cellulitis. *Tr. 17-18.* In the spring of 2006, Client gained over 100 pounds in three weeks and was hospitalized because the swelling could not be controlled. *Tr.18.* Ultimately, she was diagnosed with lymphedema, a condition of localized fluid retention and tissue swelling caused by a compromised lymphatic system. *Tr. 18.* She required extensive medical intervention and was unable to live independently. *Tr. 18-19.* Following her hospitalization, in April 2006, Client moved into the Augustana Care Center where she currently resides. *Tr. 19.* The Medical Assistance program has been paying the cost of her care at Augustana since her admission. *Tr. 15*

In January 2010, Client was losing weight, was getting physical therapy, and was on track to lose more weight. *Tr. 20.* Her goal was (and is) to move to a more independent setting. *Tr. 20.* Client suffered a setback when, on January 28, 2010, while being transported from a medical appointment, ambulance company personnel dropped her from a gurney, breaking her femur. *Tr. 19.* Client believed the accident was the result of negligence on the part of the ambulance workers as she kept telling them she was sliding and they did not listen to her. *Tr. 19.* She sued the ambulance company and ultimately prevailed. *Tr. 21.*

On January 19, 2011, Client received and deposited into her checking account a settlement check from the ambulance company in the amount of $54,904.48. *Tr. 21 and Agency Ex. 11.* Following Medical Assistance rules, Client reduced her assets to $3,000 within ten days so that she would remain eligible for Medical Assistance to pay the cost of her care at Augustana. After paying other expenses, Client established a sub-account with the Best Pooled Trust. She paid a $1,000

enrollment fee and placed $36,498.69 into the sub-account. *Appellant Ex. C, D, and E.* Client placed her funds in the pooled trust sub-account because she wanted to make sure she could use those funds to leave the nursing home and live as independently as possible. *Tr. 25-27.* Although the accident caused by the ambulance crew set Client back almost two years, she still believes she can return to the community and live independently. *Tr. 20, 22-25.*

Client testified that Jane Doe of BEST POOLED TRUST, her trustee, advised her that using the funds to help her establish independence and were expenditures she would approve as trustee. *Tr. 25-26.* Client testified that Jane had already approved and purchased clothing and Avon skin care products for her and that she would not have placed funds in the pooled trust if she had any inkling that she would not be able to use the money for those things. *Tr. 23- 25.* If she was not allowed to place her settlement funds into the pooled trust sub-account without penalty, she would have had to use all of the funds to pay for her nursing home stay until she reduced her assets to $3,000 and was once again eligible for Medical Assistance. *Tr. 22.*

On January 31, 2011, Client notified DCHS of the receipt of the personal injury settlement and of the subsequent reduction of assets. *Appellant Ex. C.* As a result of the deposit into the BEST POOLED TRUST pooled trust sub-account, the DCHS imposed a 6.79-month period of ineligibility solely because Client is over the age of 64, and for no other reason.[1] *Agency Ex. 8.* Neither DCHS nor the Commissioner analyzed whether Client received adequate compensation for her transfer as it is their position that a transfer into a pooled trust by a person over the age of 64 is a transfer *per se*. *Agency Ex. 1, Tr. 11., and Record d.*

Mr.Jones, BEST POOLED TRUST's Vice President of Finance/CFO executed the 2010 Amended and Restated Pooled Trust Agreement on September 28, 2010 on behalf of the non-profit organization. *Tr. p. 38 and Appellant Ex. F.* Jones testified that the BEST POOLED TRUST Pooled

[1] The period of ineligibility is calculated by dividing the amount put into the trust ($36, 498.69) by the then Statewide Average Payment for Skilled Nursing Facility Care (currently $5,340). Minnesota Health Care Programs Manual (HCPM) § 22.35.

Trust was established to fill an identified gap in services in the disability community in the state of Minnesota. *Tr. 39 and Appellant Ex. F.* He stated that administering a pooled trust to preserve assets of disabled individuals to provide funds to supplement government benefits is an excellent way to further the BEST POOLED TRUST Guardian/Conservator Services' Mission to preserve the integrity, independence and well-being of vulnerable adults in the least restrictive manner possible. *Tr. 37-38.*

Jones testified that BEST POOLED TRUST as trustee has a contractual obligation to pay for items or services for the sole benefit of sub-account beneficiaries as long as those items or services supplement and do not supplant government benefits and as long as the expenditures promote the comfort and well-being of the beneficiaries. *Tr. 32, 39.* In fact, he testified that a denial of a reasonable request that meets those criteria would be a breach of contract and would be in bad faith. *Tr. 32, 39.* The BEST POOLED TRUST of Minnesota Board of Directors would demand a change in procedure if it were determined that the Trustees were not allowing expenditures that met those criteria. *Tr. 40; Agency Ex. 9 Amended Trust Sections 5.02 and 5.03.*

The BEST POOLED TRUST Pooled Trust has the following characteristics:

- The trust is irrevocable. *Agency Ex. 9, Joinder Agreement, p. 1 and Amended Trust Section 1.04.*
- Disbursements from the trust are at the discretion of the trustee. *Agency Ex. 9, Amended Trust Section 3.03.*
- The trust is established and managed by a non-profit organization, BEST POOLED TRUST. *Agency Ex. 9, Joinder Agreement preamble, p.1, preamble.*
- A separate sub-account is maintained for each beneficiary of the trust, but for purposes of investment and management of funds, the trust pools these accounts. *Agency Ex. 9, Amended Trust Section 4.01.*
- Client, a disabled individual, established a sub-account for her sole benefit. *Agency Ex. 9, Joinder Agreement, p.3.*
- To the extent that amounts remain in a beneficiary's account upon her death, the trust will retain a 10% portion of the remainder to be paid to the charitable trust. *Agency Ex. 9, Amended Trust Sections 6.02(a) and 6.03.*

- Following retention of 10%, the trustee will pay to the State from such remaining amounts in the account an amount up to the total amount of Medical Assistance paid on behalf of the beneficiary. *Agency Ex. 9, Amended Trust Section 6.02 (a).*

There is no dispute that Client's assets in the BEST POOLED TRUST Pooled Trust sub-account are excluded. The only disputed issue is whether or not a transfer penalty should be imposed because Client was over the age of 64 when she funded the sub-account. *Tr. p. 43-44.* DCHS and the Commissioner did not evaluate whether or not Client received adequate compensation when she transferred her assets into the BEST POOLED TRUST Pooled Trust sub-account. *Tr. 11.* The Commissioner affirmed DCHS's position that the transfer of the funds into the pooled trust sub-account is a prohibited transfer because Appellant is over the age of 64 and that there is no need to further evaluate the transfer. *Tr. 10 and Agency Ex. 7.*

Fair market value assessment

Pooled Trust sub-account for Walter White

Date: 05/12/2015

Mailing address: Walter White c/o

Home address: Minneapolis MN 55411

Phone:

DOB: July 4, 1935

LIFE EXPECTANCY PER MA ANNUITY TABLE I (79): 7.61 YEARS

INITIAL INVESTMENT: $50,410.69

Total Assets on hand as of 4-30-15: $44,622

The fund will last less than 6 years given these expenditures AND this includes an income of approximately 3% per year for the account

ONGOING EXPENDITURES	COST PER YEAR
Geriatric Care Management Services	$1,000/year; 1 visit per month plus travel.
Companion Care Services	$1,056/year
Hearing Aid Maintenance and Repair	$ 200/year
Glasses Maintenance and Repair	$ 200/year
Vision/Eye Care	$ 100/year
Podiatry/Foot Care	$ 400/year; 4 visits per year
Orthopedic Shoes repair and replacement	$ 200/year
Upgraded cable package (sports networks, MLB specific)	$ 480/year
Phone Bill	$ 580/year
Haircuts	$ 180/year
Household Goods	$ 350/year
Clothing	$ 600/year
Annual visit by attorney-in-fact to visit residential facility and check on care of beneficiary	$1000/year
Securian Trust Administration Fees	$280/year at $40K balance (0.7% per year on declining balance)
Lutheran Social Service Trustee Fees	$2,142/year

	1 annual accounting/year 56 requests for fund disbursements 23 communications related to requests for disbursements 12 monthly reconciliations
TOTAL:	$ 8,918

ONE-TIME EXPENDITURES	**COST**
Dental Care (new dentures)	$ 6000 once in the next 7 years

Explanation related to LSS fees based on these expenses: Number of disbursement requests – each billed as 0.3 hr or $25.50; number of communications with client – each billed as 0.2 hr or $17; if the bill is automatically sent to us there is no communication task, but if the clients calls, emails, etc then there is.

ONGOING EXPENDITURES	**COST PER YEAR**	**REQUESTS;COMMUNICATIONS**
Geriatric Care Management Services	$1,000/year; 1 visit per month	pay quarterly 4; 0
Companion Care Services	$1,056/year; 4 visits per month	pay quarterly 4;0
Hearing Aid Maintenance and Repair	$ 200/year	2; 2
Glasses Maintenance and Repair	$ 200/year	1; 1
Vision/Eye Care	$ 100/year	1; 0
Podiatry/Foot Care	$ 400/year; 4 visits per year	4; 0
Orthopedic Shoes repair and replacement	$ 200/year	1; 1
Upgraded cable package (sports networks, MLB specific)	$ 480/year	12; 0
Phone Bill	$ 580/year	12; 0
Haircuts	$ 180/year	Pay quarterly 4; 4
Household Goods	$ 350/year	3; 3
Clothing	$ 600/year	3; 3
Restaurant gift cards	$ 150/year	6; 6
Annual visit by attorney-in-fact to visit residential facility	$1000/year	3; 3

and check on care of beneficiary		
TOTAL:	$ 6,496/YEAR	60; 23

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

Special Needs Trusts National Conference

Friday, October 16, 2015

Breakout Session 3
3:15 P.M. – 4:05 P.M.

Work and Beneficiaries: What are the SSI and SSDI Work Incentives?

Presenter:
Linda Landry
Disability Law Center, Inc
Boston, MA

- 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

Work and Beneficiaries: What are the SSI and SSDI Work Incentives?

September 2015, Linda Landry, Disability Law Center, Boston, MA

Introduction

Both of the Social Security Administration's (SSA) disability benefit programs, Title II and Title XVI, contain "work incentive" programs for recipients who want to test their ability to work without immediate loss of monthly cash and health benefits. The work incentive programs for the Title II and Title XVI disability benefit recipients are different and will be covered separately in this article.

Practice Note

The SSA's publication, A Summary Guide To Employment Supports For With Disabilities Under The Social Security Disability Insurance And Supplemental Security Income Programs, also known as the Red Book, contains a good overview of the work incentives.[1]

Title II Social Security Work Incentive Programs

These work incentives apply to the Title II benefits based on disability: Social Security Disability Insurance (SSDI); Child Disability Benefits (CDB); Disabled Widow/er benefits. For ease reference, however, this article will refer only to SSDI benefits.

Trial Work Period

SSDI recipients are entitled to a nine-month trial work period.[2] A trial work month is a month in which the recipient is working at the "services" level.[3] The definition of "services" is any activity which is usually done for pay or profit if the amount of work meets certain criteria. For employees in 2015, "services" is defined at $780 or more in gross monthly wages.[4] For those in self-employment, "services" means net self-

[1] It is available online at http://www.socialsecurity.gov/redbook/eng/main.htm

[2] 20 C.F.R. § 404.1592.

[3] 20 C.F.R. § 404.1592(a).

[4] The "services" amount is indexed to the January COLA. See POMS DI 1301.050 for a table of trial work period thresholds for prior years.

employment earnings of $780 or more per month or working 80 hours or more per month in the business.[5] Recipients continue to receive their full SSDI benefits during the trial work months, no matter how much they earn. The nine months do not have to be consecutive. Beneficiaries only get only one set of 9 trial work months in any period of disability.

The trial work period is completed when the recipient has had nine trial work months in a rolling sixty-month period.[6] When the nine-month trial work period is complete, the SSA will review the work to determine whether the recipient is performing substantial gainful activity SGA. The SSA should also conduct a continuing disability review (CDR) to see whether the recipient remains medically disabled.

If the individual is no longer medically disabled, benefits will cease. Recipients who remain medically disabled begin the Extended Period of Eligibility (EPE).[7]

Extended Period of Eligibility

The Extended Period of Eligibility (EPE) provides an additional period of time for individuals who continue to meet the medical disability standard to continue to test the ability to return to work. The first 36 months of the EPE constitute the Re-entitlement Period, a consecutive thirty-six month period that begins the month following the 9th trial work month. During the Re-entitlement Period, recipients are not eligible for a cash benefit payment for months in which they work at or above the Substantial Gainful Activity (SGA) level, but they are payment eligible in months in which they work below the SGA level.[8] The EPE continues after the 36th month of the Re-entitlement Period, if the individual is not working at the SGA level. However, after the 36 month of the Re-entitlement Period, work at the SGA level results in termination of entitlement, regardless of whether the individual continues to meet the medical disability standard.[9]

[5] Id.

[6] The Trial Work Period (TWP) POMS DI 13010.035, https://secure.ssa.gov/apps10/poms.nsf/lnx/0413010035

[7] 20 C.F.R. § 404.1592a (a).

[8] Id.

[9] How the EPE Works, POMS DI 28055.005, https://secure.ssa.gov/apps10/poms.nsf/lnx/0428055005

Determining SGA During the EPE

SGA involves the performance of significant physical or mental duties productive in nature.[10] The SSA has developed a complex set of rules for evaluating when work activity should be considered SGA. The primary consideration for employees is the amount of gross monthly wages for work actually performed by the individual. In 2015, the SSA presumes that gross wages of $1090 per month or more shows the ability to perform SGA for those eligible on the basis of disability, $1820 or more for those eligible on the basis of statutory blindness[11].[12] For the self-employed, SSA considered not only net self-employment earnings but also the value of the activity to the business.[13]

In determining whether work during the EPE constitutes SGA, it is important to consider the following:

- *Impairment Related Work Expenses (IRWEs)* may be used to reduce monthly earnings before SSA makes the SGA determination. An IRWE is the cost of a disability related item or service that the individual needs in order to work and for which the individual pays out of pocket without reimbursement from any source.[14] Examples or IRWE expenses include medications and other treatment, mobility equipment, counseling services, specially adapted vehicles, etc.[15]

- The *value of any subsidies*,[16] and special conditions,[17] should be deducted from monthly gross wages before deciding whether the wages constitute SGA.[18]

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[10] 20 C.F.R. §§ 404.1572, 404.1573.

[11] Meaning of Blindness as Defined in the Law, 20 C.F.R. § 404.1581

[12] The SGA threshold was indexed to the annual COLA in 2001. See POMS DI 10501.015 for chart of the SGA threshold for prior years.

[13] 20 C.F.R. § 404.1575.

[14] 20 C.F.R. § 404.1576(b)(3).

[15] Impairment Related Work Expenses, POMS DI 10520.000 et seq. https://secure.ssa.gov/apps10/poms.nsf/lnx/0410520000

[16] 20 C.F.R. § 404.1574(a)(2).

[17] 20 C.F.R. § 404.1573(c).

[18] POMS DI 10505.010.

- *Wages count when they are earned, not when they are paid* for SGA purposes (note that this is different, post-entitlement, in the SSI program where wages are counted when paid). Earnings put into pre-tax retirement plans count toward SGA.[19]

- *Only pay for actual work activity counts in determining SGA*. Pay for time not worked, such as paid sick or vacation time, should not be included.[20]

- For self-employed beneficiaries, the SSA counts net self-employment income less the reasonable value of any significant unpaid help from family members.[21] In addition to counting actual earnings, the SSA also considers the comparable worth of the self-employment activity.[22]

The Cessation Month

The first month in which the beneficiary performs SGA after the end of the trial work period is called the cessation month. In determining whether a beneficiary has performed SGA for the first time, the SSA considers unsuccessful work attempts,[23] and average earnings,[24] in addition to IRWEs, subsidies, and special conditions. [25] After the cessation month, unsuccessful work attempts and averaging do not apply in determining SGA. Benefits are payable in the cessation month and the following two months, regardless of the level of earnings.[26] The cessation month may occur during or after the 36 month Re-entitlement Period or after.

Averaging Earnings

In determining whether work is SGA, the SSA may average earnings until the cessation month. Earnings may be averaged for periods in which the work or the self-employment was continuous without significant change in work patterns or earnings, and there has

[19] POMS DI 10505.005, DI 10505.010.

[20] POMS DI 10505.010.

[21] 20 C.F.R. §§ 404.1575(c), 416.975(c).

[22] 20 C.F.R. § 404.1575(a).

[23] 20 C.F.R. § 404.1574(c).

[24] 20 C.F.R. § 404.1574a.

[25] 20 C.F.R. § 404.1592a (a)(1).

[26] 20 C.F.R. § 404.1592a (a)(2)(i).

been no change in the SGA earnings levels.[27] If there is a significant change in work pattern or earnings during the period of work requiring evaluation, the SSA will average earnings over each separate period of work.[28] As long as the beneficiary remains medically disabled, benefits can be reinstated during the Re-entitlement Period portion of the EPE without a new application for any month in which the person does not work at the SGA level. Medicare benefits continue throughout the EPE, regardless of whether the recipient is eligible for a cash benefit.

Termination of Benefits After the EPE

Entitlement terminates at the end of the thirty-six month Re-entitlement Period if the recipient is performing work at the SGA level. If the recipient is not working at the SGA level at that time, the EPE and benefit eligibility continues. In this case, entitlement terminates with first month the recipient does perform SGA after the end of the 36 month Re-entitlement Period.[29]

Title XVI (SSI) WORK INCENTIVE PROGRAMS

Once an individual has become entitled to SSI, SGA no longer plays a role in benefit eligibility. For SSI recipients, the effect of work is as to financial eligibility. i.e., how much of gross monthly wages will count to reduce the SSI benefit.

SSI Earned Income Exclusion

The favorable treatment of earned income in the SSI program is a significant work incentive for SSI recipients. Using an income exclusion formula, the SSA counts less than half of the recipient's gross monthly earned income to reduce the SSI benefit. The actual formula first subtracts $65 from gross monthly earnings and then excludes one-half the remainder.[30] For example, earned income in the amount of $585 results in $250 in countable monthly income, as shown below.

$585.00 gross monthly earnings

- $20.00 (general income deduction, if unused on unearned income)

= $565.00

[27] 20 C.F.R. § 404.1574a.

[28] 20 C.F.R. § 404.1574a(c). POMS DI 10505.015 Averaging Countable Earnings.

[29] 20 C.F.R. § 404.1592a(a)(3).

[30] See 20 CFR § 416.1112

- 65.00 (first earned income deduction)

= $500.00

$500 divided by 2 (second earned income deduction)

= $250 (countable earned income).

The SSI benefit payable is reduced by $250.

Impairment Related Work Expenses (IRWEs)

IRWEs are the out of pocket costs of disability related items and services that an SSI recipient needs to work. IRWEs are deducted from gross monthly income before applying the earned income exclusion to determine the monthly SSI benefit.[31] Using the example above with $100 in IRWEs, the calculation is as follows:

$585.00 (gross monthly earnings)

- $20.00 (if unused on unearned income)

= $565.00

- 65.00 (first earned income deduction)

= $500.00

- $100.00 (IRWEs)

= $400.00

$400 divided by 2 (second earned income deduction)

= $200 (countable earned income).

The SSI benefit is reduced by $200.

Blind Work Expenses (BWEs)

There are additional work expense deductions available to people who receive SSI on the basis of statutory blindness.[32] Examples of BWE items include: service animal expenses; transportation to and from work; Federal, state, and local income taxes;

[31] See 20 C.F.R. § 416.976.

[32] 20 C.F.R. § 416.1112(c)(8). See the definition statutory blindness at 20 C.F.R. § 416.981.

Social Security taxes; attendant care services; visual and sensory aids; translation of materials into Braille; professional association fees; lunches at work; lunches at work; and union dues.[33]

Any item that could count as an IRWEs could also be a BWE, and should be treated as a BWE. This is more advantageous to the SSI recipient because BWEs are deducted after application of the earned income deduction. Using the above example with $100 in BWEs instead of IRWEs demonstrates this point:

$585.00 (gross monthly earnings)

- $20.00 (general income deduction if unused on unearned income)

=$565.00

- $65.00 (first earned income deduction)

=$500.00

One-half of $500 divided by 2 (second earned income deduction)

=$250

$250.00

- $100.00 (BWEs)

=$150.00 (countable earned income)

The SSI benefit is reduced by $150.

Student Earned Income Exclusion

For students who are under age 22 twenty-two and regularly attending school, the SSA does not count up to $1,780 of earned income per month in 2015 in calculating the SSI payment amount. The maximum yearly exclusion is $7180 in 2015.[34] These amounts are indexed to the annual COLA and increase each January.

"Regularly attending school" means that the student takes one or more courses of study and attends classes:[35]

[33] POMS SI 00820.535

[34] 20 C.F.R. § 416.1112(c)(3). POMS SI 00820.510.

[35] POMS SI 00501.020.

- In a college or a university for at least 8 eight hours a week; or
- In grades 7- through 12 for at least 12 twelve hours a week; or
- In a training course to prepare for employment for at least 12 twelve hours a week (15 fifteen hours a week if the course involves shop practice); or
- For less time than indicated above for reasons beyond the student's control, such as illness.

The purpose of the student earned income exclusion is to allow youth with disabilities to get those early work experiences so important to later employment – without loss of SSI and related Medicaid benefits.

Special Cash Benefits and Medicaid under Sections 1619(a) and 1619(b)

SSI recipients with earnings are potentially eligible for the Section 1619 program.[36] Recipients who have earnings above the SGA level can continue to receive cash payments under the Section 1619(a) program (special SSI payments for people who work) as long they remain medically disabled and meet all other SSI financial and categorical eligibility requirements.[37] The recipient's financial eligibility and payment amount will be calculated in the same way as for someone who is not working at the SGA level. Medicaid eligibility also continues with Section 1619(a) eligibility. When earnings become too high to allow for a cash payment, the recipient may be eligible for Section 1619(b), continued Medicaid eligibility. [38]

In order to qualify, the recipient must[39]

- have been eligible for an SSI cash payment for at least one month,
- continue to meet the disability definition,
- continue to meet other non-disability requirements,
- need Medicaid in order to work, and
- have gross earned income insufficient to replace SSI and Medicaid.

[36] 42 U.S.C. § 1382h; 20 C.F.R. §§ 416.260–.267; POMS SI 02302.000 et seq.

[37] 42 U.S.C. § 1382h(a).

[38] 42 U.S.C. § 1382h(b); 20 C.F.R. §§ 416.268-.269; POMS SI 02300.000 et seq.

[39] POMS SI 02302.010.

Persons who remain medically disabled can move between SSI, Section 1619(b) Medicaid only as their ability to work changes, without having to file a new application. However, changes in circumstances will not be known to the SSA without timely reports of changes made by the recipient.

Plans to Achieve Self-Support (PASS)

A plan to achieve self-support (PASS) is a little-used SSI program that allows blind or disabled SSI applicants and recipients to save income and resources, which that would otherwise be countable under SSI, for a vocationally feasible goal. Examples of income that may be sheltered in a PASS include the following: earned income; SSDI benefits; veterans' benefits; and private pension benefits.[40] Excess resources, including property, may also be used in a PASS and "sheltered" from the usual SSI resource limitations.

Under the Social Security Act and regulations, an individual can enter into a written plan with the SSA to save and expend funds to achieve a vocational goal and, as a result, gradually achieve financial independence.[41] All funds saved in a PASS are excluded from countable income and resources, if the individual follows the written plan in expending the PASS funds. The legislative history shows that Congress expressed "a desire to provide every opportunity and encouragement to the blind and disabled to return to gainful employment."[42] In a reviewing a PASS, the SSA will focus significant attention on the plan's "feasibility" in terms of costs and the vocational goals desired. Compliance reviews will be reinforced and scheduled as a part of the plan's terms. All expenses involved with a PASS are subject to a "reasonable and necessary" test.

The following is a partial list of potential PASS goals:

- tuition at a trade school or a college;
- support for living expenses, away from home, while receiving training;
- tools and equipment used on the job;
- startup costs of a business;
- child care;

[40] 20 C.F.R. § 416.1226.

[41] 42 U.S.C. § 1382a(b)(4)(A)(iii) and (B)(iv), 1382b(a)(4); 20 C.F.R. § 416.1226; POMS SI 00870.000 –.100

[42] Plans for Achieving Self-Support -Overview, POMS SI 00870.001(A).

- adaptive devices at home, at work, or in a vehicle to make the workplace accessible to the person with disabilities;
- job coaching or counseling services; and
- purchase of a vehicle necessary to achieve the vocational goal.

A PASS must meet the following requirements:[43]

- be designed especially for the individual;
- be in writing;
- be approved by the SSA (a change of plan must also be approved);
- be designed for an initial period of not more than eighteen months. The period may be extended for an indefinite number of six-month extensions.[44] There is no time limit placed on PASS plans and, in fact, a federal court struck down a forty-eight -month time limit that existed in the prior version of the PASS rules;[45]
- show the individual's specific occupational goal;
- show what resources the individual has or will receive for purposes of the plan and how he or she will use them to attain his or her occupational goal;
- show how the resources the individual set aside under the plan will be kept identifiable from his or her other funds;
- show a list of current earnings, if any, and estimated earnings when the vocational goal is obtained;
- show a detailed business plan, when self-employment is a goal, addressing each item set forth in POMS SI 00870.006(A)(10) ; and
- show a list of "milestones" and "interim steps" to be achieved during the life of the PASS and an estimated time frame for the achievement of each "milestone."

An individual may develop a plan on his or her own initiative, and any employer, or social agency, the SSA employee, or another person can assist in setting up the plan

[43] POMS SI 00870.006.

[44] POMS SI 00870.001.

[45] Panzarino v. Heckler, 624 F. Supp. 350 (S.D.N.Y. 1985)

and its goals. If appropriate, an individual may also be referred to a state rehabilitation agency or an agency for the blind for assistance. Any fee for the preparation of a PASS is an allowable expense and can be included in the PASS. Fees must be reasonable, and no fees for private PASS monitoring will be allowed.

The SSA may reject the plan if, for instance, it concludes that the goals of the plan are not realistic for the particular individual or the funds available will not be adequate to meet the plan's goals. The POMS and emergency instructions encourage the SSA to consider vocational information in order to determine if a PASS applicant's goal is '"feasible" in light of that individual's disabling impairments. Vocational information can include the applicant's prior work history and education. PASS denials are appealable through the SSA's regular administrative appeals process (Reconsideration, ALJ hearing, Appeals Council).

The SSA regularly monitors PASS compliance and will begin to count the recipient's earned and unearned income and resources excluded under the PASS at the point that: 1) the recipient reaches the goal, or completes the time schedule set forth in the plan; or 2) abandons or fails to follow the conditions of the plan. A PASS may be suspended, then reinstated and modified, with the written approval of the SSA, upon the recipient's request.

Practice Note

Free work incentive planning assistance, including assistance with PASS, is available for SSI/ and SSDI recipients in most states through WIPA (Work Incentive Planning and Assistance) programs. For more information and to find the WIPA programs serving a particular state, see SSA's work site at http://www.chooseworkttw.net/findhelp/

Expedited Reinstatement: After Work Results in Benefit Termination

Effective with January 1, 2001, Section 112 of the Ticket to Work and Work Incentive Improvement Act of 1999[46] established expedited reinstatement (EXR) for Title II and Title XVI disability benefit recipients who lose eligibility due to work. EXR allows recipients whose eligibility has terminated due to earnings within the past five years (60 months) to be quickly reinstated if they are again unable to work due to the same medical condition.[47] EXR was developed to help allay the fears of benefit recipients that they would be without means while waiting for a new benefit application to be processed

[46] Pub.L.No. 106-170(12/17/1999), codified at 42 U.S.C. §§ 423(i), 1383(j).

[47] 20 C.F.R. §§ 404.1592b - .1492g, 416.999 - .999e. POMS DI 13050.000 et seq.

if their disabilities again resulted in the inability to work after benefit termination due to work.[48]

EXR eligibility criteria

The following are the criteria for entitlement to EXR.[49]

* previous entitlement to a Title II or Title XVI benefit based on disability or blindness.

* disability benefit entitlement terminated due to performance of substantial gainful activity (SSDI) or because of earned income or a combination of earned and unearned income (SSI).

* in the month in which the individual files the request for EXR, the individual is not able to do SGA because of his/her medical condition.

* the individual's current impairment must be the same as or related to the individual's prior impairment and the individual must be disabled as determined under the medical improvement review standard (MIRS).

* SSA must receive the written request for EXR within the consecutive 60-month period that begins with the month in which SSDI or SSI entitlement terminated due to earnings. SSA may grant an extension for good cause.[50]

Provisional benefits[51]

Individuals may receive up to 6 consecutive months of provisional cash benefits during the provisional benefit period, while SSA formally determines EXR eligibility. The amount of the provisional SSDI benefits is equal to the last monthly benefit payable during the prior entitlement, increased by any cost of living increases that would have been applicable to the prior benefit amount.[52] For SSI, provisional benefits do not include the state supplement, if any.[53] If SSA denies the request for reinstatement, it

[48] Note that EXR is not available to those who lose benefits after a CDR finding that they are no longer medically eligible for disability benefits.

[49] 20 C.F.R. §§ 404.1592c, 416.999a.

[50] POMS DI 13050.010.

[51] 20 C.F.R. §§ 404.1592e, 416.999c.

[52] POMS DI 13050.025.

[53] POMS DI 13050.030.

generally will not consider the provisional benefits received as an overpayment.[54] If the reinstatement request is denied, SSA will treat that request as intent to file an initial application for benefits.[55]

The EXR benefit[56]

EXR is a 24 month reinstatement period, which begins with the month benefits are reinstated and ends with the 24th month in which a benefit is payable. For SSDI, a benefit is payable in a month in which the individual does not perform SGA. Averaging of earnings and unsuccessful work attempts do not apply during this period. For SSI, a benefit is payable in a month when, using normal SSI income and resource eligibility calculation procedures, SSA determines the individual eligible for a monthly payment. After the individual receives 24 monthly reinstatement payments, the individual is reinstated to a regular period of eligibility and is eligible for additional work incentives under SSDI (such as a trial work period and an extended period of eligibility), as well as possible future reinstatement through the expedited reinstatement provision under SSDI and SSI.

The POMS contains a helpful discussion of the relative merits of filing for EXR and reapplying.[57]

Vocational Rehabilitation Opportunities: Ticket to Work and Work Incentives Improvement Act of 1999

On December 17, 1999, the Ticket to Work and Work Incentives Improvement Act was signed into law.[58] This act represents the most significant return to work development since the implementation of the SSI Section 1619 program. The express purposes of the act are:

1. to provide health care and employment preparation and placement services to individuals with disabilities,

2. to encourage states to adopt an expansion of Medicaid availability,

[54] 20 C.F.R. §§ 404.1592e(h), 416.999c(h).

[55] 20 C.F.R. §§ 404.1592f(h), 416.999d(f).

[56] 20 C.F.R. §§ 404.1592f, 416.999d.

[57] POMS DI 13050.020, Filing Considerations – Expedited Reinstatement Versus Initial Claim.

[58] Pub. L. No. 106 170 (Dec. 17, 1999).

3. to expand Medicare availability to disabled workers, and

4. to establish a "ticket to work" that will allow an individual with a disability to obtain necessary services and supports to obtain and retain employment and reduce dependency on cash benefits.

Current work incentive programs, such as the Trial Work Period, Extended Period of Eligibility and the SSI Section 1619 programs, are not affected by the new act and continue to be available to disability benefit recipients.

The Ticket to Work[59]

Title II and Title XVI disability benefit recipients aged 18 - 64 (eligible under adult disability standard) are eligible for a "Ticket to Work." The Ticket allows eligible individuals to obtain employment services, vocational rehabilitation services, or other support services from any participating provider (public or private) willing to provide services to that individual. Use of the Ticket is voluntary. The Ticket is SSA's commitment to pay participating service providers to assist in the return to work effort. Each participating individual will develop an "individual work plan" with the participating service provider that will set forth the planned employment goal as well as the services and supports necessary to attain that goal.[60]

Expanded Medicare Benefits

SSA published final regulations in 2004[61] at to implement the Ticket to Work and Work Incentives Improvement Act of 1999 provision establishing additional Medicare coverage for disabled beneficiaries who lose Title II disability benefits due to SGA.

Prior to this change, Medicare entitlement ended with performance of SGA after the 36th month of the Re-entitlement period. Effective October 1, 2000, Medicare entitlement can continue for up to 78 months after the 15th Re-entitlement Period Month. Those who have lost entitlement to Title II disability cash benefits due to SGA, must continue to meet the disability standard to be eligible for continued Medicare.[62]

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[59] POMS DI 55000.000 et seq., https://secure.ssa.gov/apps10/poms.nsf/lnx/0455000000 See also, SSA's Ticket to Work website, http://www.chooseworkttw.net/findhelp/

[60] POMS DI 55020.001

[61] 69 Fed. Reg. 57, 224 (Sept. 24, 2004)

[62] 42 C.F.R. 406.12(e). POMS HI 00801.146.

Expanded Medicaid Benefits

Section 201 of the Ticket to Work Act[63] also gave the states the option of expanding Medicaid coverage to allow for "buy-in" programs for Title II and Title XVI disability benefit recipients who lose benefits due to work. Options exist in every state to cover former disability benefit recipients who work at least 40 hours per week and who have income under 450% of the federal poverty level.

[63] Pub.L.No.106-170 (12/17/1999).

Work and Beneficiaries: What are the SSI and SSDI Work Incentives?

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September 2015

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3 Questions

- How does work affect Title XVI (SSI) and/or Title II (SSDI) disability benefits?
- If a recipient loses SSI and/or SSDI due to work, will the recipient also lose Medicaid or Medicare?
- What can recipients do to avoid a problem with SSI or SSDI benefits when working?

SSI and Work

What is Supplemental Security Income (SSI)?

- Title XVI (SSI) is a "needs-based" monthly cash benefit payable to disabled adults & children and to those aged 65 and older.
- SSA must consider countable monthly income for ongoing SSI eligibility.
- SSA must also consider countable "resources" for ongoing SSI eligibility.

SSI Benefits and Work: Effect of Wages

- For SSI recipients the main work incentive is the earned income deduction.
- For working SSI recipients, the question is:
  - How much of my wages will count to reduce my SSI benefit?

SSI Benefits and Work Effect of Wages

- For employees, SSA considers gross monthly wages when paid
- To compute countable monthly wages, deduct $65 plus ½ of the remainder
- A good estimate of countable wages is ½ of gross monthly wages

SSI Benefits and Work Effect of Wages

- SSI recipients may also deduct the $20 "general income disregard" from wages, if not used on "unearned" income.
- Unearned income includes SSDI, interest, pensions, worker's compensation, alimony and other income that is not wages.

SSI Benefits and Work Effect of Wages – Example 1

- Carmen receives $733 in SSI in for disability in 2015, and no other income.
- She takes a job paying $885 in gross wages per month.
- Will Carmen remain eligible for SSI with these wages?
- What should Carmen do when she takes this job?

SSI Benefits and Work Effect of Wages – Example 1

- SSA will count $400 of the wages [$885 – 85 ($65 + $20) divided by 2 = $400].
- Her SSI benefit will be $333 ($733 - $400 = $333).
- Her new total gross monthly income will be $1218 ($885 + $333).

SSI Benefits and Work
Effect of Wages – Example 2

- Joe receives $520 in SSDI and $233 in SSI benefits based on disability per month in 2015.
- He also takes a job paying $885 per month in gross wages.
- These wages make him SSI ineligible.
- More later on the effect of these wages on his SSDI.

SSI Benefits and Work
Effect of Wages – Example 2

- $520 SSDI - $20 = $500 countable SSDI
- $885 gross wages - $65 = $820
  $820 divided by 2 = $410 countable wages.
- $500 + 410 = $910, in countable income for SSI purposes – too much to remain eligible for SSI.
- Joe's total gross monthly income is $1405.

SSI Benefits and Work
Self Employment Income

- For SSI recipients who are self-employed, SSA counts **net** self employment income against the amount of SSI the individual would otherwise be eligible to receive.

SSI Benefits and Work
IRWE Deductions

- Impairment related work expenses (IRWEs) may be deducted to determine countable gross monthly wages and countable net self-employment income.
- IRWE deductions are in addition to other permitted earned income deductions.

SSI Benefits and Work
IRWE Deductions

- IRWEs are:
  - impairment related items and services
  - needed in order to work
  - that the individual pays for and that are not covered or reimbursed by any source, i.e., the individual must pay for them out of pocket.

SSI Benefits and Work
Examples of IRWEs

- Attendant care services provided at work or at home to prepare for work.
- Transportation costs required because of disability.
- Durable medical equipment, work assistive equipment, and prostheses.

SSI Benefits and Work Examples of IRWEs, cont'd

- Medical treatment necessary to control or improve a condition to permit work
- Expendable medical supplies
- Medical devices and appliances
- Non-medical devices and appliances where verified as essential for control of a condition, e.g., an air cleaner for a severe respiratory condition

SSI Benefits and Work BWE Deductions

- Blind Work Expense (BWE) deductions are available to SSI recipients eligible on the basis of legal blindness.
- BWEs are in addition to other permitted earned income deductions.

SSI Benefits and Work BWE Deductions

- Examples of BWEs:
  - service animal expenses;
  - transportation to and from work;
  - taxes;
  - attendant care services;
  - visual aids;
  - translation of materials into Braille;
  - lunches;
  - professional association dues.

SSI and the Student Earned Income Deduction

- The student earned income deduction is for SSI recipients who:
  - are under age 22, and
  - are regularly attending school.

SSI and the Student Earned Income Deduction

- Regularly attending school means:
  - For grades 7-12, attending at least 12 hrs per week;
  - For college or vocational program, attending at least 8 hrs per week.

SSI Benefits and Work Student Earned Income Deduction

- In 2015, the student earned income deduction is $1780 per month, up to a maximum of $7180 per year.
- This amount is indexed to the yearly cost of living increase.
- This deduction is in addition to other permitted earned income deductions.

Federal Educational Assistance

- All student financial assistance received under Title IV of the Higher Education Act of 1965, or under BIA Student Assistance Programs, is excluded from income and resources, regardless of use. Title IV programs include: Pell Grants; federal work study programs; Upward Bound, and others specified in POMS SI 00830.455

Other Educational Assistance

- Any portion of a grant, scholarship, or fellowship used for paying tuition, fees, or other necessary education expenses is not countable income.
- Any grant scholarship, fellowship, or gift for the cost of tuition or fees does not count as a resource for nine months.

Plan to Achieve Self-Support (PASS)

- Set aside income and resources to use to achieve an occupational goal.
- Occupational goal must be feasible.
- PASS must be in writing and include budget (& business plan if self-empl.).
- If PASS is followed, income and resources don't count for SSI.

Keeping Medicaid While Working: Loss of SSI Cash

- Will SSI recipients lose Medicaid coverage if they make too much money to receive SSI benefits, even with all the deductions they can take?
- Probably not if under age 65– they may remain eligible under "1619b Medicaid" or a state Medicaid Expansion (Check for Medicaid expansions in your state).

SSI Benefits and Work 1619b Medicaid

- 1619b Medicaid is continued Medicaid for SSI recipients who make too much money to be eligible for an SSI cash payment
- These individuals can be "deemed" eligible for MassHealth - if they continue to meet all other SSI eligibility criteria, including the asset limit, AND if they meet the "**Medicaid Test**."

SSI Benefits and Work 1619b "Medicaid Test"

- The individual must:
  - have been eligible for SSI for at least 1 month;
  - remain medically disabled;
  - need MassHealth in order to work; and
  - have insufficient income to replace Medicaid and SSI.

SSI Benefits and Work 1619b Medicaid

- The beauty of 1619b Medicaid is that individuals can move back and forth between SSI cash eligibility and 1619b Medicaid as the ability to fluctuate – as long as they remain medically disabled – without having to reapply for SSI.

SSI Benefits and Work 1619b Medicaid

- The bad news is having to continue to meet the SSI asset test – which can be hard while working.
- $2,000 for individual
- $3,000 for couples

SSI and Work - Medicaid Expansion Programs

- The 1999 Ticket to Work Act allowed states to expand Medicaid eligibility for Title II & Title XVI disability benefit recipients working at least 40 hrs per week with income under 450% fpl.
- States are also allowed to expand Medicaid resource eligibility.
- Check your state Medicaid policies.

How Do SSI Recipients Avoid Problems When Working?

- Report to SSA anything that might affect SSI eligibility, e.g., new job, pay change, bonus, loss of job, etc.
- Report w/in 10 days of the month after the end of the month of the change & keep records.
- Understand SSI income counting rules.
- Provide SSA with verifications for all applicable income deductions.

Telephone and Mobile Wage Reporting- POMS SI 00820.143

- Ask SSA about telephone and mobile wage reporting.
- It's convenient and timely.
- Applies only to certain SSI wage reporting
- Requires training by SSA.
- https://secure.ssa.gov/apps10/poms.nsf/lnx/0500820143

SSDI and Work

What is SSDI (Social Security Disability Insurance)?

- SSDI is a Social Security **insurance** program that pays a monthly cash benefit to people who are:
  - **Disabled** = same definition of disability as with SSI (for adults), AND
  - **Insured** = worked and earned enough Social Security credits by paying FICA taxes. For most adults, this means working for about 5 of the last 10 years before becoming disabled.
- SSDI has no income or asset limits.

Earning Credits to Become Insured for SSDI

- Earn 1 credit for every $1220 earned (in 2015). $4880 earned = 4 credits.
- Maximum of 4 credits/year.
- Must pay FICA taxes. No credits for "under the table" work.
- Special SSDI Rule for Young Adults:
  - To be insured for SSDI, adults under 24 years old only need to earn 6 credits in the 3 years before they become disabled.

More About SSDI

- The SSDI benefit amount depends on how much you earned. Average is @ $1000, but could be much lower or higher. Maximum is $2663/month in 2015.
- Certain dependents of the wage earner may be eligible for benefits on SSDI recipient's wage record.
- SSDI recipients receive Medicare after 24 months of eligibility (Recipients with ALS do not have to wait 24 months.) SSDI recipients may also qualify for Medicaid, but need to apply for it.

How Does Work Affect SSDI ?

The rules for SSDI and work are completely different than for SSI. It's like being on another planet.

SSDI Work Incentive Scheme

9 Month Trial Work Period

36 Month Re-entitlement Period in The Extended Period Of Eligibility

The Cliff: Benefit Termination if over SGA

What SSDI Recipients Need to Know

- Have I completed my 9-month **Trial Work Period**? When?
- If yes, when does/did my 36 month **Re-entitlement Period** end?
- Are my countable earnings above the **Substantial Gainful Activity** level?

Trial Work Period

- 9 "service" months in any 60-month period
- Benefits no matter how much earned as long as recipient remains medically disabled
- ONLY 1 Trial Work Period per period of disability

Trial Work Period

- A trial work month used if "services" performed, meaning:
  - Earn more than $780 gross wages per month in 2015 (this amount changes every year)
  - If self-employed, earn more than $780/month gross or work more than 80 hours/month
  - Not just training or therapy
- No deductions for IRWEs; no averaging earnings during TWP

Trial Work Period – Example 1

- Joe went back to work for the first time after getting on SSDI. His gross earnings were:
  - $400 in January 2015
  - $800 in February 2015
  - $1000 in May 2015
  - $500 in June 2015
- How many trial work months did he use?
- Should he get his SSDI for all these months?

Trial Work Period – Example 2

- Jill's gross earnings went over the trial work month "services" limit in the following months:
  - 1. June 2007
  - 2. January 2008
  - 3. February 2008
  - 4. March 2008
  - 5. April 2008
  - 6. May 2008
  - 7. June 2008
  - 8. August 2014
  - 9. September 2014
  - 10. October 2014
  - 11. November 2014
- What month of her TWP is she in as of November 2014?

Example 2 – The Answer

- TWP 1 - June 2007
- TWP 2 - January 2008
- TWP 3 - February 2008
- TWP 4 - March 2008
- TWP 5 - April 2008
- TWP 6 - May 2008
- TWP 7 - June 2008
- **TWP 1 - August 2014 (60-mo. look back to Aug. 2009)**
- **TWP 2** – September 2014
- **TWP 3** - October 2014
- **TWP 4** - November 2014

Extended Period of Eligibility (EPE)– An All or Nothing Deal

- The EPE starts with the month after the 9th month Trial Work month for those who remain medically eligible.
- The first 36 months of the EPE are the Re-entitlement Period.
- In the Re-entitlement Period, whether recipients are payment eligible depends on whether they are working at the Substantial Gainful Activity (SGA) level.

Extended Period of Eligibility – An All or Nothing Deal

- During Re-entitlement Period, one can go back and forth on SSDI payment eligibility depending on SGA, by reporting earnings.
- After the Re-entitlement Period, SSDI entitlement terminates w/SGA level work.
- Otherwise, the EPE continues, if the recipient remains medically eligible, until the first month of SGA level work.
- SGA after the 36th month is "the Cliff."

EPE Example

- Joe's 9th Trial Work month was Dec. 2012. When does his EPE start? When is his Re-entitlement Period?
- Answer: January 2012 and January 2012 through December 2014.
- Between 1/12 and 12/14, he can go back and forth on SSDI payment eligibility depending whether he works at SGA level.
- On and after 12/14, SGA results in termination of entitlement to SSDI.

Is it SGA?

- Work must be substantial and gainful.
- In 2015, work is presumed to be SGA if gross countable earnings are $1090/mo. or higher ($1820/mo. or higher if SSDI for statutory blindness).
- Three additional SGA tests for self-employed, based on worth of work.

How to Count Earnings for SGA

- Earnings count when they are earned, not when the paycheck is received, unlike SSI.
- Count **gross** earnings unless self-employed.
- Only pay for work activity counts.
  - Pay for sick or vacation time doesn't count
  - Bonus pay counts if based on productivity
  - Earnings put into pre-tax Cafeteria and retirement plans count

Is It SGA?–Deductions Available During EPE

- Impairment Related Work Expenses
- Subsidies
  - Employer pays more than actual value of services performed ($ amount or % reduction)
- Special Conditions
  - E.g., close and continuous supervision; work done by job coach; frequent rest periods
- Unincurred Business Expenses (self-employment only) – e.g., free help

Is it SGA? - Continued

- Unsuccessful Work Attempt (UWA)
  - Yes - If work ended or reduced below SGA within 3 months due to the impairment or removal of special conditions related to the impairment.
  - Maybe – If work ended or went below SGA after 3 months and before 6 months. Look at absences, work performance, special conditions, etc.
  - No – If work lasted more than 6 months.
- If it's a UWA, it's not SGA – BUT UWA can't be used after the first EPE SGA month .

Is it SGA? - Continued

- Averaging Earnings
  - Can average until first month of SGA in EPE.
  - Average over entire work period unless:
    - Significant change in work patterns or earnings, or
    - Change in SGA level (e.g., yearly COLA)

SGA Example

- Carmen gets SSDI based on disability. She is in her EPE. Her gross earnings in May 2015 were $1150.
- In May, 2015 she paid for the following impairment related work expenses:
  - $10 for prescription co-pays
  - $75 for therapy
  - $50 for her support dog Max
- Are her countable earnings presumed SGA for May 2015?

SGA Example: The Answer

- NO. Her wages are presumed SGA, but she has IRWEs that reduce her wages below SGA.
- IRWEs: $10 + $75 + $50 = $135
- Gross income $1150 – $135 IRWEs = $1015 countable income for SGA purposes., which is less than the 2015 presumed SGA amount of $1090.

Cessation and Grace Period

- 1st month of SGA after TWP is called the cessation month.
- Despite SGA, SSDI benefits are payable for the cessation month and the following 2 months.
- Income averaging or unsuccessful work attempt concepts do not apply after the cessation month.

After the Re-entitlement Period – The Cliff

- SSDI entitlement ends with the earlier of SGA in the 36th month of the Re-entitlement Period, or with the first SGA month after the 36th month.
- IRWEs, subsidies and special conditions deductions continue to apply after throughout the EPE.
- Averaging and Unsuccessful Work Attempt do **not** apply after the first SGA EPE month.
- If SSDI entitlement terminates due to SGA, no right to continuing benefits during appeal, unlike medical Continuing Disability Review.

Getting Back on SSDI After SGA Termination

- New Application; OR
- Expedited Reinstatement of Benefits (SSDI and SSI)
  - If benefits terminated due to earnings;
  - Unable to perform SGA in month of application;
  - Disabled due to the same or related impairments as those for which previously on benefits; and
  - Request reinstatement within 60 months from date of termination.
  - Up to 6 months of "provisional" benefits available while eligibility is decided.
  - EXR benefits can be retroactive up to 12 months from the date of application.

Extended Medicare

- Medicare continues during EPE even if not eligible for SSDI cash.
- If SSDI terminates after EPE due to SGA, Medicare continues for up to 54 additional months, if remain medically disabled.
- Must pay Medicare Part B premiums quarterly if no SSDI to deduct from.

How To Avoid Problems with SSDI When Working

Understand the Trial Work Period, the EPE, SGA, and how Social Security counts earnings for SSDI.

- Keep records of monthly earnings and deductions such as IRWEs and subsidies.
- Track use of trial work months and Re-entitlement Period months.
- Report changes in jobs and earnings to SSA within 10 days of the end of the month in which the change occurs. The sooner the better.
- Get benefits counseling from a Community Work Incentive Coordinator. http://www.chooseworkttw.net/index.html

Special Needs Trusts National Conference

Friday, October 16, 2015

Breakout Session 3
3:15 P.M. – 4:05 P.M.

Marketing Your Special Needs Planning Skills to Others; Expanding Your Practice Focus

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

- Materials
- PowerPoint

Stetson University College of Law presents:
2015 SPECIAL NEEDS TRUSTS
THE NATIONAL CONFERENCE
October 14-16, 2015
The Vinoy Renaissance Resort & Golf Club
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ATTORNEYS AT LAW

MARKETING YOUR SPECIAL NEEDS PLANNING SKILLS TO OTHERS: EXPANDING YOUR PRACTICE FOCUS

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THE ROLE OF THE SPECIAL NEEDS PLANNER

Special needs planning encompasses much more than simply drafting first and third party special needs trusts. Special needs planners must have a thorough knowledge of the various government benefits programs that are available to individuals with special needs and must be able to advise their clients regarding eligibility for those programs. Special needs settlement planning is a niche practice area that combines traditional government benefits planning with settlement related issues as varied as identifying government benefits programs, determining and compromising Medicare, Medicaid and other liens, advising the personal injury attorney and the client regarding settlement vehicles in the context of disability planning, preparing and administering special needs trusts and creating Medicare Set-Aside Arrangements. Special needs settlement planners may also get involved in assisting family law attorneys whose clients include a disabled spouse or parents of disabled children.

THE TEAM APPROACH TO SPECIAL NEEDS PLANNING

One of the biggest challenges for parents of children with special needs is to ensure that there are sufficient funds available to care for their children when they are gone. Wealth management advisors who are experienced in spotting issues important to families with individuals who have special needs and who can help families maximize available resources are crucial members of the families' team of allied professionals. Other advisors may include, but are not limited to, financial planners, advisors, accountants, personal injury attorneys, matrimonial attorneys and attorneys in other practice areas, insurance agents and trust officers. Families also may rely on teachers, educational specialists, clinicians, doctors, psychologists,

care managers, life care planners, social workers and group home house managers, to name a few. Because these professionals often are trusted advisors to such families, they can be an excellent source of referrals.

BUILDING YOUR SPECIAL NEEDS PRACTICE BY BUILDING RELATIONSHIPS

It's great to get referrals from past and existing clients but it's generally a passive and slow process. By developing strategic relationships with allied professionals, we can exponentially increase referral sources without similarly increasing our marketing budgets. These referral sources often have already developed relationships with the prospective clients and have determined that the clients need and can afford your services. Their clients often value referrals made by their advisors and are less likely to shop around for other special needs attorneys.

Many of those in the allied professions mentioned above have worked hard to gain the trust and confidence of their clients. They have built relationships with their clients over a period of time. When an allied professional refers a client to an attorney experienced special needs law, that professional wants to make sure that the attorney is knowledgeable, ethical, experienced and compassionate. Referring an attorney to a client is a value added component of the allied professional's services.

Special needs planners impart in-depth knowledge and experience. We develop estate planning and incapacity planning strategies to ensure that assets will be available for the person with special needs. We introduce clients to other professionals who can meet the needs of people with special needs and their families. We keep up with the latest developments in the law and we advocate on behalf of our clients. Allied professionals want to develop relationships with

excellent special needs attorneys who can provide a valuable service to your clients. Of course, they also will want you to refer business to them.

CREDENTIALING YOURSELF AS A SPECIAL NEEDS PLANNER

The first challenge in marketing your special needs skill is to persuade others that you are an expert in the field. Public benefits programs are complex and difficult to navigate. Allied professionals want to build relationships with experienced and knowledgeable planners. Of course, you really do need to be knowledgeable to convince others that you know what you're doing. Attending Stetson University College of Law's Special Needs Conferences are an excellent way of gaining the knowledge you need to assist clients. Attending other educational programs and reading articles and books on the subject also will help you in building a solid foundation. Being mentored by a more experienced practitioner will allow you to "learn while you earn."

Let potential referral sources and existing clients know that you are attending special needs conferences and keeping up to date with changes in the law. Write articles and have them published. Others will think you are an expert in what you have written about.

MARKETING YOUR SPECIAL NEEDS PRACTICE

Developing An Effective Strategic Marketing Plan

a. Your time is valuable. You have a business to run and clients to serve. Marketing takes a considerable amount of time and effort. Making a plan will help you to market your special needs planning practice effectively. Incorporating objective measurement criteria into the plan will to help you determine whether your marketing efforts have been worthwhile.

b. Think about your target referral sources. Are they going to be allied professionals or potential clients such as parents of children with special needs? Referrals from trusted advisors tend to weed out “tire kickers,” those who are shopping around for the best price for “products” such as a special needs trust. Perhaps you have a have a relative who has special needs and would prefer to focus your marketing efforts on parents whose children have similar disabilities. The message and the marketing should be targeted to your audience. An article directed at lawyers may look very different from an article directed at parents.

c. Consider your marketing budget. There are ways to market that require very little money but may require a good deal of your time or the time of your staff. One of the most cost-effective ways to market is to use a marketing piece more than once. For example, turn a blog or newsletter article into an article for a periodical. Turn that article into a presentation, or expand the scope of an article published locally into an article that may be of interest to a national audience.

d. If you are comfortable speaking in public or writing articles, you will reach the greatest number of people in the least amount of time. It is important, however, to consider your comfort zone. If you are more comfortable speaking to people one on one, then networking and business development meals may work better for you. It is always worthwhile to step outside of one’s comfort zone and explore different marketing ideas. Because one’s time is limited, however, it is helpful to incorporate special needs marketing into your business plan with a concrete idea of the types of professionals who can business to you and the ways you will go about developing those business referrals.

After you have implemented your marketing strategy, it is helpful to find out from each client upon intake how they came to you. The responses should guide you in determining where to concentrate your marketing efforts.

e. Keep track of your referrals so that you know where to devote your marketing efforts. When a potential client contacts my office for an appointment, he or she is asked for the name of the referral source so that we can thank that source. Let the referral source know that you appreciate the referral.

f. Be flexible. If you belong to a networking group that does not result in any referrals over time, perhaps it is time to turn your marketing efforts elsewhere.

MARKETING ON A LIMITED BUDGET

Make sure your website identifies your special needs planning services

Your website is as important as your office's waiting room. Indeed, it is your "virtual" waiting room. Many potential clients and referral sources may visit your website before they visit your office. Your website should look attractive, be kept up to date and give the visitor a sense of your practice. It should list your accomplishments but it also should identify the services you provide. Your visitors want to know what you can do for them.

Business cards

Think about the content you want on your business cards. Perhaps you want to list satellite offices in addition to your primary office. Perhaps you'd like the back of the card to list the services you provide. Maybe you want to have your photograph imprinted on the card. Make

sure you have enough cards to give extras to potential referral sources. Ask them to give you extra cards to give to your clients.

Write articles.

a. There are many publications that welcome unsolicited manuscripts if they are well-written and about topics that will interest and educate their readership. These include local bar association and section newsletters, law journals, estate planning magazines, periodicals that are targeted to parents of special needs children such as Exceptional Parent, publications targeted to allied professionals such as Psychology Today and newsletters published by various non-profit organizations to name a few.

b. Write an article and publish it on your organization's website.

Join listservs

a. Giving substantive answers to posts on listservs serves the triple purposes of credentialing your expertise, marketing your practice and helping the person who posted the query. It is a great way to network from the convenience of wherever you happen to be at the time, whether at the office or in your home. Make sure your signature block contains your pertinent contact information and a link to your website.

Give presentations

a. Give workshops and other presentations by yourself or offer to co-present with allied professionals.

b. Invite financial planners, trust officers, accountants and other allied professionals to your seminar or workshop.

c. Give presentations to personal injury attorneys through your local bar association or through the local chapter of the AAJ. Bonus: the bar association and the local chapter of the AAJ usually will provide the advertising and the venue.

d. Offer to give free training sessions to staff of agencies that operate group homes and day programs and other agencies that support people with special needs.

e. Give presentations to other attorneys through your state's CLE providers, including presentations to the personal injury and the family law bars.

f. Give presentations to your local Estate Planning Council, comprised of attorneys, financial advisors and tax professionals.

g. Give presentations to schools and colleges for people with special needs.

h. Give presentations at hospitals.

i. Offer attendees at your presentations a small but significant discount on your consultation fee.

Social media

Do you have an account on Linkedin, Facebook and/or Twitter? These are good places to post a link to articles you've written or articles written by others that you think your audience may be interested in reading. You can also let your "followers" know about your marketing events, and conferences that you are attending. Make sure, however, that you are aware of your state's ethics rules involving social media use.

Invite allied professionals for breakfast, lunch, dinner, coffee or a tour of your office.

It's difficult to find the time to meet face to face with others but it's often necessary to build relationships with allied professionals. Allied professionals want to make sure that you are caring, compassionate and a strong advocate in addition to being knowledgeable. Breakfast meetings before you start your work day or inviting others to your office are good ways to get to know others and to have them get to know you.

Join your local Estate Planning Council

Estate planning councils are multi-disciplinary associations that provide educational programs and networking meetings for estate planning professionals such as attorneys, accountants, trust officers, life insurance agents and underwriters, financial planners, wealth managers, and similar professionals. Offer to give presentations at such educational programs on special needs trusts, guardianships, etc.

Become an active member of a local chapter of a non-profit organization that serves people with special needs

Every local non-profit organization has projects that require volunteers. By becoming an active participant, members of that organization will get to know you and the work that you do.

Create and send a monthly e-mail newsletter

In order to do this effectively, you will need an organized database. Whenever you meet new people, ask for their business cards and make sure their contact information goes into your

contacts list. There are free and inexpensive apps that let you scan business cards into lists that may be compatible with the one used by your office.

Join a networking group

There are networking groups that connect people from many different professions and businesses. These people may have family members with special needs or clients who have special needs. Always ask for business cards and have their contact information added to your database.

Attend award dinners, golf clinics and outings and other professional events

Many of us are not comfortable going into a room of people where we don't know anyone and striking up a conversation. The person standing alone by the coffee maker may feel the same way. Go up to that person and introduce yourself. Ask questions designed to make that person talk about themselves. They will return the favor, giving you an opportunity to explain what you do.

Market to your existing clients

Word of mouth from satisfied clients can reap new clients. Periodically offer to review their documents for free. You may end up with more business from existing clients.

Reach out and touch someone

Try to make time to telephone referral sources every now and then. It's all about building relationships and letting people know you care.

MARKETING ON A BIGGER BUDGET

Devoting some money to marketing may reap big results and save you time. You can spend your marketing budget on print advertisements, radio and television advertisements, and newsletters curated by others. You may want to send monthly newsletters in the mail instead of or in addition to electronically delivered newsletters. You can invite clients to "Client Appreciation" events, rent out space to give presentations and give away promotional items imprinted with your contact information. You may be able to hire a public relations firm or a marketing professional to be part of your staff on a full time or part time basis. The key is to keep track of your success in these endeavors over a period of time to determine whether your efforts are worthwhile.

WORKING WITH OTHER PROFESSIONALS

Professionals in other disciplines may have a distorted view of what special needs planners do. Some of them may want to be in charge of the planning and will want you to limit the scope of the engagement to drafting documents necessary to implement that plan if you're an attorney or picking out investments if you're a financial advisor. It is preferable to have a frank discussion at the outset with the other professional about the services you offer to his or her clients and the role of the other professional.

A team approach recognizes that each professional has expertise in a particular area that inures to the benefit of the mutual client. If the client consents, consider inviting the other professional to at least part of your first meeting with the client so that he or she can see how you interact with the client. Chances are that once the other professional has had an opportunity to see you interact with his or her client they will rarely want to continue to attend such meetings.

Building relationships with allied professionals requires us to view these professionals as individuals in the same way we must view our clients as individuals. Do not expect these other professionals to understand all of the services you can provide to their clients. If you can educate them and show them how you will help their clients, they will refer more prospective clients to you.

MARKETING YOUR SPECIAL NEEDS PLANNING SKILLS TO OTHERS:EXPANDING YOUR PRACTICE FOCUS

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Role of the Special Needs Planner

- Gives advice about public benefits programs, eligibility requirements and liens
- Drafts first and third party special needs trusts and other appropriate trusts
- Assists in trust administration
- Gives advice about assisted and surrogate decision-making vehicles such as POAs and guardianship
- Gives advice about laws affecting people with disabilities such as Affordable Care Act, ABLE Act, Military Child Protection law.

Special Needs Settlement Planning

- Combines traditional government benefits planning with settlement related issues
  - Personal injury matters
  - Divorce
    - Spouse or child with special needs

Special Needs Settlement Planning

- Identifies government benefits programs
- Determines and compromises Medicare, Medicaid and other liens
- Advice regarding special needs and other appropriate trusts
- Creates Medicare Set-Aside Arrangements
- Guardianship

Team Approach

- Advisors may include:
  - Other attorneys
  - Accountants
  - Financial advisors
  - Financial planners
  - Insurance agents
  - Trust officers
  - Life care planners
  - Care managers
  - Teachers
  - Family members
  - Medical Providers

Allied Professionals

- Allied professionals can be an excellent source for networking and referrals

Building Your Special Needs Practice by Building Relationships

Credentialing Your Skills

Goal: Persuade others that you are an expert

Give seminars

Write articles

Let others know you are attending conferences or seminars on special needs topics

Developing An Effective Strategic Marketing Plan

- Make a written plan
- Incorporate objective measurement criteria into the plan
- Think about target referral sources
- Consider marketing budget
- Choose marketing strategies that make you comfortable
- Decide how much time you can devote to marketing
- BE REALISTIC

Keeping Track

- Find out how each potential client came to you.
- Responses will let you know where to devote your marketing efforts
- Thank your referral sources
- If tweaks don't improve results, concentrate your marketing efforts elsewhere

MARKETING ON A LIMITED BUDGET

Your Website

- Make sure your website identifies your special needs planning services
- Your website's home page is your firm's virtual "reception area."
- Keep it clean, tidy and up to date.
- List accomplishments
- Identify what you can do for your clients

Business Cards

- Office Locations
- Photo
- List services on the back of the card
- Bring enough to hand out!

Write Articles

- Many publications welcome unsolicited manuscripts
- Legal newspapers
- Bar association newsletters
- Estate planning magazines
- Periodicals targeted to people with special needs and their families
- PTA

Write Articles

- Trade publications
- Non profit organization newsletters and websites
- Post your articles to your own website

Network

- Become active on listservs

Substantive posts help others, credential your knowledge, market your practice, remind people that you are there

- Join networking groups
- Attend in-person conferences

Give Presentations

- Give workshops by yourself or with other allied professionals
- Invite allied professionals to your seminar or workshop
- Give presentations to personal injury attorneys and divorce attorneys
- Offer free training sessions to agency and financial institution staff
- Provide continuing education credits

Give Presentations

- Schools and colleges for people with special needs
- Hospitals
- Estate Planning councils
- CPA associations
- Care manager associations

Give Presentations

- Consider offering attendees small but significant discount on your consultation fee

Social media

- Linkedin
- Facebook
- Twitter
- Follow state ethics rules involving social media use

Meet With Allied Professionals

- Invite allied professionals to share a meal or coffee
- Give allied professionals a tour of your office
- Build relationships by getting to know each other

Join Your Local Estate Planning Council

- Multi-disciplinary associations that provide educational programs and networking opportunities for attorneys, accountants, trusts officers, insurance agents, financial planners, wealth managers
- Offer to give presentations on special needs topics such as guardianship, special needs trusts

Non-profit organizations

- ARC
- NAMI
- Etc.
- Become an active member
- Become a board member

Newsletters

- Paper or e-mail
- Need organized database that is kept up to date
- Scan business cards or manually add to database

Attend events

- Award dinners
- Golf outings and clinics
- Fundraisers

Market to Your Existing clients

- Word of mouth from satisfied clients reap new business
- Keep in touch with existing clients

Reach Out to Referral Sources

- Make time to telephone referral sources
- Build and maintain relationships
- Refer business to others

Marketing on a Bigger Budget

- Advertisements – print, radio, television
- Send newsletters with content curated by others
- Client Appreciation events
- Promotional items with firm contact information imprints
- Engage public relations and/or marketing firms or staff
- Keep track of results

Special Needs Trusts National Conference

Friday, October 16, 2015

Breakout Session 3
3:15 P.M. – 4:05 P.M.

Getting Properly and Legally Paid when Establishing or Defending a Special Needs Trust that Affects SSI Disability Benefits

Presenter:
David J. Lillesand
Attorney at Law
Lillesand & Associates, P.A.
A Member Law Firm of Lillesand,
Wolasky, & Waks, P.L.
Clearwater, FL

- Materials
- Exhibits A1-C
- PowerPoint

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

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Getting Properly and Legally Paid when Establishing or Defending a Special Needs Trust that Affects SSI Disability Benefits

2015 Special Needs Trusts National Conference

The Vinoy Renaissance St. Petersburg Resort & Golf Club
St. Petersburg, Florida

October 16, 2015.

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SUMMARY. Refusing to file a notice of appearance and thus not "representing the client before the agency" is no safeguard from prosecution for failure to get advance fee approval, as the federal court opinion in *United States of America vs. Lewis,* 235 F. Supp. 220 (E.D. Tenn. 1964), formally adopted by the Social Security Administration as a mandatory Social Security Ruling, SSR 65-33c, shows.

This presentation reviews the draconian federal statute designed to protect clients from attorneys, including which individual or entity can agree pay you without advance SSA fee approval when you are creating an SNT to preserve SSI benefits. Review of the Social Security Act, case law, federal regulations, SSA Rulings, and the SSA POMS define when you can take a fee, how to get a fee approved by SSA, and how to appeal the denial of a fee petition.

Failure to follow the rules can result in disbarment, imprisonment and fines, as Mr. Lewis's federal criminal conviction by a jury of his peers, upheld on appeal, shows.

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SSA RULES AND REGULATIONS AFFECTING ATTORNEYS FEES

SSA Rules of Conduct for Representatives

Introduction. It is not only the regulation of fees that can lead to disbarment, fine or imprisonment, but a wide range of violations of the Commissioner's Rules of Conduct for Representatives. However, our focus here is primarily to look at the specific rules on approval of an attorney's fee, when it is required and when it is not. To some extent we will also touch briefly on the mechanics of getting a fee approved, and the two primary avenues for fee approval – the fee petition process and the fee agreement process.

Statutory Obligation and Authority of the Commissioner. The Social Security Administration is charged by Congress to protect claimants from rapacious attorneys overcharging their clients excessive fees. 42 USC §406 – Representation of claimants before Commissioner. Representatives (attorneys and non-attorney representatives, must show that they are "of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. An attorney in good standing who is admitted to practice before the highest court of the State, Territory, District, or insular possession of his residence or before the Supreme Court of the United States or the inferior Federal courts, shall be entitled to represent claimants before the Commissioner of Social Security." 42 USC §406(A)(1).

Further, the Commissioner "may, after due notice and opportunity for hearing, suspend or prohibit from further practice before the Commissioner any such person, agent, or attorney who refuses to comply with the Commissioner's rules and regulations or who violates any provision of this section for which a penalty is prescribed." 42 USC §406(B).

Pursuant to Section 406(a), "the Commissioner shall, if the claimant was represented by an attorney in connection with such claim, fix…a reasonable fee to compensate such attorney for the services performed by him in connection with such claim."

The Commissioner has the power to punish, severely, those who violate the Commissioner's rules and regulations:

> Any person who shall, with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant or beneficiary under this subchapter by word, circular, letter or advertisement, or who shall knowingly charge or collect directly or indirectly any fee in excess of the maximum fee, or make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee, prescribed by the Commissioner of Social Security shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall for each offense be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both.

42 USC 406(a)(5).

The authority of Congress and the Commissioner of Social Security to regulate fees was specifically challenged in federal court. The court in *Weisbrod v. Sullivan*, 875 F.2d 526 (5th Cir. 1989) ruled that the statute and regulations did not violate the attorney's constitutional rights. The Social Security Administration adopted the court's decision as a "Social Security Ruling" found at SSR 90-3c and published in the Federal Register. In another Social Security Ruling (82-19c), the Commissioner cited to a number of cases in which attorneys who had represented applicants before the secretary and who had asked the secretary to award attorney's fees to them for this representation unsuccessfully attempted to have the courts overturn what the attorneys' believed were insupportably low awards. *Chernock v. Gardner*, 360 F.2d 257 (3rd Cir. 1966); *Fenix v. Finch*, 436 F.2d 831 (8th Cir. 1971); *Schneider v. Richardson*, 441 f.2d 1320 (6th Cir.), *cert. denied* 404 U.S. 872 (1971); *Copaken v. Califano*, 590 F.2d 729 (9th Cir. 1979). See the later U.S. Supreme Court case of *Randolph v. U.S.A.*, 389 U.S. 570 (1968) which ended with the same result.

The amount of the fee set by the Commissioner is not subject to court review. *Schneider* v. *Richardson*, 441 F.2d 1320 (6th Cir. 4/28/71); *cert. den.* U. S. Supreme Court (1971).

Federal Regulations. It is possible to practice Social Security/SSI law and comply with the regulations governing attorney conduct before the agency. The Social Security Administration acknowledged as much when they recently revised the federal regulations governing all of us who represent claimants:

> **New Rules of Conduct for Representatives** The vast majority of representatives conduct their business before us ethically and do a conscientious job in assisting their clients. Unfortunately, there are a few representatives whose behavior requires us to take action to prevent them from representing claimants before us. The number of representatives sanctioned each year is small when compared to the entire universe of representatives. For example, over 27,000 representatives were involved at the hearings

> level in Fiscal Year 2011, but we have sanctioned, on average, only 11 representatives per year since 2007. Nevertheless, our experience has convinced us that there are sufficient instances of questionable conduct to warrant additional regulatory authority to address representative conduct that is inappropriate.
>
> **Federal Register** /Vol. 76, No. 247 / Friday, December 23, 2011 /Rules and Regulations..

The Social Security Administration hosts a web page designed to help attorneys comply with the rules, find the law, and secure the forms that SSA prefers (in practical terms, mandates) be used in representing claimants. See http://www.socialsecurity.gov/representation/. On that page is an incredibly useful web-link called "Resources, Fact sheets and Guides" which takes you to all the Social Security laws, regulations, POMS, HALLEX, and other useful tools of practice.

The Social Security Administration administers both Social Security Act Title II claims (RIB, DAC, SSDI, etc.) and Title XVI Claims for SSI benefits. Title II benefits are pre-qualified social insurance programs for the wage earners and their dependents and survivors. Elder and special needs attorneys, however, generally practice in the area of SSI eligibility where countable income and countable resources (assets) are the focus of securing financial eligibility for our clients. Few elder law attorneys also handle medical disability eligibility claims.

However, attorneys should be aware that although this presentation refers to the SSI regulations, there are corresponding and VERY PARALLEL RULES for assisting clients with Title II claims as well. See Citations: 20 CFR §§404.1740 to 1799 for Title II (OASDI) cases and 20 CFR §§416.1540 to 1599 for Title XVI (SSI) cases.

When adopting the rules of conduct and in response to a comment that the rules are too vague, SSA responded that violations will be measured against a "reasonable person" standard:

> These regulations are similar to other standards of conduct, such as the American Bar Association Model Rules, because they do not list every act or omission that might constitute a violation of the rules of conduct. Developing this type of list would be inappropriate and virtually impossible to complete because representing claimants involves limitless factual situations. Rather, we deal with each complaint on a case-by-case basis to determine whether a representative engaged in actionable misconduct under the attending circumstances. When we decide whether to bring an action against a representative, we consider whether a reasonable person, in light of all the circumstances, would consider the act or omission a violation of the relevant rule.

As a general comment about giving advice to claimants, which could include advice to SSI claimants on how to illegally hide assets SSA also noted:

> The Supreme Court recently cited with approval ABA Model Rule of Professional Conduct 1.2(d), which states that a '''lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.''' *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1337–38 (2010). See Model Rules of Prof'l Conduct R. 1.2(d) (2011).

Advising a claimant to refuse to comply with SSI rules or regulations, or doing so as the attorney, is specifically prohibited in the Act and the regulations.

For SSI (Title XVI of the Act) the rules for representing parties are found in the federal regulations below (please note that many areas throughout the presentation are hyperlinked or you convenience to access the original materials directly):

Subpart O—Representation of Parties

416.1500	Introduction.
416.1503	Definitions.
416.1505	Who may be your representative.
416.1506	Notification of options for obtaining attorney representation.
416.1507	Appointing a representative.
416.1510	Authority of a representative.
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416.1515	Notice or request to a representative.
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416.1520	Fee for a representative's services.
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416.1540	Rules of conduct and standards of responsibility for representatives.
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416.1550	Notice of charges against a representative.
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416.1565	Hearing on charges.
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416.1575	Requesting review of the hearing officer's decision.
416.1576	Assignment of request for review of the hearing officer's decision.

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The most important regulations for our purposes are laid out below. Please NOTE that if you are formally citing to the regulations, the correct cite includes the prefix "20 CFR" as in 20 CFR §416.1505. For the purposes of this presentation the items most important are highlighted.

§ 416.1510. Authority of a representative.

(a) ***What a representative may do***. Your representative may, on your behalf—

(1) Obtain information about your claim to the same extent that you are able to do;

(2) Submit evidence;

(3) Make statements about facts and law; and

(4) Make any request or give any notice about the proceedings before us.

(b) ***What a representative may not do***. A representative may not sign an application on behalf of a claimant for rights or benefits under title XVI of the Act unless authorized to do so under § 416.315.

§ 416.1520. Fee for a representative's services.

(a) **General**. A representative may charge and receive a fee for his or her services as a representative only as provided in paragraph (b) of this section.

(b) **Charging and receiving a fee**. (1) The representative must file a written request with us before he or she may charge or receive a fee for his or her services.

(2) We decide the amount of the fee, if any, a representative may charge or receive.

(3) Subject to paragraph (e) of this section, a representative must not charge or receive any fee unless we have authorized it, and a representative must not charge or receive any fee that is more than the amount we authorize.

(4) If your representative is an attorney or an eligible non-attorney, and you are entitled to past-due benefits, we will pay the authorized fee, or a part of the authorized fee, directly to the attorney or eligible non-attorney out of the past-due benefits, subject to the limitations described in § 416.1530(b)(1). If the representative is a non-attorney who is ineligible to receive direct fee payment, we assume no responsibility for the payment of any fee that we have authorized.

(c) **Notice of fee determination**. We shall mail to both you and your representative at your last known address a written notice of what we decide about the fee. We shall state in the notice—

(1) The amount of the fee that is authorized;

(2) How we made that decision;

(3) Whether we are responsible for paying the fee from past-due benefits; and

(4) That within 30 days of the date of the notice, either you or your representative may request us to review the fee determination.

(d) **Review of fee determination**—(1) **Request filed on time**. We will review the decision we made about a fee if either you or your representative files a written request for the review at one of our offices within 30 days after the date of the notice of the fee determination. Either you or your representative, whoever requests the review, shall mail a copy of the request to the other person. An authorized official of the Social Security Administration who did not take part in the fee determination being questioned will review the determination. This determination is not subject to further review. The official shall mail a written notice of the decision made on review both to you and to your representative at your last known address.

(2) **Request not filed on time**. (i) If you or your representative requests a review of the decision we made about a fee, but does so more than 30 days after the date of the notice of the fee determination, whoever makes the request shall state in writing why it was not filed within the 30-day period. We will review the determination if we decide that there was good cause for not filing the request on time.

(ii) **Some examples of good cause follow**:

(A) Either you or your representative was seriously ill and the illness prevented you or your representative from contacting us in person or in writing.

(B) There was a death or serious illness in your family or in the family of your representative.

(C) Material records were destroyed by fire or other accidental cause.

(D) We gave you or your representative incorrect or incomplete information about the right to request review.

(E) You or your representative did not timely receive notice of the fee determination.

(F) You or your representative sent the request to another government agency in good faith within the 30-day period, and the request did not reach us until after the period had ended.

(3) Payment of fees. We assume no responsibility for the payment of a fee based on a revised determination if the request for administrative review was not filed on time.

(e) **When we do not need to authorize a fee**. We do not need to authorize a fee when:

(1) An entity or a Federal, State, county, or city government agency pays from its funds the representative fees and expenses and both of the following conditions apply:

(i) You are not liable to pay a fee or any expenses, or any part thereof, directly or indirectly, to the representative or someone else; and

(ii) The representative submits to us a writing in the form and manner we prescribe waiving the right to charge and collect a fee and any expenses from you directly or indirectly, in whole or in part; or

(2) A court authorizes a fee for your representative based on the representative's actions as your legal guardian or a court-appointed representative.

[45 FR 52106, Aug. 5, 1980, as amended at 72 FR 16725, Apr. 5, 2007; 74 FR 48384, Sept. 23, 2009; 76 FR 45195, July 28, 2011]

§ 416.1525. Request for approval of a fee.

(a) **Filing a request**. In order for your representative to obtain approval of a fee for services he or she performed in dealings with us, he or she shall file a written request with one of our offices. This should be done after the proceedings in which he or she was a representative are completed. The request must contain—

(1) The dates the representative's services began and ended;

(2) A list of the services he or she gave and the amount of time he or she spent on each type of service;

(3) The amount of the fee he or she wants to charge for the services;

(4) The amount of fee the representative wants to request or charge for his or her services in the same matter before any State or Federal court;

(5) The amount of and a list of any expenses the representative incurred for which he or she has been paid or expects to be paid;

(6) A description of the special qualifications which enabled the representative, if he or she is not an attorney, to give valuable help to you in connection with your claim; and

(7) A statement showing that the representative sent a copy of the request for approval of a fee to you.

(b) **Evaluating a request for approval of a fee**. (1) When we evaluate a representative's request for approval of a fee, we consider the purpose of the supplemental security income program, which is to assure a minimum level of income for the beneficiaries of the program, together with—

(i) The extent and type of services the representative performed;

(ii) The complexity of the case;

(iii) The level of skill and competence required of the representative in giving the services;

(iv) The amount of time the representative spent on the case;

(v) The results the representative achieved;

(vi) The level of review to which the claim was taken and the level of the review at which the representative became your representative; and

(vii) The amount of fee the representative requests for his or her services, including any amount authorized or requested before, but not including the amount of any expenses he or she incurred.

(2) Although we consider the amount of benefits, if any, that are payable, we do not base the amount of fee we authorize on the amount of the benefit alone, but on a consideration of all the factors listed in this section. The benefits payable in any claim are determined by specific provisions of law and are unrelated to the efforts of the representative. We may authorize a fee even if no benefits are payable.

§ 416.1528. Proceedings before a State or Federal court.

(a) **Representation of a party in court proceedings**. We shall not consider any service the representative gave you in any proceeding before a State or Federal court to be services as a representative in dealings with us. However, if the representative also has given service to you in the same connection in any dealings with us, he or she must specify what, if any, portion of the fee he or she wants to charge is for services performed in dealings with us. If the representative charges any fee for those services, he or she must file the request and furnish all of the information required by § 416.1525.

(b) **Attorney fee allowed by a Federal court**. If a Federal court in any proceeding under title XVI of the Act makes a judgment in favor of the claimant who was represented before the court by an attorney, and the court, under section 1631(d)(2) of the Act, allows to the attorney as part of its

judgment a fee not in excess of 25 percent of the total of past-due benefits to which the claimant is eligible by reason of the judgment, we may pay the attorney the amount of the fee out of, but not in addition to, the amount of the past-due benefits payable. We will not pay directly any other fee your representative may request.

[72 FR 16725, Apr. 5, 2007]

§ 416.1540. Rules of conduct and standards of responsibility for representatives.

(a) **Purpose and scope**. (1) All attorneys or other persons acting on behalf of a party seeking a statutory right or benefit must, in their dealings with us, faithfully execute their duties as agents and fiduciaries of a party. A representative must provide competent assistance to the claimant and recognize our authority to lawfully administer the process. The following provisions set forth certain affirmative duties and prohibited actions that will govern the relationship between the representative and us, including matters involving our administrative procedures and fee collections.

(2) All representatives must be forthright in their dealings with us and with the claimant and must comport themselves with due regard for the nonadversarial nature of the proceedings by complying with our rules and standards, which are intended to ensure orderly and fair presentation of evidence and argument.

(b) **Affirmative duties**. A representative must, in conformity with the regulations setting forth our existing duties and responsibilities and those of claimants (see § 416.912 in disability and blindness claims):

(1) Act with reasonable promptness to obtain the information and evidence that the claimant wants to submit in support of his or her claim, and forward the same to us for consideration as soon as practicable. In disability and blindness claims, this includes the obligations to assist the claimant in bringing to our attention everything that shows that the claimant is disabled or blind, and to assist the claimant in furnishing medical evidence that the claimant intends to personally provide and other evidence that we can use to reach conclusions about the claimant's medical impairment(s) and, if material to the determination of whether the claimant is blind or disabled, its effect upon the claimant's ability to work on a sustained basis, pursuant to § 416.912(a);

(2) Assist the claimant in complying, as soon as practicable, with our requests for information or evidence at any stage of the administrative decision-making process in his or her claim. In disability and blindness claims, this includes the obligation pursuant to § 416.912(c) to assist the claimant in providing, upon our request, evidence about:

(i) The claimant's age;

(ii) The claimant's education and training;

(iii) The claimant's work experience;

(iv) The claimant's daily activities both before and after the date the claimant alleges that he or she became disabled;

(v) The claimant's efforts to work; and

(vi) Any other factors showing how the claimant's impairment(s) affects his or her ability to work, or, if the claimant is a child, his or her functioning. In §§ 416.960 through 416.969, we discuss in more detail the evidence we need when we consider vocational factors;

(3) Conduct his or her dealings in a manner that furthers the efficient, fair and orderly conduct of the administrative decision-making process, including duties to:

(i) Provide competent representation to a claimant. Competent representation requires the knowledge, skill, thoroughness and preparation reasonably necessary for the representation. This includes knowing the significant issue(s) in a claim and having a working knowledge of the applicable provisions of the Social Security Act, as amended, the regulations and the Rulings; and

(ii) Act with reasonable diligence and promptness in representing a claimant. This includes providing prompt and responsive answers to our requests for information pertinent to processing of the claim; and

(4) Conduct business with us electronically at the times and in the manner we prescribe on matters for which the representative requests direct fee payment. (See § 416.1513).

(c) **Prohibited actions**. A representative must not:

(1) In any manner or by any means threaten, coerce, intimidate, deceive or knowingly mislead a claimant, or prospective claimant or beneficiary, regarding benefits or other rights under the Act;

(2) Knowingly charge, collect or retain, or make any arrangement to charge, collect or retain, from any source, directly or indirectly, any fee for representational services in violation of applicable law or regulation;

(3) Knowingly make or present, or participate in the making or presentation of, false or misleading oral or written statements, assertions or representations about a material fact or law concerning a matter within our jurisdiction;

(4) Through his or her own actions or omissions, unreasonably delay or cause to be delayed, without good cause (see § 416.1411(b)), the processing of a claim at any stage of the administrative decision-making process;

(5) Divulge, without the claimant's consent, except as may be authorized by regulations prescribed by us or as otherwise provided by Federal law, any information we furnish or disclose about a claim or prospective claim;

(6) Attempt to influence, directly or indirectly, the outcome of a decision, determination, or other administrative action by offering or granting a loan, gift, entertainment, or anything of value to a presiding official, agency employee, or witness who is or may reasonably be expected to be involved in the administrative decision-making process, except as reimbursement for legitimately incurred expenses or lawful compensation for the services of an expert witness retained on a non-contingency basis to provide evidence;

(7) Engage in actions or behavior prejudicial to the fair and orderly conduct of administrative proceedings, including but not limited to:

(i) Repeated absences from or persistent tardiness at scheduled proceedings without good cause (see § 416.1411(b));

(ii) Willful behavior which has the effect of improperly disrupting proceedings or obstructing the adjudicative process; and

(iii) Threatening or intimidating language, gestures, or actions directed at a presiding official, witness, or agency employee that result in a disruption of the orderly presentation and reception of evidence;

(8) Violate any section of the Act for which a criminal or civil monetary penalty is prescribed;

(9) Refuse to comply with any of our rules or regulations;

(10) Suggest, assist, or direct another person to violate our rules or regulations;

(11) Advise any claimant or beneficiary not to comply with any of our rules and regulations;

(12) Knowingly assist a person whom we suspended or disqualified to provide representational services in a proceeding under title XVI of the Act, or to exercise the authority of a representative described in § 416.1510; or

(13) Fail to comply with our sanction(s) decision.

[63 FR 41417, Aug. 4, 1998, as amended at 76 FR 56109, Sept. 12, 2011; 76 FR 80247, Dec. 23, 2011]

§ 416.1545. Violations of our requirements, rules, or standards.

When we have evidence that a representative fails to meet our qualification requirements or has violated the rules governing dealings with us, we may begin proceedings to suspend or disqualify that individual from acting in a representational capacity before us. We may file charges seeking such sanctions when we have evidence that a representative:

(a) Does not meet the qualifying requirements described in § 416.1505;

(b) Has violated the affirmative duties or engaged in the prohibited actions set forth in § 416.1540;

(c) Has been convicted of a violation under section 1631(d) of the Act;

(d) Has been, by reason of misconduct, disbarred or suspended from any bar or court to which he or she was previously admitted to practice (see § 416.1570(a)); or

(e) Has been, by reason of misconduct, disqualified from participating in or appearing before any Federal program or agency (see § 416.1570(a)).

[63 FR 41418, Aug. 4, 1998, as amended at 71 FR 2877, Jan. 18, 2006]

§ 416.1550. Notice of charges against a representative.

(a) The General Counsel or other delegated official will prepare a notice containing a statement of charges that constitutes the basis for the proceeding against the representative.

(b) We will send this notice to the representative either by certified or registered mail, to his or her last known address, or by personal delivery.

(c) We will advise the representative to file an answer, within 30 days from the date of the notice or from the date the notice was delivered personally, stating why he or she should not be suspended or disqualified from acting as a representative in dealings with us.

(d) The General Counsel or other delegated official may extend the 30-day period for good cause in accordance with § 416.1411.

(e) The representative must—

(1) Answer the notice in writing under oath (or affirmation); and

(2) File the answer with the Social Security Administration, at the address specified on the notice, within the 30-day time period.

(f) If the representative does not file an answer within the 30-day time period, he or she does not have the right to present evidence, except as may be provided in § 416.1565(g).

[45 FR 52106, Aug. 5, 1980, as amended at 56 FR 24132, May 29, 1991; 62 FR 38455, July 18, 1997; 63 FR 41418, Aug. 4, 1998; 71 FR 2878, Jan. 18, 2006; 76 FR 80247, Dec. 23, 2011]

For our purposes, we want to know when and who we can charge for advising on SSI eligibility, preparing documents, and representation when our beautifully prepared is improperly denied by the agency.

The relevant POMS sections on attorney's fees are found in Section GN 039. The POMS generally are explanatory statements of agency policy. There are specific provisions in the POMS that do not appear in the statute or in the federal regulations. However, the Social Security Act as drafted by Congress gives the Commissioner of Social Security broad powers to enact rules and regulations to carry out the Act.

Are the POMS "law?" In *Draper v. Colvin*, 779 F.3d 556 (8th Cir. 2015), with amicus by the NAELA, the United States Court of Appeals for the Eighth Circuit opined as follows:

> The district court determined that the POMS provisions at issue warrant deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* deference recognizes that an agency's interpretation of the statute it is charged with implementing "may merit some deference whatever its form, given the `specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *Mead*, 533 U.S. at 234 (quoting *Skidmore*, 323 U.S. at 139). Such deference operates along a spectrum. *Id.* at 228. The amount of deference afforded to an agency interpretation under *Skidmore* turns on several factors, including: (1) the thoroughness of the agency's consideration, (2) the validity of its reasoning, (3) consistency with earlier and later pronouncements, (4) formality, (5) expertise of the agency, and (6) all those other factors "which give it power to persuade, if lacking power to control." *Id.* at 228-29 (quoting *Skidmore*, 323 U.S. at 140).
>
> We conclude that the district court properly held that the provisions in the POMS interpreting § 1396p(d)(4)(A) warrant *Skidmore* deference. According respect under *Skidmore* here is consistent with the Supreme Court's conclusions that "[t]he Social Security Act is among the most intricate ever drafted by Congress," *Schweiker*, 453 U.S. at 43, and that Congress routinely relies on agencies to fill gaps in the statutes they administer. *See* 42 U.S.C. § 405(a) (giving the Commissioner "full power and authority to make rules and regulations and to establish procedures" to administer the Social Security Act); *Chevron*, 467 U.S. at 843 (noting that Congress explicitly and implicitly delegates authority to agencies to fill statutory gaps); *see also Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385-86 (2003) (granting the POMS provisions examined in that case respect under *Skidmore*); *Gragert v. Lake*, 541 F. App'x 853, 856 n.1 (10th Cir. 2013) (stating that the POMS warrants respect under *Skidmore*); *Carillo-Yeras v. Astrue*, 671 F.3d 731, 735 (9th Cir. 2011) (stating that the POMS may be entitled to respect under *Skidmore* "to the extent it provides a persuasive interpretation of an ambiguous regulation"); *accord Davis v. Sec'y of Health & Human Servs.*, 867 F.2d 336, 340 (6th Cir. 1989) ("Although the POMS is a policy and procedure manual that employees of the [administering agency] use in evaluating Social Security claims and does not have the force and effect of law, it is nevertheless persuasive.").
>
> We further agree with the district court's conclusion that the POMS provisions at issue here—namely, those in POMS SI 01120.203B—warrant relatively strong *Skidmore* deference. The relevant POMS provisions fall squarely within the SSA's area of expertise. *See Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 303 (3d Cir. 2012) (explaining that the SSA "has a great deal of expertise in administering" the Social Security program). In addition, the POMS provisions demonstrate valid reasoning; that is, the detailed process required for establishing qualifying special-needs trusts contained in the POMS is consistent with "Congress's command that all but a narrow class of an individual's assets count as a resource when determining the financial need of a potential SSI beneficiary." *Draper v. Colvin*, No. CIV. 12-4091-KES, 2013 WL 3477272, at *9 (D.S.D. July 10, 2013) (citing 42 U.S.C. § 1382b). Finally, the provisions interpreting § 1396p(d)(4)(A) are part of a relatively long-standing and consistent interpretation that ensures universal applicability of the statute. *Id.*; *see Sai Kwan Wong v. Doar*, 571 F.3d

247, 261 (2d Cir. 2009) (noting that "the deference due to an agency interpretation is at the high end of the spectrum of deference when the interpretation in question is not merely ad hoc but is applicable to all cases" (quoting *Estate of Landers v. Leavitt*, 545 F.3d 98, 110 (2d Cir. 2008));*cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (declining to grant deference to an interpretation that emerged during litigation rather than through earlier agency action). Draper has not pointed to any contrary interpretation of § 1396p(d)(4)(A) advanced by the SSA since the special-needs trust exception was incorporated into § 1382b. For these reasons, we conclude the district court correctly held that Draper had to comply with the requirements listed in the POMS to establish a qualifying trust.

We are going to cite the full relevant POMS section to two sections here because it speaks directly to when and whether a special needs attorney is required or not required to seek approval of the attorney fee.

Particularly pertinent sections have been highlighted.

GN 03920.005 Representative's Fees Subject to SSA's Authorization

A. Policy - SSA's Authority

The Act directs the Commissioner to authorize the fee an attorney representative (hereinafter we use "attorney") or non-attorney representative may charge and collect for services provided to a claimant in proceedings before SSA.

B. Policy - Fee Authorization Required

A representative, attorney or non-attorney, must obtain SSA's authorization to charge and collect a fee for services provided in proceedings before SSA irrespective of whether (among other things):

- the services result in an allowance, reinstatement, or disallowance action by SSA;
- the attorney/non-attorney was ever recognized by SSA as a claimant's representative, or the individual did not deal directly with or actually contact SSA; or
- the fee is charged to or collected from the claimant or a third party (e.g., an insurance company), unless the requirements in GN 03920.010B. are met.

C. Policy - Proceedings Before SSA

SSA considers any claim or asserted right under titles II, XVI, or XVIII of the Social Security Act, which results in the following, to be a proceeding before SSA for fee purposes:

- an initial, revised, or reconsidered determination or action by a field office or processing center; or
- a decision or action by an Administrative Law Judge or an Administrative Appeals Judge, including a decision issued after a court remand.

D. List of Proceedings Before SSA

Proceedings that require SSA's fee authorization include, but are not limited to, services in connection with:

- an application for Social Security monthly benefits, supplemental security income (SSI) payments, or a lump-sum death payment;
- an application for hospital insurance benefits or supplemental medical insurance benefits;
- a request to establish or continue a period of disability;
- a request to modify the amount of benefits;
- a request to reinstate benefits;
- a request to waive recovery of an overpayment, or an appeal of an overpayment waiver denial determination; and
- a request to revise an earnings record.

GN 03920.010 Representative's Fees Not Subject to Social Security Administration's (SSA) Authorization

A. Definitions

1. Nonprofit organization

A nonprofit organization is one that is exempt from income tax under section 501 or 521 of the Internal Revenue Code, as discussed in RS 01901.540.

Generally, most nonprofit organizations considered within the scope of this section are those, which perform, or arrange for the performance of, representative services on behalf of claimants and assume responsibility for the payment of these services at no cost to the claimants.

2. Government agency

Government agency is used in the common sense of the term (i.e., a Federal, State, county, or city agency).

3. Third-party entity

A third-party entity is a business, firm, or other association, including but not limited to partnerships, corporations, for-profit or nonprofit organizations, or a government agency. As used in this section, a third-party entity provides a claimant with representation and pays the representative's fee and expenses without passing any financial liability to the claimant or any auxiliary beneficiaries.

4. Out-of-pocket expenses

Out-of-pocket expenses are expenses incurred by the representative for which the representative has been paid or expects to be paid. Out-of-pocket expenses include, but are not limited to, the cost of obtaining copies of doctor or hospital reports, birth or death certificates, postage, and photocopying. They do not include paralegal or secretarial services, in-house experts, review of fees, or any share of the representative's overhead or utility costs.

5. Waiver statement

A waiver statement is a written statement a representative submits to document that the representative does not wish for us to withhold past-due benefits for direct fee payment or does not wish to charge or collect a fee. We accept three types of waiver statements:

a. **Waiver of direct payment** – the representative waives the right to receive direct payment of his or her fees. We will authorize the fee the representative will charge, but we will not withhold any amount from the claimant's past-due

benefits or pay that fee. The representative must collect his or her fee directly from the claimant (see GN 03920.020B.2).

b. **Waiver of payment of the fee from a claimant and any auxiliary beneficiaries** – the representative relieves the claimant and any auxiliary beneficiary from all liability to pay a fee and any expenses, but may charge and collect the fee from another source. We may not have to authorize this fee if certain specific criteria are met (see GN 03920.010B).

c. **Waiver of all fees** – the representative will not charge or collect a fee from any source (i.e., the claimant or a third party) for services the representative provided in representing the claimant before us or before a court. This relieves the claimant of all liability to pay a fee and expenses for those services (see GN 03920.020 for waiver procedures).

B. Policy for payment of fee by a third-party entity

1. General provisions of authorization of fees for representatives

A primary purpose of SSA's statutory authority to authorize fees for representation is to protect claimants against unreasonable fees.

However, when a third-party entity pays for the representative's services, the risk of claimants' liability for unreasonable fees is eliminated. Therefore, when a third-party entity pays the representative's fees and certain conditions are met, we do not need to authorize the representative's fee.

2. When we do not need to authorize a fee

Our regulations at 20 C.F.R. §§ 404.1720 and 416.1520 do not require fee authorization by SSA under the following conditions:

- The claimant and any auxiliary beneficiaries are free of direct or indirect financial liability to pay a fee or expenses, either in whole or in part, to a representative or to someone else; and
- A third-party entity, or a government agency from its own funds, pays the fee and expenses incurred, if any, on behalf of the claimant or any auxiliary beneficiaries; and
- The representative submits to SSA a form SSA-1696-U4 (or a written statement) waiving the right to charge and collect a fee and expenses from the claimant and any auxiliary beneficiaries as specified in GN 03920.020B.3.b.

C. Policy for out-of-pocket expenses

We do not authorize out-of-pocket expenses (see examples of out-of-pocket expenses in GN 03920.010A.4). These expenses are a matter for the representative and claimant to settle. However, we will question out-of-pocket expenses if it appears that the representative is attempting to circumvent our fee authorization process by designating his or her services as out-of-pocket expenses or if the alleged out-of-pocket expenses appear unreasonable. If we question out-of-pocket expenses, we may require the representative to provide proof of such expenses.

D. Policy for court proceedings

We do not consider the services in proceedings before state or Federal courts (even if the state court action was to establish relationship or death) to be services provided in connection with proceedings before us; therefore, the fee authorization provisions do not apply to court proceedings. However, we must still withhold past due benefits for possible direct payment of fees authorized by the court. For information about

reimbursement of expenses incurred in the course of court actions (see, Equal Access to Justice Act GN 03990.000).

E. Policy for legal guardian or other state court-appointed representative

A legal guardian, committee, conservator, or other state court-appointed representative (hereinafter "legal guardian") may ask the court to approve a fee for services provided in connection with proceedings before us. If the court orders a fee, we do not need to authorize that fee.

- If a legal guardian asks us for information regarding fees, advise the legal guardian to ask the state court to approve a fee for all services, including those provided in connection with proceedings before us.
- If a legal guardian files a fee petition, advise the legal guardian that we do not act on the fee request until the state court has acted.

EXCEPTION: If the legal guardian notifies us that the court declined to order a fee on the fee request, advise the legal guardian to file a fee petition for only those services provided in proceedings before us. If the legal guardian files a fee petition, the legal guardian must provide all of the following:

- copies of the accounting submitted to the court;
- copies of the fee request submitted to the court; and
- the court's decision to not act on the fee request, or any court-ordered fee for services performed as legal guardian.

F. Policy for Medicare Parts A and B cases

1. Fee agreement process not applicable to Medicare cases

The fee agreement process cannot apply in Medicare-only cases because there are no "past-due benefits" from which to calculate a representative's fee. A successful appeal of a claim for payment or service in Medicare results only in a decision to:

- pay a provider or supplier directly for items or services already provided or rendered;
- reimburse a beneficiary for monies the beneficiary has already paid directly to the provider or supplier for an item or service; or
- approve authorization for a request for service.

2. Services below the hearing level for Part B cases

We do not consider services below the hearing level in connection with claims in certain proceedings exclusively before Part B intermediaries or carriers to be services provided in connection with proceedings before us; therefore, the fee authorization provisions do not apply to those services.

3. Fee petition filed by a representative for services provided to the beneficiary

We use the same procedures and regulations to approve a fee petition filed by a Medicare beneficiary's representative (see 20 CFR 404.1720 – CFR 404.1725). However, because there are no past-due benefits in Medicare cases, there are no direct pay provisions for representatives.

4. Fee petition filed by a representative of any party other than the beneficiary

In Medicare cases, we do not authorize a fee for services provided to anyone other than the beneficiary because the Centers for Medicare and Medicaid Services (CMS)

> considers 20 CFR Part 404, Subparts J and R to apply only to fee petitions filed by the representative of a beneficiary (see 42 CFR 405.701(c) and 42 CFR 405.801(c)).

How attorneys who regularly practice Social Security law view the application of these federal regulations and the POMS. Generally, for the vast majority of the 27,000 U.S. Social Security practitioners, it is never an issue – you always are getting fees set by or approved (or reduced or denied) by the agency, and in the vast majority of cases, the fees are based on a contingent fee of 25% of the past due ("retroactive") benefits secured for the claimant if the case is successful.

Tom Bush, a long-time author of the best Social Security practice manual available[1], says:

> There are only three circumstances in which SSA has acknowledged that the fee approval regulations do not apply—two appear in the regulations and the other in an informal letter. If you are paid for representing a claimant by an "entity"—any business, firm or other association, for-profit or nonprofit organization—or government agency, you will not be required to have your fee approved as long as: 1) the claimant and auxiliaries are free of any liability for fees or expenses; and 2) you submit a written statement in the form and manner required by SSA waiving the right to charge and collect a fee and any expenses from the claimant and auxiliaries. 20 C.F.R. § 404.1720(e)(1). … Be sure to check this box if your fee will be paid by an "entity."
>
> "Entity" is defined in 20 C.F.R. § 404.1703 as "any business, firm, or other association," including for-profit organizations and not-for-profit organizations. Profit making entities are likely to be long term disability insurance (LTD) carriers, which often pay representatives to assist with an insured's Social Security disability claim. If all of the requirements of the regulation are met, you do not have to seek approval of your fee from SSA if you are paid by such an entity. *See also* POMS GN 03920.010B.
>
> The regulations also provide that if you represent a claimant before SSA and a court authorizes your fee as a legal guardian or court-appointed representative, you do not need to seek approval of your fee from SSA. 20 C.F.R. § 404.1720(e)(2).
>
> If a claimant doesn't appoint you as a representative and you do not perform what SSA regards to be "services" in connection with a claim, you may charge a fee without first getting it approved by SSA. The only example of this appears in an SSA opinion letter which was sent to NOSSCR. SSA approved the practice of some attorneys who charge a fee for evaluating a case but ultimately decide not to represent the claimant. Such attorneys request money from the claimant at the initial interview. If the attorney accepts the case for representation, the money is put into a trust account to be used for payment of expenses in the claimant's case. If the attorney evaluates the case and decides to decline representation, the payment is accepted for case evaluation, something which SSA has said is not "services." Contact NOSSCR for a copy of the SSA opinion letter.[2]
>
> Do the fee-setting regulations apply if an attorney provides "services" in connection with a pending claim but the attorney is not officially appointed as a "representative" pursuant to 20 C.F.R. § 404.1707? For example, can you counsel a claimant in an overpayment case and avoid the operation of the fee-setting regulations by never being appointed as the representative? Some attorneys have been known to argue that unless they are appointed as a representative, the fee-

[1] *Social Security Disability Practice*, Section 746, by Thomas E. Bush, a practicing Social Security disability attorney in Milwaukee, Wisconsin; publication by James Publishing (866) 725-2637; www.JamesPublishing.com.

[2] A Memo from NOSSCR to members which includes the 1982 SSA letter to NOSSCR is attached through the kind assistance of Barbara Silverstone, Executive Direct of NOSSCR. Join NOSSCR at www.nosscr.org.

setting regulations do not apply. They point out that only appointed representatives are required to file fee petitions under 20 C.F.R. § 404.1720(b).

Nevertheless, SSA's policy is that an SSA fee authorization is required "irrespective of whether" the attorney "was ever recognized by SSA as a claimant's representative, or the individual did not deal directly with or actually contact SSA." POMS GN 03920.005B. Thus, SSA may argue that the ambiguous language of 20 C.F.R. § 404.1740(c) is broad enough to impose penalties on an attorney who charges a fee that is not approved. This controversy illustrates yet another example of the poor quality draftsmanship in the attorney fee regulations. Cf. §726. Because penalties are involved, caution is appropriate. For an exceptionally broad interpretation of services, *see* SSR 65-33c, which adopted as a Social Security ruling the court's decision in *United States v. Lewis*, 235 F. Supp. 220 (E.D. Tenn. 1964), a criminal case in which defendant Lewis, an accountant, assisted with preparation of fraudulent self-employment tax returns in order to establish eligibility for Social Security benefits. This was found to constitute services in connection with a claim for Social Security benefits.

The Social Security Administration adopted the *Lewis* case as a "Social Security Ruling" quoted below.

What are the "Social Security Rulings"? The Social Security Rulings or SSRs are "a series of precedential standards to be used in subsequent similar cases decisions relating to the programs administrated by SSA and are published under the authority of the Commissioner of Social Security. SSRs may be based on case decisions made at all administrative levels of adjudication, Federal court decisions, Commissioner's decisions, opinions of the Office of the General Counsel, and policy interpretations of the law and regulations." SSRs are announced through publication in the Federal Register.

It is the oldest continuous ruling in existence on attorney's fees, has never been withdrawn or modified, and merely quotes verbatim a part of the federal court criminal appeal that held an accountant liable for failure to secure approval of a fee <u>for preparing a federal tax return</u>.

SSR 65-33c: SECTION 206. -- REPRESENTATION OF CLAIMANT -- FEE FOR SERVICES – VIOLATION - 20 CFR 404.975, 404.976, 404.977, and 404.977a

UNITED STATES OF AMERICA v. LEWIS and HICKS, 235 F. Supp. 220 (1964)

Whether the services performed in the preparation of a self-employment tax return are services performed in connection with a claim before the Secretary for which the charging of a fee would be subject to regulation by the Secretary under section 206 of the Act, depends upon whether the real purpose of determining the self-employment income is to knowingly further a claim then made or to be made before the Social Security Administration.

WILSON, *District Judge:*

* * * * * *

An issue of law that merits careful consideration is raised upon behalf of the defendant Lewis with respect to her conviction upon Counts 3 thru 6. The defendant is charged in these counts with charging fees in excess of that permitted by law for services to social security applicants in

connection with the claim for social security benefits. The defendant contends that such charges as were made by her were for work performed in the preparation of the subject's income or self-employment tax returns and not for any representation before the Social Security Administration. The defendant further contends that the law does not purport to authorize the Social Security Administration to regulate fees with respect to services performed in the filing of tax returns, including self-employment tax returns, and that charges for such tax services could not constitute a criminal offense.

The difficulty with the defendant's contentions in this respect is twofold. In the first place, a dispute of fact exists under the record in this case whether the fees charged were solely for services in regard to tax work, as testified by the defendant, or whether in fact the fees charged were at least in part for services rendered the social security applicant in other respects in the presentation and processing of his claim before the Social Security Administration. In the second place, it cannot be held as a matter of law that charges for services performed in regard to preparation of self-employment tax returns could not under any circumstances constitute a violation of the law regulating fees charged for services performed in connection with any claim before the Social Security Administration.

The statute here involved, 42 U.S.C. § 406, provides in relevant part:

"* * * The Secretary may, by rule and regulation, prescribe the maximum *fees which may be charged for services performed in connection with any claim before the Secretary* under this subchapter, and any agreement in violation of such rules and regulations shall be void. Any person who shall * * * knowingly charge or collect directly or indirectly any fee in excess of the maximum fee, or make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee, *prescribed* by the Secretary shall be deemed guilty of a misdemeanor * * *".

The regulation governing fees adopted in accordance with the above statute, to the extent that the same is relevant to the present discussion, is as follows:

"The fee that an attorney or other person may charge the claimant for representing him in matters before the social security administration must be approved by the social security administration in all cases except (exceptions not applicable). * * * "

In light of the issue now before the Court, it is apparent that the significant language in the above statute is the phrase "service performed in connection with any claim before the Secretary". The word "services" does not necessarily exclude tax services. Neither does it necessarily include tax services. Rather, such inclusion or exclusion must depend upon the facts of the particular case. Whether a fee charged for preparation of the self-employment tax return would or would not be subject to regulation would depend upon whether, under the facts of the particular case, such service might properly be considered a "service performed in connection with any claim before the Secretary". If the real purpose of determining self-employment income was to knowingly further a claim then made or to be made before the Social Security Administration, such would constitute a "service" the fee for which may be regulated. On the other hand, if there was no evidence that the real purpose of the service performed in the determination of the self-employment income was knowingly performed in furtherance of a claim then made or to be made before the Social Security Administration, such work would not constitute a service the fee for which was subject to regulation.

Under the record in this case there was evidence from which a jury could conclude on each count that the tax work performed by the defendant Lewis was in fact a service knowingly performed in connection with a claim before the Social Security Administration. In each instance there was evidence that (a) the applicant initially came to or was referred to the defendant for assistance in making a social security claim, (b) application was made for social security benefits immediately before or after the tax work was performed, (c) the tax returns filed were delinquent returns and reflected only delinquent self-employment tax which would have the effect of establishing social security eligibility, and (d) even though the defendant contended no charge was made for additional services, but only for the tax work, in most instances the defendant performed additional services in connection with the claim before the Social Security Administration. The

> Court is therefore of the opinion that under the record in this case a jury issue existed under Counts 3, 4, 5, and 6 as to whether the fee charged by the defendant was one subject to regulation under 42 U.S.C. § 406.
>
> Having fully considered the defendants' motions for new trial, the Court is of the opinion that the motions should be overruled as to each count thereof.
>
> An order will enter accordingly.

Accountants prepare literally hundreds of thousands of federal tax returns each year. Is SSA saying that all documents produced for a client for a fee must have that fee approved by SSA? Any sentient being in the United States would know that is not the case. So what are the factors that may distinguish the *U.S. v. Lewis* case from the typical accountant, or for our purposes, the typical elder and special needs lawyer preparing a Last Will and Testament containing a third party Special Needs Trust or a personal injury first party Special Needs Trust?

There are some factors that may distinguish the *Lewis* case from the normal practice:

- First, this was a criminal case against an individual who was seeking, with criminal intent, to submit not just a tax return, but a fraudulent one by producing documents to the Internal Revenue Service alleging self-employment earnings that would secure quarters of coverage to trigger Social Security benefits for which the client was not otherwise eligible;
- The U.S. Attorney in prosecuting the criminal case included the technical violation of the Social Security Act as a lesser-included offense;
- The documents produced by the accountant had as their entire goal, the knowing qualification for benefits for which the defendant account know that claimant was not potentially legally eligible for;
- SSA does not include any other single case where representation resulted in criminal prosecution, so *Lewis* may be held to its particular facts;
- This is not a prosecution to remove a practitioner from the Social Security roles where the standard enunciated by SSA in the 2011 notice of final rules is "reasonableness" standard based on all the facts.
- This was a decision, 60 years ago, from a District Court, not the U.S. Court of Appeals.

There are some factors, however, that should strike fear in the hearts of well-meaning elder and special needs attorneys in the *Lewis* case that are eerily close to our practice of elder and special needs law. Specifically, in denying a motion for new trial by the tax accountant, note that the federal judge listed several factors that indicate SSA fee approval was required:

> …If the real purpose of determining self-employment income was to knowingly further a claim then made or to be made before the Social Security Administration, such would constitute a "service" the fee for which may be regulated. On the other hand, if there was no evidence that the real purpose of the service performed in the determination of the self-employment income was knowingly performed in furtherance of a claim then made or to be made before the Social Security Administration, such work would not constitute a service the fee for which was subject to regulation.
>
> Under the record in this case there was evidence from which a jury could conclude on each count that the tax work performed by the defendant Lewis was in fact a service knowingly performed in connection with a claim before the Social Security Administration. In each instance there was evidence that (a) the applicant initially came to or was referred to the defendant for assistance in making a social security claim, (b) application was made for social security benefits immediately before or after the tax work was performed, (c) the tax returns filed were delinquent returns and reflected only delinquent self-employment tax which would have the effect of establishing social security eligibility, and (d) even though the defendant contended no charge was made for additional services, but only for the tax work, in most instances the defendant performed additional services in connection with the claim before the Social Security Administration. The Court is therefore of the opinion that under the record in this case a jury issue existed under Counts 3, 4, 5, and 6 as to whether the fee charged by the defendant was one subject to regulation under 42 U.S.C. § 406.
>
> [235 F. Supp. 220, 222-223]

Following this line of the court's reasoning, for special needs law attorneys it appears that a fee petition to SSA is required for preparation of a d4A SNT or a joinder agreement for a d4C pooled trust, or modification of a third party SNT where:

1. The client initially comes to or was referred to the attorney for assistance in making a SSI claim;
2. An application for new or continuing benefits was made immediately before or will be after the special needs planning work is performed;
3. The document(s) produced or services would have the effect of establishing SSI eligibility; and

4. Regardless if the services performed produced some other benefit (e.g., estate planning), and the attorney contends that no charge was made for the SSI services and only for the estate planning services, "in most instances" the attorney will have performed additional services in connection with the claim before the Social Security Administration requiring fee approval.

Application of the Fee Approval Rules and Regulations. What works and what doesn't? Where is the line? Like all good legal questions, the good legal answer is, "it depends."

Office consultations. At first blush, the *Lewis* case casts a broad net. Are there any exceptions recognized by SSA? Yes, in a private opinion letter sent by SSA to the national organization of Social Security attorneys, NOSSCR (the National Organization of Social Security Claimant Representatives which is NAELA's counterpart in the SSA world), the agency expressed its opinion that Social Security attorneys who charge a consultation fee to evaluate whether to take a case, would be allowed to charge for the initial conference fee, and not have that fee approved in advance by SSA.

Not appearing before the agency (not submitting a notice of representation). However, can an attorney avoid the attorney fee regulations by not submitting a SSA 1696 Notice of Appointment of Representative form which would, if submitted, force SSA to deal both with the claimant and the attorney? Not really, because as noted above in the POMS, "a representative…must obtain SSA's authorization to charge and collect a fee for services provided in proceedings before SSA irrespective of whether…the attorney/non-attorney was ever recognized by SSA as a claimant's representative, or the individual did not deal directly with or actually contact SSA." POMS GN 03920.005B.

Furthermore, SSA defines "proceedings before SSA" to include "services in connection with" an application for benefits, a request to establish or continue benefits, and to modify or reinstate benefits, among other things. POMS GN 03920.005D. SSI eligibility services by elder and special needs attorneys clearly involves helping the client get, keep, or change benefit amounts the client hopes to achieve.

Charging fees to the client's special needs trust. Some elder and special needs attorneys have argued that SSA fee approval is not required if the fee is to be paid by the trustee of the client's special needs trust. Again, however, SSA specifically advises in the same POMS

paragraph quoted above that SSA must approve the fee even if "the fee is charged to or collected from the claimant or a third party (e.g., an insurance company), unless the requirements in GN 03920.010B. are met."

So we are potentially under the agency's fee approval process by POMS GN 03920.005 unless we can find an exemption in POMS GN 03920.010.

Clear Exceptions to the Fee Approval Process. POMS GN 03920.010 does provide some clear exceptions to SSA fee regulations.

Waiving Fees - Not charging a fee to the claimant or a third party. Waiving all fees and doing the matter pro bono obviously removes the attorney from the fee approval process. However, the attorney must indicate on the Notice of Appointment of Representative that he is formally waiving any and all fees from any source, complying with another section of the POMS, GN 03920.020; 20 CFR §416.1520(e).

Charging a fee that will be paid by an exempt third party. If the client will be "free of direct or indirect financial liability to pay a fee or expenses" because a "third-party entity, or a government agency" will pay from its own funds the costs and fees, and the representative has filed a 1696 form or written statement waiving all fees, the fee approval regulations will not be in play. POMS GN 03920.010B.2.

Working under contract for a Legal Services or Legal Aid program, or a Long Term Disability carrier is an example of an exempt third party payment.

The key operative phrase here is that the client be free of even "indirect financial liability" to pay the fee or costs. Suppose the attorney is employed to defend the validity of a trust, arguing that the trust should not be a countable resource. There may be a difference in application here between a Third Party Special Needs Trust (it was never the client's money) and benefits multiple generations and parties, and a First Party Special Needs Trust containing only the assets of the disabled claimant, such as a personal injury settlement of the client's claims or an inheritance the client already received free of trust but has to be transferred to a self-settled d4A First Party Special Needs Trust to maintain SSI eligibility. What is your state law with regard to the legal interest that an SSI claimant may have in the trust in question? In the absence of a clear pronouncement by SSA, each practitioner is going to have to decide how to apply the SSA rules and regulations. Reasonable people may disagree, but each will take action (or not) based on their own comfort level.

Legal Guardian's Fee for Establishing a Special Needs Trust Approved by the State Guardianship Court. One of the regulations, 20 CFR §416.1520(e)(2) specifically removes the SSA fee approval process where "a court authorizes a fee for your (the client's) representative based on the representative's action as your legal guardian or a court-appointed representative." POMS GN 03920.010B.2.

More helpful is POMS GN 03920.010(E) which further explains that:

> A legal guardian, committee, conservator, or other state court-appointed representative (hereinafter "legal guardian") may ask the court to approve a fee for services provided in connection with proceedings before us. If the court orders a fee, we do not need to authorize that fee.

Thus, the legal guardian's fee for taking steps to petition for the establishment of a Special Needs Trust and to move the guardianship funds, which count against eligibility, to an SNT which doesn't count, would be protected IF the court considers and approves the legal guardian's fee.

Attorney's Fee for Establishing a Special Needs Trust through "court proceedings." Compare GN 03920.010(E) "A legal guardian…may ask the court to approve a fee for services provided in connection with proceedings before us. If the court orders a fee, we do not need to authorize that fee" (emphasis added) with the provisions for attorneys with the broader rule in subparagraph (D):

> We do not consider the services in proceedings before state or Federal courts (even if the state court action was to establish relationship or death) to be services provided in connection with proceedings before us; therefore, the fee authorization provisions do not apply to court proceedings.

GN 03920.010(D). The latter exception for "court proceedings" does not require that the attorney fee has to be ordered by a court.

The court proceedings exception is not limited to establishing the SNT in guardianship court. Trial and other divisions of the courts would fall under this exception.

However, there is no further explanation of what "court proceedings" means. Is it simply the preparation of a motion to establish a Special Needs Trust rather than drafting the trust itself? What if the elder or special needs attorney prepares the SNT at the request of the trial attorney who presents it in the court proceedings, but the SNT attorney is not an attorney of record nor even appears in person at any hearings?

The example given "the state court action was to establish relationship or death" clearly is a proceeding in state court. The last two sentences of subparagraph D suggest that when drafting this POMS, SSA staff were considering the "court proceedings" exception more in the context of federal court appeals of denial of SSI claims. If the court awards a fee, but it is to be paid from the client's retroactive award, SSA "must still withhold past due benefits for possible direct payment of fees authorized by the court. For information about reimbursement of expenses incurred in the court of court actions (see Equal Access to Justice Act GN 03990.000)." Since EAJA fees are routine in federal court actions against the agency but not found in state court actions in general, the context of the broad "court proceedings" exception may be limited to federal court appeals of denial of SSI claims, and not be a broad grant of immunity to elder and special needs attorneys whose fees are almost exclusively related to state court proceedings if they are in state court at all.

However, the plain language of the POMS – "services in proceedings before state or Federal courts" – would seem to indicate a safe harbor for attorneys who use probate, guardianship or general jurisdiction or trial courts to take steps necessary to qualify the client for SSI benefits.

For both legal guardians and for attorneys, if the court orders less than what the representative wants, a fee for work other than that connected with the "court proceedings" requires the filing of a fee petition with Social Security before payment for any additional "services." Further, with respect to legal guardians at least, SSA will advise the guardian that "it will not act on the fee request until the state court has acted."

Practice Suggestions. Where a court may have to approve a personal injury settlement for a minor child or a disabled incompetent adult, ask the PI attorney to include your fee in the list of items to be approved by the court to help bring your services within the "court proceedings" exception to SSA fee approval.

Secondly, when drafting a d4A Special Needs Trust that will be required as the result of a personal injury award or an inheritance from an open probate estate, it may be advisable to place the court style of the case, "Smith v. Jones, Case No. 15-7895…" at the top of the Special Need Trust document to help tie the work to the "court proceedings" even in cases where a parent or grandparent is establishing the trust as grantor, but certainly in cases where the SNT is established by the legal guardian or by the court.

Some Hypotheticals. As can be easily seen, the application of the statute and the federal regulations, albeit aided by the slightly more detailed POMS provisions, still leaves an enormous gap in defining "where's the line." The line, is more of a blurred gray bar. We have some black, and we have some white, but there's an enormous gray DMZ between. We've already identified a few that are clearly black or clearly white.

The oral presentation will raise for discussion, some fact patterns that some attendees will find easy, some will find difficult, and others will find baffling:

1. Client calls for information on how to hide the $5,000 he just won in a neighborhood craps game
2. Trustee calls asking if a proposed distribution to pay traveling companions for a disabled beneficiary to go to Disney World would violate SSI rules
3. Client calls for information on how to do a "spend-down" on exempt resources to continue eligibility for SSI and SSI-related Medicaid
4. Parents call asking you to appeal the SSA determination that the d4A First Party Special Needs Trust they established for their adult daughter is invalid
5. You agree to prepare a brief for the client to hand the Administrative Law Judge at the hearing in which the client's will appear "without counsel" but you do not agree to go to the hearing as the attorney for the client
6. The trustee calls and asks your assistance in defending claims by the SSI beneficiary that the trustee has mismanaged the trust funds, or has made disbursements which resulted in termination of SSI benefits
7. The client beneficiary of a Special Needs Trust calls and wants advice only on what to tell the SSA local office staff about the establishment of an SNT that you did not draft
8. The client employs you to assist in completing a Joinder Agreement to place $30,000 of his $40,000 personal injury settlement in a Pooled Special Needs Trust, but the client tells you he intends to keep $10,000 in cash in a box under his bed
9. Wells Fargo calls asking you to represent them as trustee in a court modification of a testamentary trust so that one of the beneficiaries of the Third Party trust will not lose their SSI benefits which was the wishes of the testator/grantor when the trust was created

10. Wells Fargo calls asking you to train their Special Needs Trust Officers to answer questions and properly manage the SNTs they administer

11. The sister of a disabled sibling calls asking how to collect insurance or pension benefits in a way that will not reveal the name of the SSI claimant or provide his Social Security number so the funds won't be traced

12. The mentally competent client asks you to draft a First Party SNT so they can file a claim for SSI benefits; the trust will be established by a living parent or grandparent, with a gift from a family member, and without the necessity of court involvement

Some Comments and Materials on the Mechanics of the Fee Approval Process. Once it's determined that the case will require SSA fee approval, what are the options and the mechanic? This topic alone, is subject to CLE courses and could occupy an additional three hours in this presentation. However, the basics are outlined below.

Practice Tip – Attorney's Trust Account: Even on a good day, it can take a very long time to secure approval of a fee. Client satisfaction with attorney services falls at a great rate, even if the attorney was successful in completing the mission and getting the benefits the client sought. If the attorney plans to charge hourly or a flat rate, rather than on a contingent fee basis, to guarantee a fee for services performed, the attorney may want to charge a retainer and place the funds in an escrow or attorney's trust account until SSA approves the fee. Such a procedure is specifically authorized by the Commissioner. Per SSR 82-39:

> Consistent with Social Security law and regulations, an attorney may solicit from Social Security and black lung claimants whom he or she represents before SSA a deposit of money into a trust or escrow account as a means of assuring payment of the fee for services in connection with such representation; *provided that*:
>
> > a. the claimant willingly entered into the trust or escrow agreement and willingly deposited the money in the trust or escrow account; and
> >
> > b. none of the money in the account is paid over to the attorney unless and until SSA has authorized a fee for the attorney, and then only in an amount up to, but not exceeding, the authorized fee; and
> >
> > c. any funds in the account in excess of the authorized fee will be refunded promptly to the claimant.
>
> At the time the attorney petitions for a fee, the amount of money held in the trust or escrow account must be disclosed to SSA.

Fee Petition Process versus Fee Agreement Process. The Social Security Administration has two separate methods for reviewing and approving attorney's fees, the "fee agreement process" and the "fee petition process."

The "fee agreement process" depends on the claimant having a retroactive award (that is, benefits owed to the client by SSA but not yet paid), is relatively quick, but does limit the attorney fee recovery to no more than $6,000, a cap last fixed by the Commissioner in 2009 with no increase in the last five years. The typical approved fee agreement limits the fee to 25% of the past due benefits, and no fee petition is required. The payment is automatic, and SSA does the calculation of the retroactive fee and the attorney's 25% and sends the check directly to the attorney. Other than costs, the attorney waives charging any additional fee. SSA will automatically execute the fee agreement payments if the attorney has filed the appropriate documents confirming his representation (the SSA 1696 Notice of Appointment) and a copy of an approved Attorney Fee Agreement between the attorney and the client.

The "fee petition process" must be used in all other cases. It requires keeping very detailed time records. See the form[3] for petitioning for approval of the fee. The fee petition process has been described as "slow, burdensome, generally stingy and leaves inordinate discretion in the hands of decision makers." Bush, *supra*, §700.

Whether the attorney will want to charge hourly or a flat rate and use the fee petition process, or the fee agreement process, a contingent fee based on the amount of the client's SSI retroactive award, depends on whether the elder and special needs attorney is playing offense or defense.

By offense, we mean that the elder or special needs attorney is proactively preparing documents that will secure for the first time or maintain SSI eligibility. If the client is already receiving SSI and the Special Needs Trust is merely to maintain eligibility, for sure the attorney will want to use the Fee Petition Process and not the Fee Agreement Process because there may be no retroactive award and 25% of zero is zero. Even if the client is about to apply for the first time for SSI, it is doubtful that if the trust is properly prepared, meeting all the SSI rules in the POMS SI 01120.199 et seq., the likelihood of the SNT being immediately reviewed and approved is high, and therefore there could be almost no retroactive benefits from which to pay

[3] SSA has quick and easy access to standard forms for Request for Hearing, Notice of Appointment of Representative, as well as the Petition for Approval of a Fee through its website forms page. Many of the forms are PDF and fillable.

the attorney out of the client's award. Therefore, the attorney would probably want to charge a flat rate or hourly fee and submit a Fee Petition using the form.

By defense, we mean that the claimant is not currently on SSI benefits because SSA has denied eligibility and the attorney is going to contest the denial. In that case, given the very long time to request and have a hearing before an ALJ, the attorney may wish to use the Fee Agreement Process. A contingent fee may result in a sufficiently large retroactive SSI award that 25% of the retroactive award due the client will result in a fair fee.

Where to submit the Fee Petition. If you performed legal services for the client's case at the Initial or Reconsideration levels, send the petition to the address of the Award Letter announcing the favorable outcome. If the matter was denied at the initial and reconsideration stages, the fee petition is filed with the Administrative Law Judge who heard the case. If the case went to the Appeals Council, then at the Appeals Council level. See the procedural chart attached which outlines the various levels of appeal.

ALJ standard when approving your fee. When you do submit a Fee Petition to an ALJ, be aware that there is another set of instructions that the ALJ will use to evaluate the appropriateness of your petition. The SSA Administrative Law Judges have a separate manual, called HALLEX, with specific national Office of Disability Adjudication and Review (ODAR) policy. One section deals with Fee Petitions, and provides a good guideline for the attorney who is filing a brief in support of the attorney's petition.

HALLEX I-1-2-57.Evaluating Fee Petitions

Last Update: 2/25/05 (Transmittal I-1-48)

There is no maximum fee amount that can be authorized in the fee petition process. A fee authorizer evaluating a petition must consider the following criteria for evaluating fee petitions and determining a representative's reasonable fee.

A. Criteria for Evaluating Fee Petitions

When evaluating the fee petition to determine a reasonable fee for representation, the fee authorizer must consider the factors listed below.

1. Purpose of the Program

The fee authorizer must consider the purpose of the program. For title II this purpose is to provide the measure of economic security for program beneficiaries. For title XVI, the purpose is to assure a minimum level of income for supplemental security income recipients who otherwise do not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level.

2. Services Provided

Depending on the circumstances in the case, the fee authorizer also will consider whether the representative:

- Researched relevant law or rulings.
- Searched old records to obtain the evidence.
- Arranged a medical examination.
- Submitted medical or lay evidence of disability or other factors of entitlement.
- Contacted the Social Security Administration (SSA) as needed about the status of the claim.
- Participated at the hearing.
- Promoted timely decision making or acted in a way that delayed the issuance of the decision without justification.

NOTE: Recognize that SSA does not set a standard value for each type of service because of the variety of activities in which a representative may engage and because the same activity may be more demanding in one situation than another. Even routine services are necessary and have value.

Examples:

1. A representative submitted a copy of a hospital report that served as the primary basis for the Administrative Law Judge (ALJ) finding the claimant disabled.
2. A representative submitted a copy of medical evidence she had used successfully in a recent workers' compensation claim to support the claim for a period of disability and disability insurance benefits. The representative provided SSA with readily available evidence we may not have had. However, the submission of new medical evidence relating to the period before insured status expired would have been a far more valuable service.

3. Complexity of the Case

Evaluate the complexity of the case based on the work or documentation needed to resolve the issues. Do not underestimate complexity because of the representative's knowledge or experience as a representative.

> **Example:** A representative contacted numerous sources for information used to establish the claimant's date of birth, a task of some complexity.

4. Level of Skill and Competence Required in Providing the Services

Consider the issues involved and the probing the representative did to resolve them. Do not base the assessment on what the fee authorizer would have done following existing instructions or on what the representative could have done theoretically, given his/her expertise.

> **Example:** One representative submitted a copy of the evidence he used in the claimant's workers' compensation claim. A representative in another case scheduled a medical examination and submitted the results for evaluation, along with other new evidence showing the claimant's condition. The representative's actions in the second case demonstrate greater skill and competence.

5. Amount of Time Spent on the Case

Credit the time allegedly spent on services (e.g., one hour to arrange a medical appointment), unless the time seems exaggerated or inordinate (e.g., 20 hours to research when the fee authorizer knows the representative regularly handles social security claims).

Refer to B. below for time to exclude.

6. Results the Representative Achieved

Consider the results achieved along with all the other factors.

- Do not permit this factor to completely override the others. If SSA made a favorable determination on one claim and an unfavorable determination on another claim, the fee authorizer should not disregard the other factors and authorize the fee amount the representative requests in the first, but authorize no fee in the second, simply because of the outcome.

EXCEPTION:

If the representative and claimant have entered into a contingency contract, providing that there will be no fee if the claim is not favorably decided, SSA will honor that provision. In such a case, SSA will not authorize any fee for services if the representative petitions.

- Do not authorize the fee primarily on the basis of the amount of benefits awarded (or lack thereof); the benefit amount payable is unrelated to the extent or caliber of services the representative provided.

Example: An assessment of his client's description of symptoms prompted the representative to develop evidence of a medical condition the field office and Disability Determination Services had overlooked. This established the claimant's entitlement to disability insurance benefits. When evaluating, you credit the favorable results the representative achieved. You also credit the representative's demonstrated skill and competence in a case complicated by the claimant stressing the symptoms of a medical condition that alone was not disabling, and SSA not recognizing the significance of his other symptoms.

7. Level(s) in the Administrative Process

Consider the level(s) in the administrative process at which the representation began.

Example: If the claimant appointed the representative after receiving notice of the reconsideration determination and the ALJ favorably decided the claim, assume the representative interviewed the claimant about what had happened thus far, researched the law and eligibility factors, and determined whether new evidence was available.

8. Amount of Fee Requested

Consider the amount the representative requested and apply all of the factors listed above in conjunction with the excluded items identified in B. below. After considering these factors, if the fee the representative requested is reasonable for the services he/she provided, authorize a fee in the amount requested. The fee authorizer may authorize a fee in a lesser amount than that requested, providing it is reasonable.

B. Excluded Activities

In evaluating the amount of time a representative spent on the case, the fee authorizer must exclude any time claimed for:

- preparing the fee petition or any other activities related to charging or collecting a fee, such as status inquiries; and
- services the representative did not provide before SSA. (See I-1-2-5 and I-1-2-52 (B.).)

C. Expenses

The representative's expenses are not considered part of the fee for services. The representative must look to the claimant for reimbursement of any expenses.

D. Concurrent Titles II and XVI Cases

Pursuant to Social Security Ruling SSR 83-27 (C.E. 1983, p. 77), SSA determines a reasonable fee for the services provided in connection with both the titles II and XVI programs when all the circumstances below apply.

- The concurrent titles II and XVI claims, or post-entitlement or post-eligibility actions, involved a common substantive issue (e.g., disability).
- Although some services may have been unique to the title II or XVI claim or post-entitlement action, most of the representative's services focused on resolving the common issue. The representative did not perform two sets of services different in most respects.
- The services the representative provided led to favorable determinations or decisions in both cases.

If the representative is eligible for direct fee payment, under SSR 83-27 SSA will certify the fee amount for direct payment from title II past-due benefits withheld unless a portion of the fee amount is attributable to services provided exclusively in connection with the title XVI program.

When evaluating the fee petition to determine a reasonable fee for representation in concurrent titles II and XVI cases that involved a common substantive issue, consider the circumstances above, as well as:

- The purposes of the programs, in A.1. above; and
- The factors listed in A.2. through A.8. above.

If all the criteria and factors are met and SSA is withholding for possible direct payment of a representative's fee, decide whether any services were so unique to the supplemental security income program that you must designate a portion of the fee amount as attributable to title XVI exclusively.

E. Documenting the Fee Rationale

Complete the Form SSA-1178 (Evaluation of Fee Petition for Representation) (refer to POMS GN 03930.150B.) to document the rationale for setting the fee. Use this form to show the amount of the fee you find reasonable, and to explain and document your rationale. The rationale must reflect how you set the fee using the factors in A.1. through A.8. above.

If the amount of the fee you believe is reasonable is $10,000 or less, file the SSA-1178 in the hearing office or Appeals Council file when the SSA-1560A-U5 is distributed. (See I-1-2-58 for procedures on processing the SSA-1560A-U5.)

If the amount of the fee you believe is reasonable exceeds $10,000, send the recommendation you prepared on the SSA-1178 to the authorizing official with the SSA-1560A-U5. Refer to I-1-2-52, Authority to Approve Fee Petition.

The typical Bar regulations as evidenced by the ABA Model Rules for the "reasonableness" of a fee have not been incorporated in the SSA determination process. In the Social Security practice, Social Security attorneys find that ALJs focus almost exclusively on the time spent by the attorney to the exclusion of other factors that the ABA recognizes as important. For example, in state court cases, it is standard to submit with the petition for fees, affidavits of the prevailing rate in the community, the experience and particular expertise of the attorney, and a factor for the contingent nature of the fee. None of these are considerations in the SSA formula as applied. Using "time spent" as a sole measure rewards inexperience and inefficiency and encourages creative writing.

Additional items. As noted at the outset, the whole mechanics of securing fee approval could be the subject of an afternoon of CLE. Again, Tom Bush's practical book, with forms, cannot be recommended highly enough, if the attorney intends to provide services in this area of practice.

Paper files versus ERE electronic folders. SSI cases involving financial eligibility, as opposed to medical determinations of disability, are handled the old-fashioned way, with paper folders in the Social Security and ALJ offices. This is mentioned here because on the attorney's SSA sub-web-page, there are numerous references to the mandatory nature of using the paperless Electronic Records Express (ERE) method of submitting documents to SSA. If in doubt, ask the SSA Claims Representative at the local office if the case is at initial or reconsideration levels, or the staff at the local ODAR if the case is already at the ALJ level. They will tell you if it is a "paper file."

Questions about attorney fee regulations. Any questions about attorney fee regulations, particularly policy issues, can be addressed to the Office of the General Counsel, Social Security Administration, P.O. Box 17788, Baltimore, MD 21235–7788, (410) 965–3196.

ATTACHMENTS

Exhibit A – NOSSCR Memo with 1982 SSA Letter

Exhibit B – Appointment of Representative – SSA form 1696

Exhibit C – Petition to Obtain Approval of a Fee for Representing a Claimant before the Social Security Administration – SSA form 1560

NOSSCR

MEMORANDUM

May I charge a potential client for my time if I ultimately decide not to undertake this representation? Do I need to have the fee authorized?

You may charge a reasonable, fee for the time spent reviewing the file, and it does not have to be authorized, provided your work is limited to reviewing the file and you decide not to undertake representation of this claimant. Of course, there would be no fee withholding, and you would have to collect your fee directly from the individual, who you have chosen not to represent.

The Social Security Act (42 U.S.C. § 406a) requires that a fee be authorized by the Commissioner "for services performed in connection with any claim before the Commissioner of Social Security under this title." According to a 1982 letter from the Social Security Administration to NOSSCR, "the attorney's review of a claimant's file (resulting in the attorney's decision not to represent the claimant) would not constitute 'services' as defined in the regulations." (20 C.F.R. § 404.1735)." The letter goes on to state that if the attorney is not appointed by the claimant as his representative, "but simply had been authorized by the claimant to review the claims folder, then whatever activities the attorney performed were not performed as the 'representative' of the claimant. Based on the foregoing, the attorney would not have to obtain the Administration's approval to charge and receive a fee for his services."

If you ultimately decide to represent the claimant, the time spent reviewing the file is included in the "services" performed as a representative, and may not be billed separately.

8/08

National Organization of Social Security Claimants' Representatives
560 Sylvan Avenue, Englewood Cliffs, New Jersey 07632 • (201) 567-4228 • (800) 431-2804 • Fax (201) 567-1542

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to: SJN42

Baltimore MD 21235

Ms. Nancy G. Shor
National Organization of Social
Security Claimants' Representatives
P.O. Box 794
Pearl River, New York 10965

MAY 14 1982

Dear Nancy:

The Social Security Administration's regulations on representation and fees define "services" of a representative as services performed for a claimant in connection with any claim or asserted right the claimant may have before the Secretary of Health and Human Services under title II of the Social Security Act. (20 C.F.R. 404.1735.) In the situation you describe in your letter of April 28, 1982, the attorney's review of a claimant's file (resulting in the attorney's decision not to represent the claimant) would not constitute "services" as defined in the regulations.

Further, an attorney must obtain the Administration's approval of a fee only for his or her services "as a representative." (20 C.F.R. 404.1720(a).) Assuming that the attorney you describe was not appointed by the claimant as his representative, but simply had been authorized by the claimant to review the claims folder, then whatever activities the attorney performed were not performed as the "representative" of the claimant.

Based on the foregoing, the attorney would not have to obtain the Administration's approval to charge and receive a fee for his services.

Sincerely,

Paul Kinzer

Paul Kinzer

Exhibit A - 2

☆ U.S.G.P.O.: 1980—327-419

Social Security Administration
Please read the instructions before completing this form.

Form Approved
OMB No. 0960-0527

Name (Claimant) (Print or Type)	Social Security Number – –
Wage Earner (If Different)	Social Security Number – –

Part I **APPOINTMENT OF REPRESENTATIVE**

I appoint this person, _____
(Name and Address)

to act as my representative in connection with my claim(s) or asserted right(s) under:

☐ Title II (RSDI) ☐ Title XVI (SSI) ☐ Title XVIII (Medicare Coverage) ☐ Title VIII (SVB)

This person may, entirely in my place, make any request or give any notice; give or draw out evidence or information; get information; and receive any notice in connection with my pending claim(s) or asserted right(s).

☒ I authorize the Social Security Administration to release information about my pending claim(s) or asserted right(s) to designated associates who perform administrative duties (e.g. clerks), partners, and/or parties under contractual arrangements (e.g. copying services) for or with my representative.

☐ I appoint, or I now have, more than one representative. My main representative is _____
(Name of Principal Representative)

Signature (Claimant)	Address	
Telephone Number (with Area Code) ( ) –	Fax Number (with Area Code) ( ) –	Date

Part II **ACCEPTANCE OF APPOINTMENT**

I, _____, hereby accept the above appointment. I certify that I have not been suspended or prohibited from practice before the Social Security Administration; that I am not disqualified from representing the claimant as a current or former officer or employee of the United States; and that I will not charge or collect any fee for the representation, even if a third party will pay the fee, unless it has been approved in accordance with the laws and rules referred to on the reverse side of the representative's copy of this form. If I decide not to charge or collect a fee for the representation, I will notify the Social Security Administration. (Completion of Part III satisfies this requirement.)

Check one: ☐ I am an attorney. ☐ I am a non-attorney eligible for direct payment under SSA law.
☐ I am a non-attorney not eligible for direct payment.

I am now or have previously been disbarred or suspended from a court or bar to which I was previously admitted to practice as an attorney. ☐ YES ☐ NO

I am now or have previously been disqualified from participating in or appearing before a Federal program or agency ☐ YES ☐ NO

I declare under penalty of perjury that I have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge.

Signature (Representative)	Address	
Telephone Number (with Area Code) ( ) –	Fax Number (with Area Code) ( ) –	Date

Part III **FEE ARRANGEMENT**

(Select an option, sign and date this section.)

☐ **Charging a fee and requesting direct payment** of the fee from withheld past-due benefits. *(SSA must authorize the fee unless a regulatory exception applies.)*

☐ **Charging a fee but waiving direct payment** of the fee from withheld past-due benefits —I do not qualify for or do not request direct payment. *(SSA must authorize the fee unless a regulatory exception applies.)*

☐ **Waiving fees and expenses from the claimant and any auxiliary beneficiaries** —By checking this block I certify that my fee will be paid by a third-party, and that the claimant and any auxiliary beneficiaries are free of all liability, directly or indirectly, in whole or in part, to pay any fee or expenses to me or anyone as a result of their claim(s) or asserted right(s). *(SSA does not need to authorize the fee if a third-party entity or a government agency will pay from its funds the fee and any expenses for this appointment. Do not check this block if a third-party individual will pay the fee.)*

☐ **Waiving fees from any source** —I am waiving my right to charge and collect any fee, under sections 206 and 1631(d)(2) of the Social Security Act. I release my client and any auxiliary beneficiaries from any obligations, contractual or otherwise, which may be owed to me for services provided in connection with their claim(s) or asserted right(s).

Signature (Representative)	Date

INFORMATION FOR CLAIMANTS

What Your Representative(s) May Do

We will work directly with your appointed representative unless he or she asks us to work directly with you. Your representative may:

- get information from your claim(s) file;
- with your permission, designate associates who perform administrative duties (e.g. clerks), partners and/or parties under contractual arrangements (e.g., copying services) to receive information from us on his or her behalf (by checking the appropriate block and signing this form, you are providing your permission for your representative to designate such associates, partners, and/or contractual parties);
- give us evidence or information to support your claim;
- come with you, or for you, to any interview, conference, or hearing you have with us;
- request a reconsideration, a hearing, or Appeals Council review; and
- help you and your witnesses prepare for a hearing and question any witnesses.

Also, your representative will receive a copy of the decision(s) we make on your claim(s). We will rely on your representative to tell you about the status of your claim(s), but you still may call or visit us for information.

You and your representative(s) are responsible for giving Social Security accurate information. It is wrong to knowingly and willingly furnish false information. Doing so may result in criminal prosecution.

We usually continue to work with your representative until (1) you notify us in writing that he or she no longer represents you; or (2) your representative tells us that he or she is withdrawing or indicates that his or her services have ended (for example, by filing a fee petition or not pursuing an appeal). We do not continue to work with someone who is suspended or disqualified from representing claimants. We will inform you if we suspend your representative.

What Your Representative(s) May Charge

Each representative you appoint can ask for a fee. To charge you a fee for services, your representative must get our authorization if you or another individual will pay the fee. However, as described in "Completing this form to appoint a representative, Part III Fee Arrangement" section of this form, under certain circumstances, we do not have to authorize the representative's fee. To request a fee, your representative must file a fee agreement or a fee petition. In either case, your representative cannot charge you more than the fee amount we authorize. If he or she does, promptly report this to your Social Security office.

Filing A Fee Petition

Your representative may file a fee petition when his or her work on your claim(s) is complete. This written request describes in detail the amount of time your representative spent on each service he or she provided you. The request also gives the amount of the fee the representative wants to charge for these services. Your representative must give you a copy of the fee petition and each attachment. If you disagree with the information shown in the fee petition, contact your Social Security office. Please do this within 20 days of receiving your copy of the petition.

We will review the petition and consider the reasonable value of the services provided. Then we will tell you in writing the amount of the fee we authorize.

Filing A Fee Agreement

If you and your representative have a written fee agreement, one of you must give it to us before we decide your claim(s). We usually will approve the agreement if:

- you both signed it;
- the fee you agreed on is no more than 25 percent of past-due benefits, or $6,000 (or a higher amount we set and announced in the Federal Register), whichever is less;
- we approve your claim(s); and
- your claim results in past-due benefits.

We will tell you in writing the amount of the fee your representative can charge based on the agreement.

If we do not approve the fee agreement, we will tell you and your representative in writing. If your representative wishes to charge and collect a fee, he or she must file a fee petition.

After we tell you the amount of the fee your representative can charge, you or your representative can ask us to look at it again if either or both of you disagree with the amount. If we approved a fee agreement, the person who decided your claim(s) also may ask us to lower the amount. Someone who did not decide the amount of the fee the first time will review and finally decide the amount of the fee

How Much You Pay

You never owe more than the fee we authorize, except for:

- any fee a Federal court allows for your representative's services before it; and
- out-of-pocket expenses your representative incurs or expects to incur, for example, the cost of getting your doctor's or hospital's records. Our authorization is not needed for such expenses.

Your representative may accept money in advance as long as he or she holds it in a trust or escrow account. We usually withhold 25 percent of your past-due benefits to pay toward the fee for you if:

- your retirement, survivors, disability insurance, and/or supplemental security income claim(s) results in past-due benefits;
- your representative is an attorney or a non-attorney whom we have determined to be eligible to receive direct payment of fees; and
- your representative registers with us for direct payment before we effectuate a favorable decision on your claim.

You must pay your representative directly:

- **the rest of the fee you owe,** if the amount of the authorized fee is more than the money we withheld and paid to your representative for you plus any amount your representative held for you in a trust or escrow account.
- **all of the fee you owe,** if we did not withhold past-due benefits, (for example, because there are no past-due benefits; your representative waived direct payment, did not register for direct payment, you discharged the representative, or he or she withdrew from representing you, before we issued a favorable decision); or we withheld an amount from your past-due benefits, but your representative did not ask us to authorize a fee or tell us that he or she planned to ask for a fee within 60 days after the date of your notice of award and we released the withheld amount to you

Social Security Administration
Please read the instructions before completing this form.

Form Approved
OMB No. 0960-0527

Name (Claimant) (Print or Type)	Social Security Number – –
Wage Earner (If Different)	Social Security Number – –

Part I **APPOINTMENT OF REPRESENTATIVE**

I appoint this person, _____
(Name and Address)

to act as my representative in connection with my claim(s) or asserted right(s) under:

☐ Title II (RSDI) ☐ Title XVI (SSI) ☐ Title XVIII (Medicare Coverage) ☐ Title VIII (SVB)

This person may, entirely in my place, make any request or give any notice; give or draw out evidence or information; get information; and receive any notice in connection with my pending claim(s) or asserted right(s).

☒ I authorize the Social Security Administration to release information about my pending claim(s) or asserted right(s) to designated associates who perform administrative duties (e.g. clerks), partners, and/or parties under contractual arrangements (e.g. copying services) for or with my representative.

☐ I appoint, or I now have, more than one representative. My main representative is _____
(Name of Principal Representative)

Signature (Claimant)	Address	
Telephone Number (with Area Code) ( ) –	Fax Number (with Area Code) ( ) –	Date

Part II **ACCEPTANCE OF APPOINTMENT**

I, _____, hereby accept the above appointment. I certify that I have not been suspended or prohibited from practice before the Social Security Administration; that I am not disqualified from representing the claimant as a current or former officer or employee of the United States; and that I will not charge or collect any fee for the representation, even if a third party will pay the fee, unless it has been approved in accordance with the laws and rules referred to on the reverse side of the representative's copy of this form. If I decide not to charge or collect a fee for the representation, I will notify the Social Security Administration. (Completion of Part III satisfies this requirement.)

Check one: ☐ I am an attorney. ☐ I am a non-attorney eligible for direct payment under SSA law.
☐ I am a non-attorney not eligible for direct payment.

I am now or have previously been disbarred or suspended from a court or bar to which I was previously admitted to practice as an attorney. ☐ YES ☐ NO

I am now or have previously been disqualified from participating in or appearing before a Federal program or agency. ☐ YES ☐ NO

I declare under penalty of perjury that I have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge.

Signature (Representative)	Address	
Telephone Number (with Area Code) ( ) –	Fax Number (with Area Code) ( ) –	Date

Part III **FEE ARRANGEMENT**

(Select an option, sign and date this section.)

☐ **Charging a fee and requesting direct payment** of the fee from withheld past-due benefits. *(SSA must authorize the fee unless a regulatory exception applies.)*

☐ **Charging a fee but waiving direct payment** of the fee from withheld past-due benefits —I do not qualify for or do not request direct payment. *(SSA must authorize the fee unless a regulatory exception applies.)*

☐ **Waiving fees and expenses from the claimant and any auxiliary beneficiaries** —By checking this block I certify that my fee will be paid by a third-party, and that the claimant and any auxiliary beneficiaries are free of all liability, directly or indirectly, in whole or in part, to pay any fee or expenses to me or anyone as a result of their claim(s) or asserted right(s). *(SSA does not need to authorize the fee if a third-party entity or a government agency will pay from its funds the fee and any expenses for this appointment. Do not check this block if a third-party individual will pay the fee.)*

☐ **Waiving fees from any source** —I am waiving my right to charge and collect any fee, under sections 206 and 1631(d)(2) of the Social Security Act. I release my client and any auxiliary beneficiaries from any obligations, contractual or otherwise, which may be owed to me for services provided in connection with their claim(s) or asserted right(s).

Signature (Representative)	Date

Social Security Administration
Please read the instructions before completing this form.

Form Approved
OMB No. 0960-0527

Name (Claimant) (Print or Type)	Social Security Number – –
Wage Earner (If Different)	Social Security Number – –

Part I APPOINTMENT OF REPRESENTATIVE

I appoint this person, _____
(Name and Address)

to act as my representative in connection with my claim(s) or asserted right(s) under:

☐ Title II (RSDI) ☐ Title XVI (SSI) ☐ Title XVIII (Medicare Coverage) ☐ Title VIII (SVB)

This person may, entirely in my place, make any request or give any notice; give or draw out evidence or information; get information; and receive any notice in connection with my pending claim(s) or asserted right(s).

☒ I authorize the Social Security Administration to release information about my pending claim(s) or asserted right(s) to designated associates who perform administrative duties (e.g. clerks), partners, and/or parties under contractual arrangements (e.g. copying services) for or with my representative.

☐ I appoint, or I now have, more than one representative. My main representative is _____
(Name of Principal Representative)

Signature (Claimant)	Address	
Telephone Number (with Area Code) ( ) –	Fax Number (with Area Code) ( ) –	Date

Part II ACCEPTANCE OF APPOINTMENT

I, _____, hereby accept the above appointment. I certify that I have not been suspended or prohibited from practice before the Social Security Administration; that I am not disqualified from representing the claimant as a current or former officer or employee of the United States; and that I will not charge or collect any fee for the representation, even if a third party will pay the fee, unless it has been approved in accordance with the laws and rules referred to on the reverse side of the representative's copy of this form. If I decide not to charge or collect a fee for the representation, I will notify the Social Security Administration. (Completion of Part III satisfies this requirement.)

Check one: ☐ I am an attorney. ☐ I am a non-attorney eligible for direct payment under SSA law.
☐ I am a non-attorney not eligible for direct payment.

I am now or have previously been disbarred or suspended from a court or bar to which I was previously admitted to practice as an attorney. ☐ YES ☐ NO

I am now or have previously been disqualified from participating in or appearing before a Federal program or agency. ☐ YES ☐ NO

I declare under penalty of perjury that I have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge.

Signature (Representative)	Address	
Telephone Number (with Area Code) ( ) –	Fax Number (with Area Code) ( ) –	Date

Part III FEE ARRANGEMENT

(Select an option, sign and date this section.)

☐ **Charging a fee and requesting direct payment** of the fee from withheld past-due benefits. *(SSA must authorize the fee unless a regulatory exception applies.)*

☐ **Charging a fee but waiving direct payment** of the fee from withheld past-due benefits —I do not qualify for or do not request direct payment. *(SSA must authorize the fee unless a regulatory exception applies.)*

☐ **Waiving fees and expenses from the claimant and any auxiliary beneficiaries** —By checking this block I certify that my fee will be paid by a third-party, and that the claimant and any auxiliary beneficiaries are free of all liability, directly or indirectly, in whole or in part, to pay any fee or expenses to me or anyone as a result of their claim(s) or asserted right(s). *(SSA does not need to authorize the fee if a third-party entity or a government agency will pay from its funds the fee and any expenses for this appointment. Do not check this block if a third-party individual will pay the fee.)*

☐ **Waiving fees from any source** —I am waiving my right to charge and collect any fee, under sections 206 and 1631(d)(2) of the Social Security Act. I release my client and any auxiliary beneficiaries from any obligations, contractual or otherwise, which may be owed to me for services provided in connection with their claim(s) or asserted right(s).

Signature (Representative)	Date

COMPLETING THIS FORM TO APPOINT A REPRESENTATIVE

Choosing to be Represented

You can choose to have a representative help you when you do business with Social Security. We will work with your representative, just as we would with you. It is important that you select a qualified person because, once appointed, your representative may act for you in most Social Security matters. We give more information, and examples of what a representative may do, in the section titled "Information for Claimants."

Privacy Act Statement

Collection and Use of Personal Information
Sections 206(a) and 1631(d) of the Social Security Act, as amended, authorize us to collect this information. We will use the information you provide on this form to verify your appointment of an individual as your representative and his or her acceptance of the appointment.

Completion of this form is voluntary; however, if you want to use this form to appoint someone to act on your behalf in matters before the Social Security Administration (SSA), then you and that individual must complete the appropriate sections of this form.

We rarely use the information you supply for any purpose other than to verify your appointment of an individual as your representative and his or her acceptance of the appointment. However, we may use it for the administration and integrity of Social Security programs. We may also disclose information to another person or to another agency in accordance with approved routine uses, which include but are not limited to the following:

1. To enable a third party or an agency to assist Social Security in establishing right to Social Security benefits and/or coverage;

2. To comply with Federal laws requiring the release of information from Social Security records (e.g., to the Government Accountability Office or the Department of Veterans Affairs);

3. To make determinations for eligibility in similar health and income maintenance programs at the Federal, State, and local level; and,

4. To facilitate statistical research, audit, or investigative activities necessary to assure the integrity and improvement of Social Security programs.

We may also use the information you provide in computer matching programs. Matching programs compare our records with records kept by other Federal, state, or local government agencies.

Information from these matching programs can be used to establish or verify a person's eligibility for Federally-funded or administered benefit programs and for repayment of payments or delinquent debts under these programs. A complete list of routine uses for this information is available in our System of Records Notice entitled "Appointed Representative File" (60-0325). The notice, additional information regarding this form, routine uses of information, and our programs and systems are available on-line at www.socialsecurity.gov or at your local Social Security office.

With your permission, your representative may designate an associate or other party to request and receive information from your claim file on your representative's behalf.

For more information about this privacy statement and how information you provide to us may be used or disclosed to others please contact any Social Security office.

How to Complete this Form

Please print or type your answers on this form. At the top of the form, provide your full name and your Social Security number. If your claim is based on another person's work and earnings, also provide the "wage earner's" name and Social Security number. If you appoint more than one individual as your representative, you may want to complete a form for each of them.

Part I Appointment of Representative

Give the name and address of the individual(s) you are appointing. You may appoint an attorney or any other qualified individual to represent you. You also may appoint more than one individual, but please refer to the "Information for Claimants" section "What your Representative(s) May Charge" for more information about payment of fees. You can appoint one or more individuals in a firm, corporation, or other organization as your representative(s), but you may not appoint a law firm, legal aid group, corporation or organization itself.

Check the block(s) showing the program(s) under which you have a claim. You may check more than one block. Check:

- Title II (RSDI), if your claim concerns retirement, survivors, or disability insurance benefits.
- Title XVI (SSI), if your claim concerns Supplemental Security Income.
- Title XVIII (Medicare Coverage), if your claim concerns entitlement to Medicare or enrollment in the Supplementary Medical Insurance (SMI) plan.
- Title XVIII (SVB), if your claim concerns entitlement to Special Veterans Benefits.

When you give your permission your representative may designate an associate (e.g. a clerk), or other party or entity (e.g. a copying service) to receive information from your claim file on your representative's behalf for the duration of your claim. If you want to give your representative permission to do that, check the block to authorize this release.

If you will have more than one representative, check the appropriate block and give the name of the individual you want to be your main representative.

You must sign and date the form. Print or type your address, area code and telephone number.

If you are appointing a representative to replace a representative that you discharged or who withdrew his or her representation, you must notify us in writing that the prior appointment has ended.

Part II Acceptance of Appointment

Each individual you appoint in Part I should also complete Part II. If the individual is not an attorney, he or she must give his or her name, state that he or she accepts the appointment, and sign the form.

Part III Fee Arrangement

To help in processing benefits and fee payments timely you and your representative should complete this section. Your representative should check a box, sign and date the form. Your representative may choose to receive payment, waive direct payment, or waive payment of the fee altogether. If you and your representative change your arrangement before we decide your claim, you can provide a new or amended form so that we can update our records. If you appoint a second representative or co-counsel who also will not charge a fee, he or she should also complete this part or provide a new form, or if not using the form, give us a separate, written waiver statement. If your representative is not eligible for direct payment, or is an attorney or an eligible non-attorney who waives direct payment, you will be responsible for paying any fee we authorize.

Under certain circumstances, we do not have to authorize the fee. These circumstances include where a Court has awarded a fee based on your representative's actions as a legal guardian or court-appointed representative, or where a business (such as an insurance company), other organization or government agency will pay your representative's fee and you and your beneficiaries have no liability to pay any fees or expenses.

Paperwork Reduction Act Statement - This information collection meets the requirements of 44 U. S.C. § 3507, as amended by Section 2 of the Paperwork Reduction Act of 1995. You do not need to answer these questions unless we display a valid Office of Management and Budget control number. We estimate that it will

take about 10 minutes to read the instructions, gather the facts, and answer the questions. **SEND THE COMPLETED FORM TO YOUR LOCAL SOCIAL SECURITY OFFICE. The office is listed under U. S. Government agencies in your telephone directory or you may call Social Security at 1-800-772-1213 (TTY 1-800-325-0778).** *You may send comments on our time estimate above to: SSA, 6401 Security Blvd, Baltimore, MD 21235-6401.* ***Send only comments relating to our time estimate to this address, not the completed form.***

References

- 18 U.S.C. §§ 203, 205, and 207; and 42 U.S.C. §§ 406 (a), 1320a-6, and 1383(d)(2)
- 20 CFR §§ 404.1700 et. seq. and 416.1500 et. seq.
- Social Security Rulings 83-27 and 82-39
- 26 U.S.C. §§ 6041 and 6045(f)

INFORMATION FOR REPRESENTATIVES

Fees for Representation

An attorney or other individual who wants to charge or collect a fee for providing services in connection with a claim before the Social Security Administration (SSA) must generally obtain our prior authorization of the fee for representation. The only exceptions are if:

- certain requirements are met and a third-party entity, such as a business, an insurance carrier, a for profit, or nonprofit organization or a government agency will pay the fee and any expenses from its own funds and the claimant and auxiliary beneficiaries incur no liability, directly or indirectly, for the cost(s); or
- a Federal court awarded a fee based on the representative's activities as the claimant's legal guardian or court-appointed representative;
- a Federal court awarded a fee for representational services provided before the court. In those cases, neither the Federal court nor SSA can authorize a fee for the other.

Obtaining Authorization of a Fee

To charge a fee for services, you must use one of two mutually exclusive fee authorization processes. You must file either a fee petition or a fee agreement with us. In either case, you cannot charge more than the fee amount we authorize.

Fee Petition Process

You may file a fee petition after you complete your services to the claimant. This written request must describe in detail the amount of time you spent on each service provided and the amount of the fee you are requesting. In order to directly pay you under a fee petition, you must either file a fee petition or notify us within 60 days after we decide the claim of your intent to file a fee petition.

You must give the claimant a copy of the fee petition and each attachment. The claimant may disagree with the information shown by contacting a Social Security office within 20 days of receiving his or her copy of the fee petition. We will consider the reasonable value of the services provided, and send you notice of the amount of the fee you can charge.

Fee Agreement Process

If you and the claimant have a written fee agreement, one of you must give it to us before we decide the claim(s). We usually will approve the agreement if:

- you both signed it;
- the fee you agreed on is no more than 25 percent of past-due benefits, or $6,000 (or a higher amount we set and announce in the Federal Register), whichever is less;
- we approve the claim(s); and
- the claim results in past-due benefits.

We will send you a copy of the notice we send the claimant telling him or her the amount of the fee you can charge based on the agreement.

If we do not approve the fee agreement, we will tell you in writing. We also will tell you and the claimant that you must file a fee petition if you wish to charge and collect a fee.

After we tell you the amount of the fee you can charge, you or the claimant may ask us in writing to review the authorized fee. If we approved a fee agreement, the person who decided the claim(s) also may ask us to lower the amount. Someone who did not decide the amount of the fee the first time will review and finally decide the amount of the fee

Collecting a Fee

You may accept money for your fee in advance, as long as you hold it in a trust or escrow account. The claimant never owes you more than the fee we authorize, except for:

- any fee a Federal court allows for your services before it; and
- out-of-pocket expenses you incur or expect to incur, for example, the cost of getting evidence. Our authorization is not needed for such expenses.

If you are not an attorney and you are ineligible to receive direct payment, you must collect the authorized fee from the claimant. If you are interested in becoming eligible to receive direct payment, you can find more information about this on our "Attorneys and Appointed Representatives" website:
http://www.ssa.gov/representation/.

If you are an attorney or a non-attorney whom SSA has found eligible to receive direct payment and you register with SSA, as described below, we usually withhold 25 percent of any past-due benefits that result from a favorably decided retirement, survivors, disability insurance, or supplemental security income claim. Once we authorize a fee, we pay you all or part of the fee from the funds withheld. We will also charge you the assessment required by section 206(d) and 1631(d)(2)(C) of the Social Security Act. You cannot charge or collect this expense from the claimant. You will need to collect from the claimant:

- **the rest of the fee he or she owes,** if the amount of the authorized fee is more than the amount of money we withheld and paid you for the claimant, plus any amount you held for the claimant in a trust or escrow account.

- **all of the fee he or she owes,** if we did not withhold past-due benefits, (for example, because there are no past-due benefits; you waived direct payment or did not register for direct payment; the claimant discharged you or you withdrew from representing before we issued a favorable decision); or we withheld past-due benefits, but you did not ask us to authorize a fee or tell us that you planned to ask for a fee within 60 days after the date of the notice of award and we released the withheld amount to the claimant.

Registering for Direct Fee Payment

If you are eligible and want to receive direct payment, you must register with us before we effectuate a favorable decision on the claim. To register, you must submit a Form SSA-1699 (Registration of Individuals and Staff for Appointed Representative Services) once and a Form SSA-1695 (Identifying Information for Possible Direct Payment of Authorized Fees) with each appointment. We will use the information you provide on these forms to issue you a Form 1099-MISC if we pay you aggregate fees of $600 or more in a calendar year. The Internal Revenue Code requires that we do this. For information on the registration process, see our "Attorneys and Appointed Representatives" website http://www.ssa.gov/representation/.

Conflict of Interest and Penalties

If you commit improper acts, you can be suspended or disqualified from representing anyone before SSA. You also can face criminal prosecution. Improper acts include:

- If you are or were an officer or employee of the United States, providing services as a representative in certain
- claims against and other matters affecting the Federal government.
- Knowingly and willingly furnishing false information.
- Charging or collecting an unauthorized fee, or charging or collecting too much for services provided in any claim, including services before a court that made a favorable decision.

References

- 18 U.S.C. §§ 203, 205, and 207; and 42 U.S.C. §§ 406 (a), 1320a-6, and 1383(d)(2)
- 20 CFR §§ 404.1700 et. seq., and 416.1500 et. seq.
- Social Security Rulings 83-27 and 82-39
- 26 U.S.C. §§ 6041 and 6045(f)

SOCIAL SECURITY ADMINISTRATION | TOE 850 | Form Approved OMB No. 0960-0104

PETITION TO OBTAIN APPROVAL OF A FEE FOR REPRESENTING A CLAIMANT BEFORE THE SOCIAL SECURITY ADMINISTRATION

IMPORTANT INFORMATION ON REVERSE SIDE

I request approval to charge a fee of: Fee$ (Show the dollar amount)

for services performed as the representative of:

My Services Began: ____ / ____ / ____ (Month / Day / Year)

My Services Ended: ____ / ____ / ____

Type(s) of claim(s)

Enter the name and the Social Security number of the person on whose Social Security record the claim is based.

__ __ __ / __ __ / __ __ __ __

1. Itemize on a separate page or pages the services you rendered before the Social Security Administration (SSA). List each meeting, conference, item of correspondence, telephone call, and other activity in which you engaged, such as research, preparation of a brief, attendance at a hearing, travel, etc., related to your services as representative in this case. Attach to this petition the list showing the dates, the descriptions of each service, the actual time spent in each, and the total hours.

2. Have you and your client entered into a fee agreement for services before SSA? ☐ YES ☐ NO

If "yes," please specify the amount on which you agreed, and attach a copy of the agreement to this petition. $ _____ and ☐ See attached

3. (a) Have you received, or do you expect to receive, any payment toward your fee from any source other than from funds which SSA may be withholding for fee payment? ☐ YES ☐ NO

(b) Do you currently hold in a trust or escrow account any amount of money you received toward payment of your fee? ☐ YES ☐ NO

If "yes" to either or both of the above, please specify the source(s) and the amount(s).

Source: _____ $ _____

Source: _____ $ _____

Note: If you receive payment(s) after submitting this petition, but before the SSA approves a fee, you have an affirmative duty to notify the SSA office to which you are sending this petition.

4. Have you received, or do you expect to receive, reimbursement for expenses you incurred? ☐ YES ☐ NO

If "yes," please itemize your expenses and the amounts on a separate page.

5. Did you render any services relating to this matter before any State or Federal court? ☐ YES ☐ NO

If "yes," what fee did you or will you charge for services in connection with the court proceedings? Please attach a copy of the court order if the court has approved a fee. $ _____

6. Have you been disbarred or suspended from a court or bar to which you were previously admitted to practice as an attorney? ☐ YES ☐ NO

7. Have you been disqualified from participating in or appearing before a Federal program or agency? ☐ YES ☐ NO

I declare under penalty of perjury that I have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge.

Signature of Representative	Date	Address (include Zip Code)

Firm with which associated, if any	Telephone No. and Area Code

[Note: The following is optional. However, SSA can consider your fee petition more promptly if your client knows and already agrees with the amount you are requesting.]

I understand that I do not have to sign this petition or request. It is my right to disagree with the amount of the fee requested or any information given, and to ask more questions about the information given in this request (as explained on the reverse side of this form). I have marked my choice below.

☐ I agree with the $ _____ fee which my representative is asking to charge and collect. By signing this request, I am not giving up my right to disagree later with the total fee amount the Social Security Administration authorizes my representative to charge and collect.

OR

☐ I do not agree with the requested fee or other information given here, or I need more time. I understand I must call, visit, or write to SSA within 20 days if I have questions or if I disagree with the fee requested or any information shown (as explained on the reverse sides of this form).

Signature of Claimant	Date

Address (include Zip Code)	Telephone No. and Area Code

2016 Special Needs Trust National Conference

SSI and Attorney's Fee Rules:

Getting Properly and Legally Paid when Establishing or Defending a Special Needs Trust That Affects SSI Disability Benefits

David Lillesand
Lillesand, Wolasky & Waks, P.L.

14 October 2015

GOAL OF PRESENTATION

1. Learn the parameters of SSA's wide reach
2. Review the relevant law
3. Determine the outer limits – completely safe versus go to jail (black and white)
4. Use hypotheticals to describe THE LARGE GRAY AREA in between

METHODOLOGY

- Materials with discussion, practice tips, hyperlinks to law, and forms
- Discussion of hypotheticals

INTRODUCTION – Why be concerned:

- Per the SSA Office of General Counsel, on average, 11 attorneys and representatives are disbarred, fined, or imprisoned each year for violations of the SSA Rules of Conduct
- *UNITED STATES OF AMERICA v. Lewis*, a criminal prosecution of a tax preparing accountant

U.S. v. Lewis Factors	Typical d4A SNT practice
Referred for assistance to make viable Social Security claim	PI attorney refers client to Elder or Special Needs atty to prepare SNT to preserve SSI eligibility
An application was pending or made based on services rendered	Client was already on, or will apply, for SSI benefits after SNT is executed
The tax returns filed had effect of establishing Social Security eligibility	The effect of the SNT is to place excess resources in safe harbor SNT to establish eligibility
Even though the CPA charged only for tax preparation, the effect was "services in connection with an SSA claim."	Even if the attorney bills for the services as "estate planning" the effect is to create SSI eligibility

STATUTORY BASIS FOR REGULATING FEES

Pursuant to Section 406(a), "the Commissioner shall, if the claimant was represented by an attorney in connection with such claim, fix...a reasonable fee to compensate such attorney for the services performed by him in connection with such claim."

PENALTY FOR VIOLATIONS OF CHARGING A FEE NOT APPROVED BY SSA"

42 U.S.C. §406(A)(5) - Any person who shall, with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant or beneficiary under this subchapter by word, circular, letter or advertisement, or who shall knowingly charge or collect directly or indirectly any fee in excess of the maximum fee, or make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee, prescribed by the Commissioner of Social Security shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall for each offense be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both.

Survived multiple constitutional challenges: *Weisbrod v. Sullivan*, 875 F.2d 526 (5th Cir. 1989); and amount of fee is not subject to court review. See *Schneider v. Richardson*, 441 F.2d 1320 (6th Cir. 4/28/71); *cert. den.* U. S. Supreme Court (1971).

REVIEW OF THE IMPLEMENTATION OF THE STATUTE

- New Rules of Conduct for Representatives published in 20 CFR § 416.1500
- The two most important POMS provisions
- Social Security Rulings – particularly SSR 65-33c
- Application of the rules to Elder and Special Needs Practice
  - Clear exceptions – safe zone
  - Clear no-no's – zombie zone
  - Some hypotheticals
- Brief discussion of the mechanics for SSA fee approval

THE MOST IMPORTANT FEDERAL REGULATIONS

All citations preceded by 20 CFR § 416.****(*)

§1520(b) - An attorney must file a written request before receiving a fee and may not charge any fee that is more than the approved amount

§1520(e) - SSA does not need to authorize a fee when:

(1) An entity or govt. agency pays from its funds the representative fees and expenses and (both required):

- The client is not liable "directly or indirectly" for the fee, and
- The atty submits to SSA in writing a waiver of fees and costs, OR

(2) "A court authorizes a fee for your representative based on the representative's actions as your legal guardian or a court-appointed representative."

THE COURT PROCEEDINGS EXCEPTION:

§1528 (a) **Representation of a party in court proceedings.** We shall not consider any service the representative gave you in any proceeding before a State or Federal court to be services as a representative in dealings with us. However, if the representative also has given service to you in the same connection in any dealings with us, he or she must specify what, if any, portion of the fee he or she wants to charge is for services performed in dealings with us. If the representative charges any fee for those services, he or she must file the request and furnish all of the information required by § 416.1525.

NOTE: "You" in the regs is the SSI claimant.

Lillesand, SSA Attorney Fee Issues

§1540 Rules of conduct and standards of responsibility for representatives

(b) Affirmative duties:

1. Act with reasonable promptness
2. Assist the claimant in complying with SSA requests
3. "Conduct his or her dealings in a manner that furthers the efficient, fair and orderly conduct of the administrative decision-making process, including duties to:
   - i. Provide competent representation to a claimant
   - ii. Act with reasonable diligence and promptness in representing a claimant

Lillesand, SSA Attorney Fee Issues

§1540 Rules of conduct and standards of responsibility for representatives

(c) Prohibited Actions...

2. Charge from any source, directly or indirectly, any fee for services in violation of law
3. Make or present false or misleading oral or written statements
9. Refuse to comply with any of our rules or regulations
10. Suggest, assist, or direct another person to violate our rules
11. Advise any claimant or beneficiary not to comply with any of our rules

Lillesand, SSA Attorney Fee Issues

POMS PROVISIONS ON FEES

General comments:

- **POMS are law** – see *Draper v. Colvin*, 779 F.3d 556 (8th Cir. 2015), with amicus by NAELA
- **The POMS are more explanatory** and detailed than the federal regulations
- **The two most important attorney fee POMS**
  - **GN 03920.005 Representative's Fees Subject to SSA's Authorization**
  - **GN 03920.010 Representative's Fees Not Subject to Social Security Administration's (SSA) Authorization**

Lillesand, SSA Attorney Fee Issues

POMS PROVISIONS ON FEES - GN 03920.005 Representative's Fees Subject to SSA's Authorization

§ B. Fee approval required irrespective of whether –

- The services result in an allowance, reinstatement or disallowance action by SSA
- The atty was ever recognized by SSA as a claimant's representative, or the atty did not deal directly with or actually contact SSA
- The fee is charged to or collected from the claimant or a third party, unless the requirements of GN 03920.010B are met

Lillesand, SSA Attorney Fee Issues

POMS PROVISIONS ON FEES - GN 03920.005 Representative's Fees Subject to SSA's Authorization

§ C. POLICY – SSA considers any SSI claim to be a "proceeding before SSA"

- an initial, revised, or reconsidered determination or action by a field office or processing center; or
- a decision or action by an Administrative Law Judge or an Administrative Appeals Judge, including a decision issued after a court remand.

Lillesand, SSA Attorney Fee Issues

POMS PROVISIONS ON FEES - GN 03920.005 Representative's Fees Subject to SSA's Authorization

§ D. List of Proceedings Before SSA

Proceedings that require SSA's fee authorization include, but are not limited to, services in connection with:

- an application for SSI payments;
- a request to modify the amount of benefits;
- a request to reinstate benefits;
- a request to waive recovery of an overpayment, or an appeal of an overpayment waiver denial determination

Lillesand, SSA Attorney Fee Issues

POMS PROVISIONS ON FEES - GN 03920.010 Representative's Fees Not Subject to Social Security Administration's (SSA) Authorization

§ A. Definitions

3. Third-party entity

A third-party entity is a business, firm, or other association, including but not limited to partnerships, corporations, for-profit or nonprofit organizations, or a government agency. As used in this section, a third-party entity provides a claimant with representation and pays the representative's fee and expenses without passing any financial liability to the claimant or any auxiliary beneficiaries.

Lillesand, SSA Attorney Fee Issues

POMS PROVISIONS ON FEES - GN 03920.010 Representative's Fees Not Subject to Social Security Administration's (SSA) Authorization

§ B. Policy for payment of fee by a third-party entity

2. When SSA does not need to authorize a fee - SSA regulations do not require fee authorization if:

- The claimant is free of direct or indirect financial liability to pay a fee or expenses, either in whole or in part, to a representative or to someone else; and
- A third-party entity, or a government agency from its own funds, pays the fee and expenses incurred, and
- The representative waives om writing the right to charge and collect a fee and expenses

Lillesand, SSA Attorney Fee Issues

POMS PROVISIONS ON FEES - GN 03920.010 Representative's Fees Not Subject to Social Security Administration's (SSA) Authorization

§ C. Policy for out-of-pocket expenses

"...we will question out-of-pocket expenses if it appears that the representative is attempting to circumvent our fee authorization process by designating his or her services as out-of-pocket expenses or if the alleged out-of-pocket expenses appear unreasonable.

D. Policy for "court proceedings" – (same as the regulations)

E. Policy for legal guardian or other state court-appointed representative

"A legal guardian, committee, conservator, or other state court-appointed representative (hereinafter "legal guardian") may ask the court to approve a fee for services provided in connection with proceedings before us. If the court orders a fee, we do not need to authorize that fee."

Lillesand, SSA Attorney Fee Issues

SOCIAL SECURITY RULINGS

- What are the SSRs – "a series of precedential standards to be used in subsequent similar cases" that are published in the Federal Register
- The SSA attorney web-page has a link to all the Rulings
- So what about SSR 65-33c – *United States of America v. Lewis*? What can we say to distinguish it from our elder and special needs practice?
  - Criminal prosecution of accountant filing fraudulent self-employment tax returns for the client seeking RIB or SSDI benefits
  - The U.S. Attorney included the SSA violations as lesser included offenses
  - The decision is 50 years old (but still an active SSR)

Lillesand, SSA Attorney Fee Issues

U.S. v. Lewis Factors	Typical d4A SNT practice
Referred for assistance to make viable Social Security claim	PI attorney refers client to Elder or Special Needs atty to prepare SNT to preserve SSI eligibility
An application was pending or made based on services rendered	Client was already on, or will apply, for SSI benefits after SNT is executed
The tax returns filed had effect of establishing Social Security eligibility	The effect of the SNT is to place excess resources in safe harbor SNT to establish eligibility
Even though the CPA charged only for tax preparation, the effect was "services in connection with an SSA claim."	Even if the attorney bills for the services as "estate planning" the effect is to create SSI eligibility

Lillesand, SSA Attorney Fee Issues

CLEAR EXCEPTIONS TO THE FEE APPROVAL RULES

- Waiving Fees - Not charging a fee to the claimant or a third party
- Charging a fee that will be paid by an exempt third party
  - Legal insurance payment
  - Contract work for Legal Aid/Legal Services program
  - Union benefits
- Legal guardian's fees approved by state court
  - Legal guardian requests attorney to move guardianship funds to SNT, and takes actions to do so
  - Legal guardian's fee must have specific court approval via an order
  - Action by the attorney may fall under the "court proceedings" exception, and the court does not have to enter an order on the attorney fee

Lillesand, SSA Attorney Fee Issues

CLEAR EXCEPTIONS TO THE FEE APPROVAL RULES – Cont.

- **Attorney fees for "court proceedings"**
  - Court-approved fees in Minor's or Incompetent's Petition to Approve Settlement of PI/Wrongful death cases for preparation of SNT
  - Probate court approval of fees in inheritance cases
  - Remaining issues: What is covered by "court proceedings?" Must you be attorney of record? What about drafting the SNT for the PI attorney to present but not appearing in the "court proceeding?"
- **Office Consultations where fee charged but representation declined**

  See Appendix A – NOSSCR Memo that attaches the 1982 SSA letter on office consultations

Lillesand, SSA Attorney Fee Issues

CLEAR PROBLEMS UNDER SSA RULES OF CONDUCT

- *I helped the client to find an offshore bank account*
- *We, the client and I, agreed that I will submit the winning ticket as though it was mine, and we'll split the winnings which I'll give him in cash*
- *I only told the client not to report anything to SSA because it's likely SSA will never find out*
- *I told the client that if he received his inheritance in a cash distribution, it doesn't have to be reported*
- *I told the client what to say and what to submit at the hearing*
- *I told the client to refuse to answer SSA questions and exercise his right to remain silent*

Lillesand, SSA Attorney Fee Issues

Black, white, and now THE GREAT MIDDLE GRAY
Preparation/Administration of Special Needs Trusts

Third Party Special Needs Trusts
- Parents estate planning
- Stand-alone Third Party SNTs
- Life insurance trusts
- Community fund raisers

First Party Special Needs Trusts (including SSI spend-down plans)
- Who's the client
- The USA v. Lewis factors

Representing the Trustee
- Third party SNTs
- First Party SNTs
- Claims against the trustee

MECHANICS OF GETTING SSA FEE APPROVAL

Using Attorney Trust account - Collecting the fee in advance - SSR 82-39

The "Fee Agreement Process"

- Contingent fee
- Must have retroactive benefits due the SSI client
- SSA will send fee directly to attorney
- Cannot bill additional except for costs

The "Fee Petition Process"

- Used in every case where you cannot use the Fee Agreement Process
- Keep good time records
- Form attached to materials; fillable form online at www.SocialSecurity.gov

MECHANICS OF GETTING ATTORNEY FEES APPROVED

Where to submit the fee petition – at highest level of appeal which disposed of case

ALJ Standard for Reviewing your fee petition – HALLEX I-1-2-57

- Heavy emphasis on time involved
- Time limits on submission of fee petition
- Often billed in quarter hours (.25)
- Problems with SSA and ALJ factors in setting the fee – Does not consider:
  - the skill and experience of the attorney
  - the contingent nature of the matter
  - The prevailing hourly or flat rate for the same services in the community
  - Generally will not pay anything for losing cases

HYPOTHETICALS FOR DISCUSSION

1. Client calls for information on how to hide the $5,000 he just won in a neighborhood craps game
2. Trustee calls asking if a proposed distribution to pay traveling companions for a disabled beneficiary to go to Disney World would violate SSI rules
3. Client calls for information on how to do a "spend-down" on exempt resources to continue eligibility for SSI and SSI-related Medicaid
4. Parents call asking you to appeal the SSA determination that the d4A First Party Special Needs Trust they established for their adult daughter is invalid
5. You agree to prepare a brief for the client to hand the Administrative Law Judge at the hearing in which the client's will appear "without counsel" but you do not agree to go to the hearing as the attorney for the client

Lillesand, SSA Attorney Fee Issues

HYPOTHETICALS FOR DISCUSSION

6. The trustee calls and asks your assistance in defending claims by the SSI beneficiary that the trustee has mismanaged the trust funds, or has made disbursements which resulted in termination of SSI benefits
7. The client beneficiary of a Special Needs Trust calls and wants advice only on what to tell the SSA local office staff about the establishment of an SNT that you did not draft
8. The client employs you to assist in completing a Joinder Agreement to place $30,000 of his $40,000 personal injury settlement in a Pooled Special Needs Trust, but the client tells you he intends to keep $10,000 in cash in a box under his bed
9. Wells Fargo calls asking you to represent them as trustee in a court modification of a testamentary trust so that one of the beneficiaries of the Third Party trust will not lose their SSI benefits which was the wishes of the testator/grantor when the trust was created

Lillesand, SSA Attorney Fee Issues

HYPOTHETICALS FOR DISCUSSION

10. Wells Fargo calls asking you to train their Special Needs Trust Trust Officers to answer questions and properly manage the SNTs they administer
11. The sister of a disabled sibling calls asking how to collect insurance or pension benefits in a way that will not reveal the name of the SSI claimant or provide his Social Security number so the funds won't be traced
12. The mentally competent client asks you to draft a First Party SNT so they can file a claim for SSI benefits; the trust will be established by a living parent or grandparent, with a gift from a family member, and without the necessity of court involvement

Lillesand, SSA Attorney Fee Issues

ANY QUESTIONS, DISAGREEMENTS, NASTY COMMENTS, OR DEATH THREATS, ETC., SHOULD BE DIRECTED TO:

The Office of the General Counsel
Social Security Administration
P.O. Box 17788
Baltimore MD 21235-7788

(410) 965-3196

Any Additional Questions to me at David@LillesandLaw.com

All Complaints to SSA, please.

Special Needs Trusts National Conference

Friday, October 16, 2015

Breakout Session 3
3:15 P.M. – 4:05 P.M.

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

Presenter:
J. Whitfield Larrabee
Attorney at Law
Law Offices of J. Whitfield Larrabee
Brookline, MA

- 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®

STRATEGIES FOR MAINTAINING PUBLIC HOUSING AND SECTION 8 ELIGIBILITY FOR PEOPLE WITH SPECIAL NEEDS TRUSTS

Presentation:

By J. Whitfield Larrabee, Esq.

October 16, 2015

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

WHAT IS THE SECTION 8 PROGRAM?

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

To use the program, tenants must find private landlords renting homes in the community who are willing to participate. Once the tenant finds a cooperating landlord, the tenant generally pays 30% of her income towards the rent; this portion of the payment is called the Total Tenant Payment (TTP). 24 C.F.R. §5.628(a). The local PHA supplements the remaining rent by issuing a check directly to the landlord so that the landlord is paid the "fair market rent." 24 C.F.R. §888.111.

The tenant must remain qualified to participate in the voucher program. The PHA must re-certify the tenant's eligibility no less regularly than annually. 24 C.F.R. §5.628(b). Among other things the PHA calculates any changes in the tenant's monthly income and adjusts the TTP if necessary. 24 C.F.R. §5.657 (2000).

IMPORTANT CASES INVOLVING INCOME ELIGIBILITY AND SPECIAL NEEDS TRUST EXPENDITURES

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

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

1. Lump sum settlements, although excluded from income if not placed in a special needs trust, are included in a Section 8 participant's annual income if expended through a special needs trust, unless they are excluded by another exclusion set forth in HUD regulations.

2. The cost of the purchase of an automobile, where the trust retained title to the vehicle, should not be included in a Section 8 participant's annual income in determining the participant's Total Tenant Payment;

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

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

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

Finley and *DeCambre* are in conflict with regard to the treatment of lump sums expended through special needs trusts.

WHAT ARE THE SECTION 8 INCOME ELIGIBILITY LIMITS?

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

Upper limits for income eligibility are as follows:

1. **Extremely Low Income - initial admission**

   75% of families initially admitted to a PHA's Section 8 program in any one year must be extremely low income families, which is defined as not more than 30% of an area's median income for a family.

   EXAMPLES:

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

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

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

   EXAMPLES:

   2015 Mobile Alabama - Family of 3 = $24,000
   2015 Orlando Florida - Family of 3 = $26,250
   2015 Boston Massachusetts - Family of 3 = $44,350

3. **Low Income - continuously assisted families**

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

EXAMPLES:

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

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

TIP NUMBER 1!

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

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

WHAT COUNTS AS INCOME?

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

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

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

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

NOTE: Section 8 Eligibility Is Determined by Income. Unlike Medicaid and SSI, There Is No Asset Limit**.**

WHAT IS EXCLUDED FROM INCOME?

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

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

TIP NUMBER 2!

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

APPLICATION OF SPECIFIC EXCLUSIONS

LUMP-SUM ADDITIONS TO FAMILY ASSETS

24 CFR 5.609(c)(9) excludes:

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

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

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

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

Importantly, not all distributions are counted, only "income" that is distributed is counted. Id. Income includes, among other things, “interest, dividends, and other net income of any kind from real or personal property.” 24

C.F.R. § 5.609(b)(3). In *DeCambre*, it is contended by the plaintiff, that lump-sum settlements that are deposited a irrevocable special needs trust did not meet this definition. The lump sum settlements, at the time they were deposited in the trust, are assets, not income. Both the Court in Finley and DeCambre recognized that, the beneficiaries could have taken their personal injury settlement and placed it under their mattresses from which they could have freely used it for any purpose without reporting her expenditures as Section 8 income.

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

The construction of § 5.603(b)(2), to exclude from income lump sums distributed from a trust, is consistent with 24 C.F.R. § 5.609(b)(3), because the

placement of the lump sum asset in a trust involves the investment of the money in a trust within the meaning of HUD's regulations. Under § 5.609 (b)(3), "Any withdrawal of cash or assets from an investment will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested by the family." The plaintiff in *DeCambre* contends that trust expenditures were merely a re-imbursement of cash that was invested by her, and should not have been included in her income.

TIP NUMBER 3!

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

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

If the PHA indicates that they do not follow *Finley*, the beneficiary has the option of pursuing litigation to try to establish the *Finley* rule in their jurisdiction. If a split occurs within federal jurisdictions, the case might have some promise for review by the U.S. Supreme Court.

At least one housing authority, in Lincoln Nebraska, appears to have decided not to include any expenditures from Special Needs Trusts in income, regardless of whether they are made regularly.

http://portal.hud.gov/hudportal/documents/huddoc?id=LINCOLNFY15PLAN.pdf

TEMPORARY, NONRECURRING OR SPORADIC INCOME

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

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

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

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

EXAMPLE # 1

FROM RENTAL HOUSING INTEGRITY IMPROVEMENT PROJECT

> Sam Daniels receives Social Security Disability and occasionally works as a handyman. He claims he only worked a couple of times last year but has no documentation. However, regular or steady jobs count as income.
>
> The regulation, 24 CFR 5.609(c)(9), does not define temporary or sporadic income. Therefore, PHAs must determine what is considered temporary or sporadic income, and define it in their policies. Generally, amounts that are neither reliable nor periodic are considered sporadic, and should be excluded from annual income.

http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/rhiip/faq_gird

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

Examples of possible expenditures that might fall into the temporary, nonrecurring or sporadic income exclusion are:

- Occasional Travel and Vacation Expenses;
- Occasional Purchase of Clothing, Appliances, Electronics, other gifts;
- Occasional Purchase Household Furnishings;
- One time payment for a root canal; (also may be excluded as a medical expense)

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

LOANS AS NONRECURRING OR SPORADIC INCOME

EXAMPLE # 2
FROM HUD FAQ

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

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

http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/rhiip/faq_ris

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

MEDICAL EXPENSES AND REASONABLE ACCOMMODATIONS

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

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

Because disabilities are often or always the result of medical conditions, § 5.609(c)(4) provides a bridge between the United States Housing Act of 1937, 42 U.S.C. § 1437f (o)(2)(A)(i) ("The Housing Act"), which established the Section 8 program, and protections from disability discrimination contained in section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("§ 504"), section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 ("ADA"), the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604 ("FHA").

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

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

LEGAL REQUIREMENTS FOR A REASONABLE ACCOMMODATION

To prevail on a claim for denial of reasonable modifications under Title II of the ADA and § 504, a plaintiff generally bears the burden of establishing: (1) that the defendant is a "public entity"; (2) that the plaintiff is a person with a

"disability"; (3) that the plaintiff is "qualified" to participate in or receive the benefits of the defendant's services, programs, or activities; (3) that the plaintiff informed the defendant of his or her disability and requested a modification of the defendant's rules, policies or practices (or that the plaintiff's disability and need for a modification was obvious); (4) that the requested modification was "reasonable"; (5) that the defendant nonetheless refused; and (6) that, as a result, the plaintiff was not able to "to participat[e] in" or enjoy "the benefits of the [defendant's] services, programs, or activities," or was otherwise "subjected to discrimination." 42 U.S.C. §§ 12102, 12131, 12132; *Kiman v. N.H. Department of Corrections*., 451 F.3d 274, 283 (1st Cir. 2006); *Reed v. LePage Bakeries, Inc*., 244 F.3d 254, 258 (1st Cir. 2001) (Title I "reasonable accommodation" case); *Higgins v. New Balance Athletic Shoe, Inc*., 194 F.3d 252, 265 (1st Cir. 1999) (Title I "reasonable accommodation" case); *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 152 (1st Cir. 1998).

STRATEGIES TO EXCLUDE EXPENDITURES BASED ON REQUESTS FOR REASONABLE ACCOMMODATIONS

To be completely safe, a trustee can ask the PHA to excluded an anticipated expenditure as a reasonable accommodation. Although there are no “magic words” or any specific form required for a reasonable accommodation request,

many housing authorities have a specific form where a physician can certify that a reasonable accommodation is necessary. Since physicians are often busy, it can be helpful for the beneficiary's trustee/attorney to fill out the request for reasonable accommodation, specifying in detail what the accommodations are and that they are needed "because of" the beneficiary's disability or disabilities, and to then have the beneficiary bring the completed form to the physician for the physician to sign.

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

TIP NUMBER 4!

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

TIP NUMBER 5!

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

New England

U.S. Department of Housing and Urban Development

Office of Public Housing
Boston Hub
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street
Boston, Massachusetts 02222-1092

New England PIH Advisory Letter # 07 – 05
April 18, 2007

Subject: **Special-Needs Trusts (SNT) Disbursements**

Dear Executive Director,

This advisory letter is provided to clarify the treatment of Special-Needs Trusts a/k/a Supplemental-Needs Trusts and their affect on income and rent calculations in our Office of Public Housing programs. Please apply this discussion to all of the programs administered through this office.

A Special-Needs Trust a/k/a a Supplemental-Needs Trust is a trust established to provide supplemental income for a disabled beneficiary who is receiving or may be eligible to receive government benefits. This type of irrevocable trust is often used by parents or guardians of disabled children to ensure the beneficiary's eligibility or continued eligibility for government benefits.

SNT as an asset

Pursuant to HUD regulations at 24 CFR 5.603(b)(2), the corpus (principal) of an applicant's or participant's SNT is not considered an asset.

SNT distributions as income

Distributions from the trust will be counted when determining annual income under 24 CFR 5.609. Annual income under 24 CFR 5.609 includes all amounts, both monetary or not, received by the applicant or made on the applicant's behalf, which is not excluded under 5.609(c) or deducted from annual income under 24 CFR 5.611.

Annual income includes the full amount, before any payroll deductions, of wages and salaries, overtime pay, commissions, fees, tips and bonuses, and other compensation for personal services; the net income from the operation of a business or profession; interest, dividends, and other net income of any kind from real or personal property. For a complete listing of items that are included in annual income please refer to 24 CFR 5.609(b).

Annual Income does not include items such as income from employment of children (including foster children) under the age of 18 years; payments received for the care of foster children or foster adults (usually persons with disabilities, unrelated to the tenant family, who are

No. 15-1458, No. 15-1515

United States Court of Appeals for the First Circuit

KIMBERLY P. DECAMBRE
Plaintiff - Appellant/Cross-Appellee

v.

BROOKLINE HOUSING AUTHORITY;
MATTHEW S. BARONAS; JANICE MCNIFF; CAROLE BROWN
Defendants - Appellees/Cross-Appellants

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF PLAINTIFF-APPELLANT KIMBERLY DECAMBRE

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Dated: September 28, 2015

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to L.R. 34.0, Plaintiff-Appellant Kimberly DeCambre ("DeCambre") requests oral argument. The question of whether lump sums expended through special needs trusts are included in the income of Section 8 participants has not been decided by any federal or state appellate court. In light of the importance of this issue, the complexity of the factual record and DeCambre's multiple liability theories, oral argument will assist the Court's review.

STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. §1343 (civil rights). It also had pendant or ancillary jurisdiction over DeCambre's state law claims under 28 U.S.C. § 1367.

Appellate jurisdiction rests on 28 U.S.C. § 1291 over the final decision of the lower court as well as on 28 U.S.C. § 1292(a)(1) with regard to denial of DeCambre's request for a preliminary injunction.

On March 25, 2015, Judge William G. Young rendered a final decision in favor of the Defendant-Appellee Brookline Housing Authority ("BHA") on Counts 1, 2, 3, 4 and 7 of the Amended Complaint. Joint Appendix 485-525 ("App."). On March 26, 2015, the lower court entered a final judgment ordering that DeCambre's motion for a preliminary injunction was denied and that her appeal of her Section 8 eligibility was remanded to the BHA. App. 526. It also ordered the cased to be closed on March 26, 2015. App. 1.

DeCambre filed her notice of appeal on April 14, 2015. App. 527.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the BHA violated regulations of the United States Department of Housing and Urban Development ("HUD") in determining DeCambre's income by including expenditures from her special needs trust that originated as lump sum settlements, and by failing to exclude certain other trust property and expenditures in calculating her Annual Income.

2. Whether the lower court erred in failing to find that the BHA's incorrect calculation of DeCambre's annual income and resulting incorrect determination of her Total Tenant Payment ("TTP") violated the rent ceiling provision of the Housing Act, and, if so, whether the court erred in failing on the basis of this violation to render a judgment for DeCambre under 42 U.S.C. § 1983.

3. Whether the lower court erred in failing to find that the BHA discriminated against DeCambre by reason of her disability in violation state or federal anti-discrimination laws by denying DeCambre's requests for reasonable modifications of its rules, policies, practices, procedures and methods of administration so as to exclude expenditures from her special needs trust in determining her income, TTP and Section 8 benefits.

4. Whether the lower court erred in failing to find that the BHA violated state or federal anti-discrimination laws by imposing or applying eligibility criteria

that screened out or tended to screen out DeCambre and other similarly situated people with disabilities who utilize special needs trusts that are funded with lump sums from fully and equally enjoying housing and the Section 8 program.

5. Whether the lower court erred in basing its decision on the wrong eligibility criteria taken from the BHA's website.

6. Whether the lower court erred in denying DeCambre's requests for a preliminary injunction or for a permanent injunction or mandamus restoring her Section 8 benefits.

STATEMENT OF THE CASE

This is an appeal of the district court's judgment in favor of the defendant BHA on DeCambre's claims for 1) deprivation of rights under the United States Housing Act of 1937, 42 U.S.C. § 1437f (o)(2)(A)(i) ("The Housing Act") in violation of 42 U.S.C. § 1983 ("§ 1983"), 2) disability discrimination violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("§ 504"), violation of section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 ("ADA"), violation of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604 ("FHA"), and violation of G. L. ch. 93 § 103, Massachusetts Equal Rights Act ("MERA"), and, 3) denial of DeCambre's request for a preliminary injunction,

a permanent injunction and other equitable relief restoring her Section 8 benefits. App. 85. This is also an appeal of DeCambre's request for review under state law.

On May 27, 2014, the BHA held an informal hearing to review its decision of December 18, 2013 increasing DeCambre's TTP, as of February 1, 2014, from $435.00 per month to $1,560.00 per month (the full contract rent), thus eliminating her Section 8 subsidy. App. 553-356 (hearing officer's decision). On June 9, 2014, the hearing officer at the BHA rendered his decision, affirming the BHA's calculation DeCambre's rent contribution. *Id*. He also opined that the BHA correctly denied DeCambre's reasonable accommodation request. *Id*. On June 27, 2014, DeCambre dual-filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") and HUD against the BHA and its employees alleging disability discrimination. App. 360; Dkt. # 12, p. 33. DeCambre filed suit in the Norfolk Superior Court challenging the BHA's actions on or about July 9, 2014. Dkt. # 1; Dkt. # 12, p. 33. The BHA removed the case from state court on August 21, 2104. *Id*. On September 4, 2014, the parties agreed to submit the matter to the court for judgment as a case stated on the issue of liability. App. 221, n. 1. Argument was heard on September 19, 2014. App. 3. On March 25, 2016, the Court entered its Memorandum of Decision, Findings of Fact and Rulings of Law, rendering a judgment in favor of the BHA on

DeCambre's claims for violation of § 1983 (Count 1), disability discrimination (Count 2), Breach of Lease (Count 3) and Interference with Quiet Use and Enjoyment (Count 4). App. 485-525. The Court denied DeCambre's motion for a preliminary injunction restoring her Section 8 benefits, and it ordered that DeCambre's appeal of her Section 8 eligibility be remanded to the BHA for reconsideration in light of the court's findings. *Id*. On March 26, 2016, the Court entered an order of remand, denying DeCambre's motion for a preliminary injunction and ordering that DeCambre's appeal of her Section 8 eligibility be remanded to the BHA. App. 526. The court also terminated DeCambre's case in the district court on March 26, 2016, closing the case. App. 1. On April 14, 2015, DeCambre appealed the Court's judgments of March 25, 2016 and March 26, 2015. App. 527. The BHA filed its notice of cross appeal on April 27, 2015. App. 528. The BHA declined to reconsider its decision on DeCambre's eligibility as instructed by the lower court in its remand order. App. 591, ¶ 8. DeCambre refiled her case against the BHA in the lower court, seeking enforcement of the remand order. Add. 4; Add. 5. The lower court declined to act in the case, and ordered it administratively closed, subject to being reopened upon the appeal being withdrawn or exhausted or a mandate being issued. *Id*. On July 8, 2015, the lower re-opened the instant case for the limited purpose of considering

DeCambre's Motion For Entry of Judgment under Rule 54(b) and Motion For Entry of Judgment On Separate Document under Rule 58. Dkt. # 44. The Court allowed the DeCambre's motions. Dkt. #s 45 and 46. The parties submitted proposed judgments. Dkt. #s 47 and 48.

STATEMENT OF THE FACTS

DeCambre participated in the Section 8 Housing Choice Voucher Program administered by the BHA from 2005 to 2014. App. 222, ¶ 5. The BHA administers the Section 8 program on behalf of HUD under federal law. App. 221, ¶ 1.

DeCambre was and is a person with disabilities who derives her income primarily from Supplemental Security Income ("SSI"). App. 222, ¶ 8. She received $835.39 per month from SSI at the time of the case stated hearing in the lower court and even less at the time of her re-certification in August of 2013. App. 486; App. 237. DeCambre's disabilities include kidney disease, medullary sponge disease and/or Gittlemen's syndrome, severe hypokalemia, post traumatic stress disorder, torn labrum in hips and shoulder, elbow injuries, arthritis and a history of depression. App. 361, ¶¶ 1, 4 and 5; App. 377-379; App. 379; App. 485, pp. 4-5 (Memorandum of Decision).

In 2010, DeCambre became the beneficiary of a special needs trust established by Suffolk Superior Court pursuant to 42 U.S.C. § 1396p(d)(4)(A). App. 222, ¶ 7. The trust was funded by settlements for personal injuries and property losses obtained by DeCambre. *Id*. In the fall of 2013, the BHA reviewed DeCambre's trust expenditures as part of a periodic re-certification. App. 223, ¶ 9. As of December 1, 2013, DeCambre's contribution to her, known as her "Total Tenant Payment," ("TTP") was $435.00, and the BHA paid a "Housing Assistance Payment" ("HAP") of $1,125.00. App. 241. On January 11, 2014, DeCambre received "Notice of Rent Adjustment," indicating the HAP, paid by the BHA on behalf of HUD, was reduced to $0.00, and DeCambre's TTP was increased to $1,560.00, the full contract rent. App. 255. In a letter that accompanied the "Notice of Rent Adjustment," the BHA indicated that the increase was based on expenditures from DeCambre's special needs trust. App. 257. DeCambre timely appealed the "Notice of Rent Adjustment" *Id*., App. 259. DeCambre and J. Whitfield Larrabee ("Larrabee"), her trustee and attorney, repeatedly took steps to notify the BHA that: 1) DeCambre is a person with disabilities, 2) that the assets and expenditures of DeCambre's special needs trust were excluded from income under HUD regulations, 3) that, by including trust expenditures in DeCambre's income, the BHA was discriminating against DeCambre by reason of her disability

in violation of state and federal law, and, 4) that DeCambre requested reasonable accommodations excluding her special needs trust expenditures so that she could participate in the Section 8 program and because of the physical and mental limitations resulting from her disabilities. App. 237; App. 245; App. 267-268; App. 282-283; App. 285; App. 288; App. 290; App. 430-432. As part of the re-certification process, on November 12, 2013, Larrabee notified the BHA that DeCambre was a recipient of SSI, that she was a person with a disability, and that the trust expenditures should not have any effect on her Section 8 benefit. App. 245. On February 7, 2014, Larrabee specifically requested reasonable accommodations, asking that the BHA exclude all trust expenditures in calculating DeCambre's income, and that it specifically exclude the cost of her car, which was needed as protection from heat due to her medical conditions. App. 267-268, ¶¶ 11-14. Larrabee stated: "the automobile was needed to prevent Mrs. DeCambre from overheating in the summer." *Id*. On March 14, 2014, Larrabee made a more detailed request for reasonable accommodation, supported by letters from DeCambre's physicians describing her disabilities and need for accommodations. App. 282-283; App. 288; App. 290. In March 2014, DeCambre's physician verified that she has "numerous medical conditions that require her to have access to heat and central air conditioning to ensure temperature regulation" and that

require her to have access to cell phones and a lifeline in case of emergency. App. 290. Also on March 14, 2014, Larrabee offered to allow the BHA to inspect over 500 pages of medical records detailing DeCambre's medical problems and disabilities. App. 387. On July 17, 2014, Larrabee submitted on DeCambre's behalf a Certification of Need For Reasonable Accommodation that he signed. App. 367-387. On July 18, 2014, the BHA notified Larrabee that it required additional medical or expert certification of DeCambre's need for reasonable accommodation by August 7, 2014. App. 390. In response, on August 6, 2015, Larrabee provided a certification from DeCambre's physician that the requested accommodations were needed "because of" her disabilities. App. 428-432. Her physician certified that she needed the following reasonable accommodations because of her disabilities: 1) exclusion of trust expenditures that have enabled her to have automobiles and therefore avoid heat and cold; 2) exclusion of trust expenditures for her cell phone that she needs to call for help in case of an emergency when she is away from home; 3) exclusion of trust expenditures for her landline so that she can use lifeline and have access to help in case of an emergency at home; 4) exclusion of trust expenditures so as to enable her to participate in the Section 8 Program; 5) exclusion of expenditures on treatment, care and boarding of cats as they provide emotional support to DeCambre and help

her in coping with the limitations resulting from her disabilities. App. 430-432. The BHA failed to make any accommodations in accordance with those identified as necessary by her physician. App. 213, ¶ 30.

On May 27, 2014, the BHA held a hearing on DeCambre's appeal. App. 353. The hearing officer limited the appeal to DeCambre's appeal of her "rent calculation" in accordance with the notice of rent adjustment. App. 353; Accordingly, only the income between December 1, 2012 and November 30, 2013 was considered. App. 188, n. 10; App. 124; App. 224, ¶ 14; App. 227, ¶ 23; App. 248-253; App. 255. DeCambre presented evidence and argument that the expenditures from the special needs trust should be excluded from her family's annual income as a reasonable accommodation for her disabilities and based on HUD regulations, excluding trust assets, lump sum settlements and "temporary, nonrecurring or sporadic income" from annual income. App. 248-253; App. 353. DeCambre presented undisputed evidence that $37,601 of the 2013 expenditures was for acquisition of automobiles to which the trust held title. App. 251; App. 267, ¶ 11; The BHA argued that DeCambre's requests for a reasonable accommodation to exclude as income the trust's vehicle, cell phone and landline expenses, and expenditures for her cats were not reasonable. App. 353, p. 3. DeCambre also presented undisputed evidence that the trust was exclusively

funded with her lump sum settlements for personal injuries and property losses. App. 266, ¶ 7. The undisputed evidence was that distributions from the trust were solely of principal, and that there was no substantial interest income in the trust. *Id*. The BHA argued that, based on a 2007 New England HUD advisory letter and an email from a HUD employee, the lump sum settlement exclusion did not apply and that DeCambre's other trust expenditures did not fall within the exclusions set forth at 24 C.F.R. § 5.609(c). App. 452; App. 353. On June 9, 2014, the hearing officer upheld the BHA's rent adjustment, based in part on the New England HUD advisory letter and email, and also determined that the BHA correctly denied DeCambre's reasonable accommodation request. App. 353, pp. 4-5.

On July 8, 2014, Larrabee sent an email to BHA's attorneys renewing her requests for reasonable accommodation excluding all SNT expenditures, requesting the BHA to reconsider its decision because of potential liability under "federal anti-discrimination laws." App. 365. The BHA's Administrative Plan provides that a hearing officer's decision is not binding on the housing authority if it "[i]s contrary to HUD regulations or requirements, or otherwise contrary to federal, State or local law." App. 315. The Administrative Plan also allows the housing authority to overturn a hearing that was "upheld" if the reason for the termination was discretionary. *Id*.

With the loss of her Section 8 subsidy on February 1, 2014, DeCambre fell behind on her rent and received a notice to quit in March of 2014. App. 463, ¶ 2. App. 464. By borrowing and depleting family assets, she was able to pay her rent but again fell behind on her rent in August and received another notice to quit. App. 463, ¶ 3; App. 466. It was undisputed that, because of the lack of funds, DeCambre cut back on food purchases and did not have enough money for food, clothing, rent, utilities, drug co-payments, medical supplies, charges for over the counter drugs and other necessities. App. 464, ¶ 7; App. 465-466.

The lower court independently consulted the website of the BHA and based its findings of fact and conclusions of law on income limits set forth on the website related to person's eligibility for admission to the Section 8 program. App. 492; App. 524. DeCambre, who was a continuing participant in the Section 8 program, and was not applying to be admitted to the program, was not subject to the eligibility limits identified by the court. App. 222, ¶ 5; App. 237-240.

SUMMARY OF THE ARGUMENT

The BHA wrongly counted distributions of DeCambre's lump sum settlement money as "income" simply because she put the lump sum settlements into a special needs trust. Under the BHA's logic (upheld by the lower court), had DeCambre not used a trust, and simply spent the money, the expenditures would

not have been counted, and DeCambre would still be eligible to receive her full Section 8 subsidy. As the lower court stated, "DeCambre could have taken her personal injury settlement and placed it under her mattress,... from which she could have freely used it for any purpose without reporting her expenditures as Section 8 income." App. 503-504. As explained below, a lump sum settlement remains a lump sum settlement when put into trust, and HUD regulations exclude lump sum settlements from income, whether they are put under a mattress, deposited in the bank, or placed in a special needs trust. 24 C.F.R. § 5.609(c)(3).

People with disabilities such as DeCambre, who receive lump sums, must use special needs trusts in order to remain eligible for Supplemental Security Income ("SSI"). App. 221, ¶¶ 7-8. Under the Social Security Act, only people who have assets less than $2,000 or $3,000 can qualify for SSI. 20 C.F.R. § 416.1205. However, under § 1396p(d)(4)(A), individuals with disabilities are permitted to place their assets in a special needs trust and avoid this asset limitation. 42 U.S.C. § 1396p(d)(4)(A). Accordingly, when DeCambre received a series of lump settlements as part of civil suit, she followed the procedure established by Congress in creating a special needs trust and she then lawfully placed the settlement funds in the trust so that she could continue receiving SSI. App. 222, ¶ 7.

By excluding DeCambre from the Section 8 programs because of DeCambre's use of a special needs trust, the BHA engaged in disability discrimination in violation of the ADA, § 504, the FHA and G.L. ch. 93 § 103. 28 C.F.R § 35.130(b)(8). The lower court found that, under the interpretation given to HUD regulations by the BHA, "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." App. 503. The BHA failed to consider the unique dependence individuals with disabilities have on special needs trusts, and the BHA's practices denied DeCambre equal access to the Section 8 program and to housing in violation of state and federal law. App. 255; App. 257; App. 358.

The BHA further erred by failing to provide DeCambre reasonable accommodations. Although DeCambre supplied medical proof of her need for reasonable accommodations excluding trust expenditures that were medically necessary on account of her physical and mental limitations, and she even provided her physician's certification that the accommodations were needed "because of" her disabilities, the BHA denied her requests. App. 353; App. 430-432. The lower court erred in failing to conduct an individualized assessment of the DeCambre's right to reasonable accommodations and in failing to find that the

BHA violated the ADA, § 504, the FHA and G.L. ch. 93 § 103. 28 C.F.R § 35.130(b)(7).

Two other factors, one occurring at the BHA, and another in the lower court, caused this case to go awry. The first error occurred when the BHA, without explanation, decided to include the cost of the DeCambre trust's acquisition of two automobiles for $37,601, in DeCambre's income, even though the trust held title to the automobiles. App. 353. Nothing in HUD regulations allows trust principal of this sort to be included in a participant's income. The lower court recognized this obvious error in holding that the automobile expenditure should not be included in DeCambre's income. App. 521. The second error resulted from the lower court independently gathering facts by visiting the website of the BHA. App. 492. The lower court took judicial notice of the eligibility criteria from the BHA website. *Id*. In doing so, the lower court selected eligibility criteria for admission to the Section 8 program, 30% of the area's median income. *Id*. As a continuing participant in the Section 8 program, DeCambre was subject to higher eligibility criteria, 80% of the area's median income. 24 C.F.R. § 5.603(b); App. 222, ¶ 5; App. 237-240. Based on its selection of the wrong eligibility criteria, the lower court incorrectly found that DeCambre was not eligible for the Section 8 program, even with the exclusion of the cost of the automobiles. App. 492, App.

521, App. 523. On the basis of these findings, the lower court incorrectly concluded that the BHA did not violate the rent ceiling contained in the Housing Act and it ruled against DeCambre on her claims under § 1983. App. 485-526.

ARGUMENT

I. STANDARD OF REVIEW

A. Review of the Case Stated

The standard for appellate review of the lower court's decision on the parties' case stated is one for clear-error; that is, the district court's factual inferences should be set aside only if they are clearly erroneous, but, the court's legal conclusions are reviewed de novo. *United Paperworkers Intern. Union v. Intern. Paper*, 64 F.3d 28, 31-32 (1st. Cir. 1995).

B. Review Of Denial of Requests For Preliminary and Permanent Injunctions.

Review of the denial of DeCambre's requests for preliminary and permanent injunctive relief is for abuse of discretion. *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir.1996). The district court's answers to abstract questions of law are subject to de novo review. *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 71 (1st Cir.), cert. denied, 537 U.S. 974, 123 S.Ct. 434, 154 L.Ed.2d 330 (2002). An error of law is always an abuse of discretion. *Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 221 (1st Cir.2003).

C. Review Of The Hearing Officer's Decision.

In deciding DeCambre's cause of action under § 1983, the hearing officer's findings of fact in the lower court are reviewed under the "substantial evidence" standard. *Ang v. Gonzales*, 430 F.3d 50, 54 (1st Cir.2005); Cf. G. L. ch. 30A, § 14(7)(e) (applying substantial evidence standard to review of state agency decisions); 5. U.S.C. § 706(2)(E) (applying substantial evidence standard to review of federal agency decisions).

Questions of law, including interpretation of federal regulations, are subject to de novo review, both in the lower court and in this court, without deference to the conclusions of the local hearing officer. *Seavey v. Barnhart*, 276 F. 3d 1, 9 (1st Cir. 2001). No deference should ever be afforded a local agency's interpretation that is contrary to a federal statute or regulation. *Ritter v. Cecil County Office of Hous. & Community Dev.*, 33 F.3d 323, 328 (4th Cir.1994). The decision of a hearing officer at a local agency interpreting federal statutes and regulations is not entitled to the deference afforded a federal agency's interpretation of its own statutes or regulations. *Orthopaedic Hosp. v. Belshe*, 103 F. 3d 1491, 1495 (9th Cir. 1997). The court should not defer to the local hearing officer's interpretations of federal law and regulations because neither the hearing officer nor the BHA are subject to Congressional oversight and they lack expertise

in interpreting and implementing federal law. *Amisub (PSL), Inc. v. State of Colorado Dept. of Social Services*, 879 F.2d 789 (10th Cir.1989), cert. denied, 496 U.S. 935, 110 S.Ct. 3212, 110 L.Ed.2d 660 (1990); *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 316 (9th Cir. 1988), cert. denied, 491 U.S. 905, 109 S.Ct. 3187, 105 L.Ed.2d 695 (1989). Furthermore, giving deference to local hearing officers' interpretations of federal regulations will inevitably result in a lack of coherent, uniform and consistent construction of federal law and regulations nationwide. *Turner v. Perales*, 869 F.2d 140, 141 (2nd Cir.1989). Deference to local housing agencies' interpretations of federal law and regulations will also necessarily lead to inconsistent application between different localities within the states.

The lower court erred in using an excessively deferential standard of review in evaluating the BHA's interpretation of HUD regulations. In deferring to the BHA, the Court cited *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). It specifically quoted *Chevron* as follows:

> 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. *Id*.

The lower court erred in giving the interpretation of the hearing officer *Chevron* deference because the BHA is not the administrator of HUD, and there is no indication that Congress has explicitly left a gap for a local officials to fill. It is not the purview of a local hearing officer to interpret federal law and regulations. The case by case determinations made by the staff of a local housing agency have none of the stature afforded regulations and other interpretive guidelines issued by cabinet level leaders of federal agencies and other ranking federal policy-makers.

The lower court, in applying the *Chevron* rule to the decision of the BHA, erred in concluding that the BHA's interpretation was reasonable. App. 504. *Chevron* only prohibits the court from substituting its own construction for the interpretation made by the agency if it is "reasonable." *Id*. While much of the remainder of this brief explains why the BHA's decision was not reasonable, the lower court itself listed a number of concerns that lead to the conclusion that including distributions of lump sum settlements forming the principal of self-settled special needs trusts in the income of Section 8 participants is quite unreasonable. The lower court:

- acknowledged the underlying problem of losing housing benefits due to use of a special needs trust designed to protect needs-based benefits;

- acknowledged that if DeCambre had put her lump sum settlements under her mattress, the withdrawal of them would not be counted as income, and,
- held that "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.

App. 502-503.

II. THE BHA VIOLATED HUD REGULATIONS IN DETERMINING DECAMBRE'S ADJUSTED ANNUAL AND MONTHLY INCOME.

A. Lump Sum Settlements Were Not Excluded from DeCambre's Annual Income

HUD specifically excludes lump sum additions to family assets in the calculation of Annual Income. HUD regulations provide in relevant part: Annual income does not include the following:...(3) 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). 24 C.F.R. § 5.609(c)(3). Except for de minimus interest, all of the funds contained in the DeCambre SNT were derived from "lump sums received as part of her personal injury and property damage suit" and therefore fall within the

exclusion set forth at 24 C.F.R. 5.609(c)(3). App. 266, ¶ 7; App. 490.

The lower court erroneously concluded that the BHA could include DeCambre's lump sum settlements in her annual income based on 24 C.F.R. § 5.603(b)(2), which provides:

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

In making its determination, the lower court erred in failing to draw a distinction between assets, principal and income. App. 502. Although the trust fund is not considered an asset, "any income distributed from the trust fund shall be counted..." Id. Importantly, not all distributions are counted, only "income" that is distributed is counted. Id. Income includes, among other things, "interest, dividends, and other net income of any kind from real or personal property." 24 C.F.R. § 5.609(b)(3). The lump sum settlements deposited in the DeCambre's trust did not meet this definition. App. 266, ¶ 7; App. 302, ¶ 7. The lump sum settlements, at the time they were deposited in the trust, were assets, not income. The lower court recognized this in holding, "DeCambre could have taken her personal injury settlement and placed it under her mattress, Finley Op. 6, from

which she could have freely used it for any purpose without reporting her expenditures as Section 8 income." App. 503-504. The hearing officer also concluded that DeCambre's settlements were assets that were excluded from income. App. 353. Because the funds were not income when placed in the trust, the funds were not income when they were disbursed from the trust as that term is intended under § 5.603(b)(2).

The logical purpose of § 5.603(b)(2) is to ensure that income that is simply passed through a irrevocable trust shall be included in annual income and that any interest and dividends produced by the trust should be included in annual income. *Id*. Accordingly, to the extent that DeCambre's Trust produced and distributed interest or dividends, or that DeCambre tried to pass other money that met the definition of income under § 5.609 through the trust, the BHA was required to include this in income under HUD regulations. 24 C.F.R. § 5.609(b)(3), *Finley v. The City of Santa Monica, et. al.*, Superior Court of California, BS127077 (2011); App. 271. Here, however, the un-rebutted evidence was that "[b]ecause Mrs. DeCambre had no substantial interest income on the trust, all of the disbursements were from the principal and none can be counted as income...." App. 266, ¶ 7.

The construction of § 5.603(b)(2), to exclude from income lump sums distributed from a trust, is consistent with 24 C.F.R. § 5.609(b)(3), because the

placement of the lump sum asset in a trust involves the investment of the money in a trust within the meaning of HUD's regulations. Under § 5.609 (b)(3), "Any withdrawal of cash or assets from an investment will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested by the family." *Id*. DeCambre's trust expenditures were merely a re-imbursement of cash that was invested by DeCambre, and should not have been included in DeCambre's income.

B. A Lump Sum Is Not Converted To Income Simply By Being Placed In A Trust

The hearing officer erroneously concluded that the lump sum settlements ceased being lump sums when they were "converted" into a special needs trust, despite the fact that none of the relevant HUD regulations provide or make reference to property being "converted" in these circumstances. App. 355. This concept that lump sums are "converted" when placed in a trust was invented out of whole cloth by the BHA hearing officer. *Id*. In addition to being baseless, the theory that property placed in a trust is "converted" in this manner is illogical. Things do not normally lose their inherent properties simply by being moved into a trust. An automobile placed in a trust remains an automobile. A stock certificate placed in a trust remains a stock certificate. For the same reason, a "settlement for personal injury or property losses" placed in a trust remains a

"settlement for personal injury or property losses" under § 5.609(c)(3), and is excluded from income. 24 C.F.R. § 5.609 (c)(3). The lower court's ruling for the BHA, based on the lack of "regulatory support" that DeCambre's "Trust corpus remained a lump-sum settlement" was not reasonable. App. 510. Whether a property is a settlement relates to its origin to a recipient. Because the origin of a settlement to a recipient does not change, it is not reasonable to assume that it changes when placed in a trust, where, as here, HUD regulations are silent on the matter.

C. It Was Clear Error To Include Trust Expenditures In DeCambre's Income Where They Did Not Satisfy The Definition Of Income Under § 5.609(a)

In a well reasoned decision, a California court concluded that a distribution of principal from a irrevocable trust is not annual income as defined by § 5.609(a) where the principal, composed of a lump sum settlement, is excluded from annual income under § 5.609(c)(3). *Finley*, *supra*; App. 335. In order for trust expenditures to qualify as income to DeCambre, § 5.609(a) requires that the expenditures "Go to, or on behalf of, the family head or spouse (even if temporarily absent) or to any other family member…and" are "not specifically excluded in paragraph (c) of this section." 24 C.F.R. § 5.609(a)(1) and § 5.609(a)(3). While the expenditures satisfied the requirement of § 5.609(a)(1), in

that they benefitted DeCambre, they did not satisfy the requirement of § 5.609(a)(3) because they fell under the exclusion set forth at § 5.609(c)(3). Because both requirements were not met, it was error for the hearing officer to uphold BHA's inclusion of trust expenditures in DeCambre's income and it was error for the lower court to affirm the hearing officer's determination. *Finley*, *supra*.

In construing § 5.603(b)(2) , the lower court erroneously concluded that the lump sum settlement exclusion under § 5.609(c)(3) was inapplicable because "nothing in the regulations instruct that certain exclusions prevail over income inclusions." App. 502. Contrary to the lower court's conclusion, the definition of annual income set forth in § 5.609(a) does provide that the exclusions in § 5.609(c) prevail over what would otherwise be considered income. The regulation's specification that annual income is all amounts that benefit the family members and that are not excluded under 24 C.F.R. § 5.609(c) indicates that the exclusions prevail over monetary amounts received. 24 C.F.R. § 5.609(a)(1) and § 5.609(a)(3). The judge in *Finle*y was able to easily reconcile § 5.603(b)(2) with § 5.609 by concluding that expenditures of principal under a special needs trust "must be 'counted' in the annual income calculation as funds benefitting the

family head under § 5.603(b)(2), but they remain excluded under section 5.609(c)." *Finley*, supra; App. 343.

D. HUD Guidance Did Not Provide A Basis For The BHA's Decision

The hearing officer's decision cannot stand because it was based on an erroneous reading of HUD guidance as set forth in an advisory letter and email from the New England HUD office. The hearing officer concluded that "the BHA followed HUD regulations and guidance regarding SNTs as stated in New England PIH Advisory Letter dated April 18, 2017 (sic) and in HUD Portfolio Management Specialist, Benjamin Palmer 's April 20, 2012 correspondence to Carole Brown..."[1] App. 355. While the 2007 Advisory Letter states, "Distributions from the trust will be counted when determining income under 24 CFR 5.609," it also states that "[n]ot all distributions from a SNT should be counted toward an applicant's annual income." App. 452-453. In particular, the advisory letter, which is exclusively focused on "Special-Needs Trusts (SNT) Disbursements," states that "Annual Income does not include items such as income from....Lump-sum additions to family assets, such as...settlement for personal

[1] The Benjamin Palmer letter does not address the issue of excluding settlements from income and does not seem to provide any guidance on this issue beyond that contained in the New England PIH Advisory Letter. App. 351; App. 452-454.

injury or property losses." *Id*. The reference to the § 5.609(c)(3) exclusion, in context letter focused on "Special-Needs Trusts (SNT) Disbursements," indicates that the exclusion does apply to disbursements from a Special needs trusts, as there is no other reason to mention the exclusion in this context. App. 452-453. Based on the record evidence, was error for the lower court to affirm the unfounded and erroneous conclusions of the hearing officer.

The lower court erred in concluding that, "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." App. 507. The lower court looked to a statement in the New England HUD advisory letter, which states that "Unlike Medicaid, 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." App. 506-507. While this distinction might provide a reason for HUD to treat some SNT expenditures differently than Medicaid would, it provides no reason whatsoever for the HUD to target individuals who happen to use special needs trusts or other irrevocable trusts for less favorable treatment than other individuals who receive lump sums. Reliance on this distinction is speculative and unreasonable.

E. The BHA Violated HUD Regulations by Including "Temporary, Nonrecurring or Sporadic Income (Including Gifts)" in Decambre's Income.

The BHA erred in failing to exclude numerous "temporary, nonrecurring or sporadic" expenditures made by DeCambre's trust from her annual income as required by the income exclusion set forth at 24 C.F. R. §5.609(c)(9). In the year under review, there were two travel expenses for DeCambre, $3,875.12 on February 13, 2013, and $2,366.80 on March 26, 2013, that should have been excluded as sporadic income. *Id*; App. 250-251. Excepting a $50 reimbursement for a luggage fee on April 10, 2013, related to the earlier travel, there no other expenditures for travel in the record. App. 250. These expenditures, which were irregular, scattered, isolated, occasional and infrequent, met the common understanding of the sporadic and were thus improperly included in DeCambre's income.

DeCambre had sick cats that required cancer treatment. App. 249. In his affidavit submitted to the BHA, DeCambre's trustee stated, "DeCambre's pet required emergency veterinary treatment. By its nature, veterinary treatment is temporary." App. 267, ¶ 9. There was no evidence that the veterinary care was more than temporary. The $3,806.21 in expenditures on the cats should have been excluded as temporary. *Id*; 24 C.F. R. §5.609(c)(9). The automobile purchase

occurred on one date, May 29, 2013, and was effectuated by a single $37,601 check payment. App. 251; App. 267, ¶ 11. Since the expenditure did not recur, and it was not shown that it was likely to recur in 2014, the expenditure fell under the exclusion for nonrecurring income or sporadic income set forth at 24 C.F. R. §5.609(c)(9). According to the New England HUD office, "[t]hose amounts and 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 toward annual income." App. 453. As the automobile expenditure was not the type of payment that either recurred or was likely to recur, it was unreasonable to presume that it would be available for housing expenses, and consequently this type of expenditure is excluded from annual income by HUD. 24 C.F. R. §5.609(c)(9). There was a single $3,549 expenditure on automobile insurance on June 19, 2013. App. 251. This expenditure should also have been excluded as non-recurring and sporadic. *Id*. Although the trial court ordered the BHA to reconsider many of these expenditures, the BHA has evaded complying by with the Court's instructions by appealing this order and refusing to reconsider. App. 528; App. 591, ¶ 8. DeCambre submits that the BHA must not only be compelled to comply with the Court's order, but that the Court must find that the improper inclusion of

these expenditures in DeCambre's income resulted in a violation of the rent ceiling set forth at 42 U.S.C. § 1437f(o)(2).

F. The BHA Violated HUD Regulations by Including Necessary Medical Expenses in Decambre's Income.

The inclusion of trust expenditures for the trust's automobile purchase, for DeCambre's cell phone and landline, and for the care and support of DeCambre's pets violated 24 C.F. R. § 5.609(c)(4). § 5.609(c)(4) excludes from annual income: "Amounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member." *Id*. This exclusion of income under The Housing Act overlaps with DeCambre's requests for reasonable accommodation under state and federal anti-discrimination laws, as discussed, infra. Reasonable accommodations required by state and federal laws prohibiting discrimination against individuals with disabilities fall within the exclusion for medical expenses in the instant case. 24 C.F. R. § 5.609(c)(4).

III. THE BHA IS LIABLE UNDER 42 U.S.C. §1983 FOR VIOLATING THE RENT CEILING SET FORTH AT 42 U.S.C. § 1437f(o)(2).

A. The Basis for Decambre's Claim That the BHA Violated § 1983

In order for DeCambre to prevail, on her claims under 42 U.S.C. § 1983, against the BHA, she must show that the BHA, acting under color of law, deprived her of a right secured by a federal statute. *Wright v. Roanoke Redevelopment and*

Housing Authority, 479 US 418, 423-424 (1987)(by violating the rent ceiling for public housing tenants set forth in the Brooke Amendment of the Housing Act, the defendant violated § 1983.) "[P]rivate individuals may bring lawsuits against state actors under 42 U.S.C. § 1983 to enforce not only constitutional rights but also rights created by federal statutes." *Johnson v. Housing Authority of Jefferson Parish*, 442 F. 3d 356, 359 (5th Cir. 2006)(referring to *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980)). However, to enforce a violation of a federal statute by means of § 1983, the statute must "unambiguously give rise to privately enforceable, substantive rights." *Johnson v. Housing Authority of Jefferson Parish*, *supra*.

The BHA violated DeCambre's unambiguous right under 42 U.S.C. § 1437f(o)(2) not to be required to pay more than 30% of her adjusted family income in rent in violation of the "rent ceiling" set forth at § 1437f(o)(2)(A)(i), and this gives rise to an enforceable claim under 42 U.S.C. § 1983. The Fifth Circuit has found that when a housing authority violates the rent ceiling set forth at § 1437f(o)(2), tenants have an unambiguous right under the Housing Act that they may enforce by means of a private suit under § 1983. *Johnson v. Housing Authority of Jefferson Parish*, *supra*. Furthermore, the Supreme Court has found that public housing tenants, under the similar provisions of 42 U.S.C. § 1437a(a), have a private right of action under § 1983 for violations of the rent ceiling

provisions set forth in the Brooke Amendments. *Wright ,* 479 U.S. 418. Other court's have reached similar outcomes in analogous circumstances. *Daniels V. Housing Auth. Of Prince George's Cty.*, 940 F. Supp. 2d 248, 259 (Dist. Maryland 2013)(right to properly calculated subsidy found under the Homeownership Option of the Housing Choice Voucher Program at 42 U.S.C. § 1437f(y)); See Also, *Farley v. Philadelphia Housing Authority*, 102 F. 3d 697 (3rd Cir. 1996) (§ 1983 held to be appropriate means to enforce right to rent abatement and repair of apartment under the Housing Act, 42 U.S.C. § 1437d(k)) .

In addition to incorrectly including expenditures of trust principal as income, the BHA violated the rent ceiling by improperly including trust property in DeCambre's income (automobiles), and by failing to exclude trust expenditures from income as required by exclusions set forth at 24 C.F.R. § 5.609(c). The BHA's erroneous inflation of DeCambre's annual income resulted in the elimination of DeCambre's Section 8 subsidy and the requirement that she pay more than 30% of her monthly adjusted family income in rent, in violation of the rent ceiling imposed by § 1437f(o)(2) and the regulations of the Department of Housing and Urban Development (HUD) implementing the Section 8 Program. 24 C.F.R. § 5.628.

B. The BHA Improperly Included Trust Property (Automobiles) In DeCambre's Annual Income With The Result That It Violated The Rent Ceiling.

The lower court correctly found that the DeCambre trust's $37,601 automobile purchase should not be included in DeCambre's income because title was held by the trust as an asset. App. 521-522. It was plainly erroneous and inconsistent with HUD regulations for the BHA to include the value of automobiles owned by DeCambre's SNT in her income. 24 C.F.R. §§ 5.603 (b)(2), 5.609(a), 5.609(c)(3), 5.609(c)(4), 5.609(c)(9); App. 353-356. No HUD regulation provides for the inclusion of any part of the principal of a non-revocable trust in the income of Section 8 participants, and the regulations defining income do not encompass trust principal. In relevant part, 24 C.F.R. § 5.603(b)(2) provides: "income distributed from the trust fund shall be counted when determining annual income under § 5.609." *Id*. On May 29, 2013, the trust obtained title to two automobiles by payment of $37,601 by check. App. 251; App. 267, ¶ 11. One automobile was sold, with the funds of the sale returned to the trust bank account. App. 11, ¶ 2. The money expended by the trust to acquire ownership of the automobiles was neither "income" as that word is defined by HUD, nor was it "distributed from the trust" within the meaning of § 5.603 (b)(2), and therefore, it should not have been included in DeCambre's income. 24 C.F.R.

§§ 5.603 (b)(2); 24 C.F.R. § 5.609(a). The exchange of money for an automobile involves a distribution within the trust, not a distribution "from the trust." In purchasing the automobiles, money was taken out of the trust, but commodities of equal value were returned. No value was distributed from the trust to DeCambre in this situation. The term "annual income" is defined as all amounts, monetary or not, which: (1) Go to, or on behalf of, the family head. . . and (3) which are not specifically excluded in section 5.609(c). 24 C.F. R. §5.609(a). Because the value of the automobile and title to it remained within the trust, and did not move from the trust to DeCambre, it did not "go to" DeCambre. Because the value of the automobile did not "go to" DeCambre, it was not income within the meaning of §5.609(a). *Id*. Where one automobile remains an asset of the trust, and proceeds from the sale of the other automobile are held in the trust bank account, the expenditure on the automobiles does not fit within the definition of income under §5.609(a). 24 C.F.R. § 5.609 (a).

Based on the erroneous inclusion of the value of automobiles in DeCambre's income, the rent ceiling was violated. 42 U.S.C. § 1437f(o)(2). With the exclusion of $37,601 for the automobile purchase from DeCambre's income, the maximum TTP allowable under § 1437f(o)(2), 30% of DeCambre's adjusted

monthly family income, was $930.62. *Id.*[2] By establishing DeCambre's TTP at $1,560, the BHA set her TTP at more than 50% of her family's adjusted monthly income, thereby violating the rent ceiling. The lower court erred in failing to conclude, based on its own findings and conclusions that the cost of the automobiles were excluded from DeCambre's income, that the BHA violated the rent ceiling and § 1983.

C. By Failing To Exclude Lump Sums, Medical Expenses, and Temporary, Sporadic or Nonrecurring Income (Including Gifts) From DeCambre's Annual Income, The BHA Violated The Rent Ceiling.

As previously discussed, the BHA unlawfully failed to exclude lump sums, medical expenses, and temporary, sporadic or nonrecurring income (including gifts) from Decambre's annual income. The BHA's failure to exclude all trust expenditures under 24 C.F. R. § 5.609(c)(3) as lump sums resulted in a 350% increase in DeCambre's rent contribution, and an obvious violation of the rent

[2] Based on the lower court's findings, DeCambre's TTP could not be higher than $930.62 calculated as follows: $12,397.00 (annual income) - $400 (deduction for disabled family under 24 C.F.R. § 5.611(a)(2)) + $62,828.99 (amount of trust expenditures and assets attributed to DeCambre's income by the BHA) - $37,601 (automobile purchase) = $37,224.99 (adjusted annual family income) ÷ 12 = $3,102.08 (adjusted monthly family income) × .30 = $ 930.62.

ceiling.[3] In combination with its erroneous inclusion of trust property in DeCambre's income, the unlawful inclusion of medical expenses, and temporary, sporadic or nonrecurring income in her income inflated her annual income and caused her to pay more than 30% of her monthly income in rent in violation of the rent ceiling. 24 C.F. R. § 5.609(c)(4); 24 C.F. R. § 5.609(c)(9).

IV. THE LOWER COURT ERRED IN CONDUCTING AN INDEPENDENT INVESTIGATION, WITHOUT NOTICE TO THE PARTIES, AND IN TAKING JUDICIAL NOTICE OF THE WRONG INCOME ELIGIBILITY LIMITS

The lower court erred when, in writing its decision, it independently consulted the website of the BHA, took judicial notice of the wrong eligibility criteria from the site, and based its findings of fact and conclusions of law on the wrong criteria. Citing the web page of the BHA, the lower court found that "the BHA's yearly gross household income limit for a two-person household is $22,600." App. 492; http://www.brooklinehousing.org/sect8.html.[4] Based on the eligibility limit for initial admission to the Section 8 program set forth on the

[3] If all trust expenditures were excluded from DeCambre's annual income based on the lump sum exclusion, DeCambre's TTP should not have exceeded $299.92, calculated as follows: $12,397.00 (annual income) - $400 (deduction for disabled family under 24 C.F.R. § 5.611(a)(2)) = $11,997.00 (adjusted annual family income) ÷ 12 = $999.75 (adjusted monthly family income) × .30 = $299.92.

[4] The BHA was incorrect when it stated on the website the $22,600 eligibility limit for admission to the Section 8 program was the "very low income" limit. DeCambre contends this is the "extremely low income" limit.

website, the lower court concluded "that DeCambre's income, as calculated by the BHA, exceeded the outlined limits of Section 8 housing eligibility." App. 524. DeCambre was subject to the eligibility limit for families "continuously assisted" in the Section 8 program. 24 C.F.R. § 982.201(b)(1)(ii); 24 C.F.R. § 5.603(b); App. 222, ¶ 5; App. 237-240. This limit is set by HUD at 80% of area median income, or according to HUD, $52,400 for Brookline in 2014. 24 C.F.R. § 5.603(b); 24 C.F.R. § 982.201(b)(1)(ii); Economic and Market Analysis Division, HUD, *FY 2014 Income Limits Summary For Brookline, Massachusetts*, http://www.huduser.org/portal/datasets/il/il14/index.html (HUD's online tool at this URL provides eligibility limits by area); Quadel Consulting Corp., *Housing Choice Voucher Program Guidebook* § 5.2, (2001). http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11749.pdf. The lower court's factual findings and conclusions based on the wrong eligibility limit were clearly erroneous and were improperly based on incorrect information that was outside of the agreed upon record. Errors of this sort "invariably" have been held to be "reversible error." *Gordon v. United States*, 178 F. 2d 896, 901 (6th Cir. 1949). The lower court missed the crux of the issue in the case, violation of the rent ceiling, and was led astray, by its unnecessary focus on the eligibility limit, a matter that was not even addressed in the informal hearing. App. 353-356.

V. THE BHA DISCRIMINATED AGAINST DECAMBRE BY REASON OF HER DISABILITY

A. The Basis For DeCambre's Claims of Discrimination

DeCambre's claims of disability discrimination are based in particular on two theories of liability: 1) that the BHA unlawfully denied of her requests for reasonable modification of its rules, policies, practices, and methods of administration with the result that it, a) excluded her from the Section 8 program, b) denied her the full and equal benefits of the Section 8 program, and, c) denied her an equal opportunity to use and enjoy housing, and, 2) that the BHA imposed or applied eligibility criteria that, by reason of her disabilities, unlawfully excluded her from the Section 8 program, denied Section 8 benefits, and deprived her of equal use and enjoyment of housing . 42 U.S.C. §§ 12131(2), 12132; 28 C.F.R § 35.130(b)(7); 28 C.F.R § 35.130(b)(8); 42 U.S.C. § 3604.

More generally, DeCambre contends that the BHA violated three distinct clauses in Title II's core anti-discrimination provision that protects people with disabilities from being 1) "excluded from participation in . . . the services, programs, or activities of a public entity"; (2) "denied the benefits of the services, programs, or activities of a public entity"; and (3) "subjected to discrimination" by a public entity. See 42 U.S.C. § 12132. The third "catch-all" clause can fairly be read to cover discrimination against a recipient of "services, programs, or

activities" offered by a public entity, and tends to broaden the breadth of the statute. *Currie v. Group Insurance Commission*, 290 F.3d 1, 6-7 (1st Cir. 2002). It is undisputed that the BHA discriminated against DeCambre based on her use of a special needs trust. App. 353-355. Discriminating soley the basis of an individual's use of a special needs trust by definition discriminates by reason of disability; for it is the fact of an individual's disability that is required for a person to have a special needs trust. 42 U.S.C. § 1396p(d)(4)(A).

This case concerns Title II, commonly referred to as the public services portion of the ADA. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. § 12131(2), in pertinent part, defines a "qualified individual with a disability" as:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices...meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. Id. (emphasis added).

In addition to her claims for disability discrimination in violation the ADA, DeCambre has brought claims for violation of § 504, the FHAA, G.L.ch. 151B and G.L. ch. 93 §103. Except as explicitly indicated in this brief, DeCambre contends

that these statutes can be analyzed in tandem, and that a violation of any one of the statutes amounts to a violation of all the statutes. *Cox v. New England Telephone & Telegraph Co.*, 414 Mass. 375, 382 (1993)(in the area of disability discrimination, the court looks to decisions under § 504, and analysis of a discrimination claim under state and federal law is essentially the same).

In the case of Massachusetts anti-discrimination laws, DeCambre asserts that the BHA is liable for violating G. L. ch. 93 § 103 ("MERA"), or, in the alternative, G. L. ch. 151B. G. L. ch. 93 § 103; G.L. ch. 151B §§ 4(3C), 4(7A)(2), 4(10); Lopez v. Commonwealth, 463 Mass. 696, 715 (2012). MERA, more readily than ch. 151B, encompasses the plaintiff's claims in the present case, because it incorporates Article 114 of the Amendments to the Massachusetts Constitution, which provides: "No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth." G. L. ch. 93 § 103; art. 114 of the Amendments to the Constitution of the Commonwealth. Article 114 mirrors § 504. MERA and ch. 151B potentially provide more expansive remedies, including punitive damages and damages for emotional distress, than do some of DeCambre's federal claims. G.L. ch. 151B § 9; G.L. ch. 93 § 103.

In disability discrimination cases, a plaintiff "may proceed under any or all of three theories: disparate treatment, disparate impact, and failure to make reasonable Accommodation." *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 48 (2d Cir. 2002). DeCambre proceeded under all three theories at trial, and now does so on appeal. App. 23; App. 85-86, App. 105-106.

B. The BHA Discriminated Against DeCambre By Reason Of Her Disabilities By Failing To Make Reasonable and Necessary Modifications To Its Policies, Practices, Methods of Administration, Rules and Procedures

The BHA, in failing to make modifications to its rules, policies, methods of administration and practices, has unfairly and unnecessarily excluded DeCambre from the Section 8 program because of her disability, it has unfairly relegated her to an inferior status in society, it has caused her economic disadvantage, and it has caused her psychological harm, contrary to the purposes of the ADA, § 504, the FHAA, G.L.ch. 151B and G.L. ch. 93 § 103. App. 463-466; App. 360-363.

The Attorney General, at the instruction of Congress, has issued regulations implementing Title II. 42 U.S.C. § 12134(a). The Title II regulation that sets forth the duty of a public entity to reasonably accommodate the disabled provides:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.
>
> 28 C.F.R. § 35.130(b)(7).

Failure to grant a request for a reasonable modification is an independent basis for liability under Title II, § 504, the FHA, ch. 151B and ch. 93 § 103. *Nunes v. Massachusetts Dept. Of Correction*, 766 F. 3d 136, 145 (1st Cir. 2014); *Alexander v. Choate*, 469 U.S. 287, 301 (1985). DeCambre's right to reasonable accommodation under state law arises under the Massachusetts Equal Rights Act, G. L. Ch. 93 § 103, and G.L. ch. 151B §§ 4(3C), 4(7A)(2), 4(10); *In re McDonough*, 457 Mass. 512, 522 (2010). App. 86-87; App. 105-106 (Amended Complaint).

To prevail on a claim for denial of reasonable modifications under Title II of the ADA, ch. 151B, § 504 and ch. 93 § 103, a plaintiff generally bears the burden of establishing: (1) that the defendant is a "public entity"; (2) that the plaintiff is a person with a "disability"; (3) that the plaintiff is "qualified" to participate in or receive the benefits of the defendant's services, programs, or activities; (3) that the plaintiff informed the defendant of his or her disability and requested a modification of the defendant's rules, policies or practices (or that the

plaintiff's disability and need for a modification was obvious); (4) that the requested modification was "reasonable"; (5) that the defendant nonetheless refused; and (6) that, as a result, the plaintiff was not able to "to participat[e] in" or enjoy "the benefits of the [defendant's] services, programs, or activities," or was otherwise "subjected to discrimination." 42 U.S.C. §§ 12102, 12131, 12132; *Kiman v. N.H. Department of Corrections*., 451 F.3d 274, 283 (1st Cir. 2006); *Reed v. LePage Bakeries, Inc*., 244 F.3d 254, 258 (1st Cir. 2001) (Title I "reasonable accommodation" case); *Higgins v. New Balance Athletic Shoe, Inc*., 194 F.3d 252, 265 (1st Cir. 1999) (Title I "reasonable accommodation" case); *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 152 (1st Cir. 1998).

1. The BHA Is a Public Entity Subject to State and Federal Anti-discrimination Laws.

It is undisputed that the BHA is a public entity and recipient of federal funds that is subject to both the ADA and § 504. App. 221, ¶ 1; App. 85, ¶ 3 (Complaint); App. 210, ¶ 3 (Answer); App. 488.

2. Decambre Is a Person with a Disability.

It is agreed that DeCambre is a person with a disability and that the primary source of her income is Supplemental Security Income ("SSI") which she receives from the Social Security Administration as a person with disabilities. App. 222, ¶ 8.

3. DeCambre Is "Qualified" To Participate In The Section 8 Program Administered By The BHA.

DeCambre is "qualified" because she met "the eligibility requirements for ...for the receipt of services or the participation in programs or activities provided by" the BHA with or without reasonable modifications to its rules, policies, or practices. 42 U.S.C. § 12131(2). When DeCambre existed only on her meager income from social security, about $835.39 per month, she was permitted to participate in the Section 8 program as administered by the BHA for many years. App. 222, ¶ 8; App. 488. The basis given by the BHA hearing officer for upholding the decision to raise DeCambre's TTP and thereby terminate her subsidy was the expenditures from the special needs trust. App. 355-356. Accordingly, but for the expenditures from her special needs trust, her TTP would not have been increased, her subsidy would not have been terminated, and she would not have been rendered ineligible for the Section 8 subsidy. *Id*.; App. 358.

4. DeCambre Informed The BHA of Her Disabilities and Repeatedly Requested Modifications.

Based on DeCambre's numerous written requests, the undisputed evidence establishes that the BHA knew of DeCambre's disabilities and her requests for reasonable modifications of its rules, policies, practices and procedures. App.225, ¶ ¶ 18-20, App. 225-226, ¶ 22 App. App. 229, ¶ 28- 31; App. 245-246, App. 266-

269; App. 282-283; App. 290; App. 369-370; App. 372; App. 377-394, App. 428-432.

5. The Modifications Requested By DeCambre Were Reasonable.

In order to meet her burden to a proposed "reasonable" modification, a plaintiff must show that the proposed modification would enable her to have access to the services, activities or programs provided by the public entity and "at least on the face of things, it is feasible for the [the public entity] under the circumstances."[5] *Reed*, 244 F. 3d at 259. (addressing the burden of an employee under Title I of the ADA).

The factual findings of the lower court established that many of the accommodations requested by DeCambre were feasible and reasonable. App. 519-522. The lower court found that several of the accommodations requested by DeCambre, such as excluding expenditures for the care of her emotional support animals, seemed to have been made in accordance with HUD's handbook or regulations, and should have been excluded from the BHA's calculation of her income. App. 520-522. The lower court found that the acquisition of automobiles

[5] Under the Fair Housing Act, a reasonable accommodation is a change in a rule, policy, practice, or service that may be necessary to allow a person with a disability the equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(B).

by the trust could not be included in income under HUD regulations. App. 521. The lower court also found that expenditures for costs to maintain a telephone line, internet connection and cable television "seem to fall under acceptable expenditures." Id. The judge identified DeCambre's travel costs as expenditures that "could also fall within allowable SNT expenditures" which would exclude it from annual income. App. 520-522. The requested accommodations were feasible and reasonable because the lower court found grounds by which the BHA could lawfully exclude most or all of the trust expenditures, and the requested accommodations were of a type ordinarily made in the run of cases. *Id*., *Reed*, 244 F. 3d at 259 (1st Cir. 2001); *U.S. Airways v. Barnett*, 535 U.S. 391, 401-402 (2002).

While the lower court made some assessment of whether expenditures were excluded under 24 C.F.R. § 5.609(c)(9) as temporary, nonrecurring or sporadic income, it appears to have given very little consideration to the question of whether DeCambre's requests for accommodations were reasonable. App. 516-518. It is "essential" that a court make an "individual assessment of the facts" in determining whether a requested accommodation is reasonable. *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F. 3d 638, 647 (1st Cir. 2000); see also, *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001). In determining that "the BHA did not

act in a discriminatory manner and that DeCambre's discrimination claims against the BHA cannot stand," the lower court failed properly consider in its opinion whether DeCambre's requests for modification were reasonable or whether a reasonable modification of the BHA's rules, policies, practices or activities would have enabled her to equally participate in the Section 8 program or have equal opportunity in housing. App. 516-518.

The exclusion of expenditures necessary to accommodate DeCambre's disabilities were feasible and were required by HUD regulations promulgated pursuant to the Housing Act, § 504 and the FHAA. 24 C.F.R. § 5.609(c)(4); 24 C.F.R. §100.204(a); 24 C.F.R. § 8.4, et. cet., 24 C.F.R. § 8.33. HUD regulations exclude from annual income: "Amounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member." 24 C.F.R. § 5.609(c)(4). The BHA explicitly recognized that medically needed expenditures were excluded from income when it excluded the $169.99 expended by the trust on air conditioner. App. 224, ¶ 14. Expenditures necessary to accommodate her disabilities were medical expenses because they were based on her "numerous medical conditions." App. 290. In her requests for reasonable accommodation, DeCambre described the medical necessity of the requested accommodations, and she supported those descriptions with

certifications and other medical documentation from her physicians. App.225, ¶ ¶ 18-20, App. 225-226, ¶ 22 App. App. 229, ¶ 28- 31; App. 245-246, App. 266-269; App. 282-283; App. 290; App. 369-370; App. 372; App. 377-394, App. 428-432. HUD regulations, promulgated pursuant to § 504, provide: "A recipient shall modify its housing policies and practices to ensure that these policies and practices do not discriminate, on the basis of handicap, against a qualified individual with handicaps" unless the modifications would result in a fundamental alteration of the program or an undue administrative burden. 24 C.F.R. § 8.33. HUD regulations promulgated under the FHAA provide: "It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas." 24 C.F.R. §100.204(a). By denying DeCambre's request that it exclude her trust expenditures as a reasonable accommodation for her disabilities, The BHA not only violated HUD regulations, but it also violated the Housing Act, § 1983, § 504, the FHAA, the ADA and G.L. ch. 93 § 103. The lower court erred in disregarding these violations and in finding for the BHA on these claims.

The costs for the care and support of DeCambre's cats were necessary medical expenses that should have been excluded as a reasonable accommodation. See *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995); *United States v. California. Mobile Home Park Management. Co.*, 29 F.3d 1413, 1417 (9th Cir.1994). Courts have concluded under the FHA and § 504 that an emotional-support animal may be a reasonable accommodation when the animal is necessary for a person with a disability to enjoy equal housing rights.[6] *Majors v. Housing Authority of DeKalb County.*, 652 F.2d 454, 457-58 (5th Cir. Unit B Aug. 1981) (reversing grant of summary judgment to housing authority on Rehabilitation Act claim concerning emotional-support animal for person with a disability, and remanding for trial on factual issues); *Fair Housing of the Dakotas, Inc. v. Goldmark Prop. Mgmt., Inc.*, 778 F. Supp. 2d 1028, 1035-36 (D.N.D. 2011); *Overlook Mut. Homes, Inc. v. Spencer*, 666 F. Supp. 2d 850, 858-61 (S.D. Ohio 2009). Furthermore, at least in the context of public housing projects, HUD requires public housing authorities not to apply or enforce any policies "against animals that are necessary as a reasonable accommodation to assist, support, or

[6] The expansive regulations that HUD has issued under § 504 encompass disability discrimination by public entities administering HUD programs and also explicitly prohibit the most or all of the types of housing discrimination forbidden by the FHA. 24 C.F.R. § 8.4, et. seq.

provide service to persons with disabilities." 24 C.F.R. § 5.303(a); see also 24 C.F.R. § 960.705 (stating that regulations authorizing public housing agency to charge pet deposit in public housing does not apply to animals "necessary as a reasonable accommodation to assist, support or provide service to persons with disabilities"). The lower court found, "[t]he HUD Occupancy Handbook covers the cost of 'assistance animal and its upkeep' as a deductible medical expense." Add. 522. Under HUD guidelines, a "housing provider may not require the applicant to pay a fee or a security deposit as a condition of allowing the applicant to keep the assistance animal." Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Accommodations Under the Fair Housing Act*, p. 9, ¶ 11. (May 14, 2004), http://www.hud.gov/offices/fheo/ library/huddojstatement.pdf. By including the expenditures for the care and support of DeCambre's emotonal-support animals in DeCambre's income, the BHA discriminated against her by diminishing her subsidy and penalizing her for keeping the animals. App. 355-356. The lower court's conclusion, that the BHA did not act in a discriminatory manner with regard to its treatment of DeCambre's pet expenses, is contradicted by its own findings and was error. App. 522-523.

Although DeCambre's automobiles were owned by the trust and could not be considered income, and she had an obvious medical need for the an automobile as protection against heat and cold because of limitations on her ability to regulate her body temperature, the BHA unreasonably refused to grant DeCambre's request that automobile purchase and insurance be excluded from income. Based on the uncontradicted evidence, DeCambre's mobility was significantly impaired due to hip injuries, impairments regulating her body temperature, and consequent intolerance for heat and cold. App. 229-230, ¶ 31; App. 267-268, ¶ 11. App. 332-33; App. 392-385; App. 430-432; Courts have frequently recognized that accommodations for people with disabilities involving mobility impairments are reasonable. *Astralis Condominium Ass'n v. Secretary, HUD*, 620 F. 3d 62 (1st Cir. 2010)(finding the plaintiffs, who were handicapped because of their "significant mobility problems" where entitled to a designated parking space). The requested accommodation excluding the cost of the automobiles and insurance from income entailed no expense to the BHA and it was reasonable. The lower court erred in failing to find disability discrimination based on the BHA's denial of this request.

DeCambre's requests for exclusion of expenses for her cell phone and landline as accommodations were reasonable in light of the undisputed medical documentation provided and other undisputed explanations of this need provided

in her requests for accommodation. App.225, ¶ ¶ 18-20, App. 225-226, ¶ 22 App. App. 229, ¶ 28- 31; App. 245-246, App. 266-269; App. 282-283; App. 290; App. 369-370; App. 372; App. 377-394, App. 428-432. Her physician certified that she required these accommodations because of her disability in case of emergency to that she can get help while at home, by means of lifeline, and while away from home by means of her cell. App. 332-333; App. 430-432: App. 377-378. The lower court favorably cited to arguments and case law that support "excluding these payments from annual income." App. 520. Plaintiff contends that these accommodation requests were reasonable because they were shown to be medically necessary because of her disabilities in that they provided her with access to potentially life saving help in the event of an emergency. App. 332-333; App. 430-432: App. 377-378.

6. The BHA Refused To Grant DeCambre's Reasonable Requests For Modifications.

It is undisputed that the BHA refused to grant DeCambre the modifications she requested, except for the exclusion of less than $175.00 from her income for the cost of an air conditioner. App. 213, ¶ 30; App. 192-193; App. 356-357.

7. Decambre Was Not Able to Participate in or Enjoy the Benefits of the BHA's Services, Programs or Activities Because of the Denial of Her Requests for Reasonable Accommodation.

It is undisputed that DeCambre's subsidy was eliminated and that she was completely excluded from the Section 8 program because of the denial of her requests for reasonable accommodations. App. 254; App. 257; App. 353-356; App. 358.

C. The BHA Waived the Fundamental Alteration Defense and Failed to Demonstrate That Making the Requested Modifications Would Fundamentally Alter the Nature of the Service, Program, or Activity.

The BHA waived any defense it may have had under § 35.130(b)(7), "that making the modifications [requested by DeCambre] would fundamentally alter the nature of the service, program, or activity," by failing to raise this affirmative defense in its answer. 28 C.F.R § 35.130(b)(7); Fed. R. Civ. P. 8(c); App. 218-219. "A claim that a requested accommodation would constitute an undue burden is an affirmative defense." *Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir.1998). Generally, affirmative defenses are required to be raised in a pleading. Fed. R. Civ. P. 8(c)." *Fair Housing of the Dakotas v. Goldmark Property*, 778 F. Supp. 2d 1028, 1039, note 3 (Dist. N. Dakota 2011). *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603-604 (1999) (Ginsburg, J., plurality opinion) (discussing the reasonable modification regulation as the State's "fundamental-alteration defense"); id. at 607, 119 S.Ct. 2176 (Stevens, J., concurring) (explaining that a "state may assert, as an affirmative defense, that the

requested modification would cause a fundamental alteration of a State's services and programs").

Even if the BHA did not waive the "fundamental alteration defense," it failed to meet its burden of establishing this defense. *Ward v. Massachusetts Health Research Institute, Inc.*, 209 F.3d 29 (1st Cir.2000) (reversing summary judgment in an ADA case where the employer had produced no evidence of undue hardship); *Garcia-Ayala v. Lederle Parenterals, Inc*., 212 F. 3d 638, 649 (1st Cir. 2000) (after case stated trial where employer did not contest reasonableness of accommodation, and presented no evidence of undue hardship, judgment was entered for the employee); *Popovich v. Court of Common Pleas Domestic Relations Div*., 227 F.3d 627, 639 (6th Cir. 2000), rev'd on other grounds, 276 F.3d 808 (6th Cir.2002) (en banc). The arguments of BHA's attorney, that the modifications would fundamentally alter the program, were not evidence, and did not meet the BHA's burden. App. 192-193; *US v. Torres-Galindo*, 206 F. 3d 136, 142 (1st. Cir. 2000). It is very well established that "the statements and arguments of counsel are not evidence," as this is a standard jury instruction. *Id*.; *Arrieta-Agressot v. US*, 3 F. 3d 525, 529 (1st. Cir. 1993). Except for the arguments of defense counsel, there was no basis in the record that the modifications requested by DeCambre would result in a fundamental alteration.

The Court's finding, that "DeCambre could have taken her personal injury settlement and placed it under her mattress....from which she could freely have used it for any purpose without reporting her expenditures as Section 8 income," demonstrates that exclusion of the trust expenditures as requested by DeCambre would not "fundamentally alter" the program. App. 503-504. The BHA's action, in excluding from DeCambre's income the trust expenditure on the air conditioner, demonstrated that the exclusion of other trust expenditures because of DeCambre's medical conditions/disabilities would not fundamentally alter the program. 24 C.F.R. § 5.609(c)(4); App. 224, ¶ 14. Because DeCambre's disabilities are medical conditions, the expenses associated with accommodating her disabilities are medical expenses. As the exclusion provided for by § 5.609(c)(4) is part of the Section 8 Program, applying it to DeCambre's trust expenditures results in no fundamental alteration. There was no evidence of any disruption of BHA operations or undue administrative burden falling upon the BHA if it were to grant DeCambre the requested accommodations. *Toledo v. Sanchez*, 454 F. 3d 24, 39-40 (1st Cir. 2006).

D. The BHA Discriminated Against Decambre by Unnecessarily Imposing or Applying Eligibility Criteria That Excluded Decambre from Fully and Equally Enjoying the Section 8 Program Because She Is an Individual with Disabilities.

The policy, practice and method of administration of the BHA to include expenditures of lump sums in the annual income of Section 8 participants who use special needs trusts is unlawful because the practice falls more harshly on people with disabilities and was not justified by necessity. *Hazen Paper Co. v. Biggins*, 507 US 604, 609 (1993). Unlike other people with revocable trusts, the beneficiaries of Special needs trusts have disability related needs for SSI, SSDI and Medicaid that Congress recognized in enacting 42 U.S.C. sec. 1396p(d)(4)(A). Where a practice imposes a burden on people with disabilities that is "different and greater" than for others, it violates the ADA. *Crowder v. Kitagawa*, 81 F. 3d 1480, 1484 (9th Cir. 1996). Because of their unique dependence on special needs trusts, individuals with disabilities are effectively denied equal access to the Section 8 program by the policy or practice of a housing authority that includes the expenditure of lump sums in their income simply because of their use of special needs trust.

The BHA violated the regulations of the Attorney General in the present case by relying on a disability-linked classification, the use of a special needs trust, to unfairly disadvantage, deny benefits to and exclude DeCambre from the Section 8 program. 28 C.F.R § 35.130(b)(8); App. 485-486; App. 353-356, 16-34. Pursuant to regulations promulgated under Title II:

> 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 C.F.R § 35.130(b)(8).

§ 35.130(b)(8) "prohibits the unnecessary exclusion of disabled individuals" from public services, programs and activities. *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1310 (Dist. Alabama 2012); see also, 24 C.F.R. 9.130(b)(4). The BHA violated § 35.130(b)(8) by 1) imposing or applying discriminatory eligibility criteria, and 2) by refusing to modify this discriminatory practice and method of operation when asked to do so by DeCambre.

In order to establish a violation of § 35.130(b)(8), DeCambre had the burden of showing that 1) the BHA was a public entity, 2) she was a person with a disability, 3) the BHA imposed or applied eligibility criteria to her that screened out or tended to screen her out from fully and equally enjoying any service, program, or activity, or, the BHA imposed or applied eligibility criteria to her that screened out or tended to screen out any class of individuals with disabilities from fully and equally enjoying any service, program, or activity. 28 C.F.R § 35.130(b)(8). The parties stipulated that DeCambre was disabled and that the

BHA was a public entity, thus satisfying the first two elements. App. 221-222, ¶¶ 1, 8. It is undisputed that the BHA imposed or applied eligibility criteria and that DeCambre was excluded from the Section 8 program. App. 228, ¶ 25; App. 485; App. 490-491; App. 495; App. 508. The lower court found, "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." App. 503. As all (100% of) special needs trust beneficiaries are disabled, the court could have more precisely stated that "disabled individuals 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." *Id*.; 42 U.S.C. 1396p(d)(4)(A). Based on the undisputed facts in the present case, DeCambre established that she was screened out from fully and equally enjoying the Section 8 program because of the BHA's use of eligibility criteria that screen out the class of disabled people who use special needs trusts.

In concluding that the BHA did not violate § 35.130(b)(8), the lower court erred in equating DeCambre's circumstance with "beneficiaries of all non-revocable trusts, including non-disabled persons." App. 516-517. The comparison was inapt, in the context of the present case, because people without a disability usually have no need for an irrevocable trust. Furthermore, they never

require, and are ineligible for, a special needs trust under 42 U.S.C. sec. 1396p(d)(4)(A).

Although § 35.130(b)(8) would permit the BHA to use eligibility criteria that exclude people with disabilities if "such criteria can be shown to be necessary for the provision of the service, program, or activity being offered," the BHA waived this defense. 28 C.F.R § 35.130(b)(8); App. 218-219, ¶¶ 94-103. Fed. R. Civ. P. 8(c). "The law is clear that if an affirmative defense is not pleaded pursuant to Fed.R.Civ.P. 8(c)'s requirements, it is waived." *Society of Holy Transfiguration v. Gregory*, 689 F. 3d 29, 58 (1st Cir. 2012). The BHA did not plead the affirmative defense in its answer. App. 218-219, ¶¶ 94-103.

Even if the BHA did not waive the necessity defense, it failed to offer any evidence in support of such a defense. 28 C.F.R § 35.130(b)(8). App. 221-466. Because DeCambre satisfied her burden under § 35.130(b)(8), the BHA had the burden of showing that the criteria were "necessary for the provision of the service, program or activity being offered." 28 C.F.R § 35.130(b)(8); *Bowers v. National Collegiate Athletic Ass'n*, 9 F. Supp. 2d 460, 478 (Dist. New Jersey 1998). The BHA offered no such evidence, and the record evidence established that the BHA's inclusion of distributions from the SNT were not necessary. With regard to expenditures on automobiles in particular, the Court found that "the fact

that title [to the automobile] is held by her Trust as an asset should preclude it from being counted towards income." App. 521-522. Where the BHA's policy of counting the automobiles owned by the trust in DeCambre's income was contrary to HUD regulations, it was not necessary. *Id*. Furthermore, HUD regulations recognized that "The value of necessary items of personal property such as furniture and automobiles shall be excluded" in determining net family assets. 24 C.F.R. § 5.603(b)(1). Allowing DeCambre the benefit of using the trust's automobiles without having them counted as income was in no way necessary for the provision of the Section 8 subsidy, and the BHA offered no evidence supporting such a claim in the case stated.

VI. THE LOWER COURT ERRED IN DENYING DECAMBRE'S REQUESTS FOR A PRELIMINARY INJUNCTION AND FOR A PERMANENT INJUNCTION OR MANDAMUS RESTORING HER SECTION 8 BENEFITS.

For the reasons previously set forth in this brief, DeCambre has established that she should prevail on the merits of her case. 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 trial judge erred in denying DeCambre's request for

injunctive relief based on its conclusion that she failed to show a likelihood of success on the merits of her § 1983 and discrimination claims. App. 523-524. DeCambre submitted a 20 page brief detailing her need for injunctive relief, and she requested a permanent injunction in her Amended Complaint that was implicitly denied by the judge. App. 8-84; App. 110-111. It was undisputed that, with the loss of her subsidy, she was threatened with eviction, and she cut back of food purchases and did not have enough money for food, clothing, rent, utilities, drug co-payments, medical supplies, charges for over the counter drugs and other necessities. App. 463-466. She also demonstrated an ongoing violation of her rights not to be subjected to excessive rent in violation of the rent ceiling set forth in the housing act. These are the sort of injuries that are needed to support a preliminary injunction. *Rio Grande Community Health Center, Inc. v. Rullan*, 397 F. 3d 56, 76 (1st Cir. 2005)(falling eight or nine months behind on a mortgage and facing imminent foreclosure proceedings were the sort of irreparable injury needed to support a preliminary injunction). The balance of hardships and the public interest also tended to favor the plaintiff. The provision of subsidies for low income people serves a variety of state interests, including the prevention of poverty. "Should an eligible tenant be wrongfully evicted, some frustration of these interests will result." *Caulder v. Durham Housing Authority*, 433 F.2d 998,

1003 (4th Cir.1970). DeCambre is in a class of people who cannot afford acceptable housing, and she faced extreme deprivation without her Section 8 subsidy and grievous loss were she to be evicted. Id.

CONCLUSION

The District Court's decision granting judgment to the BHA on the plaintiff's claims for disability discrimination and violation of § 1983 should be reversed and judgment should be granted to DeCambre. The District Court's decision denying DeCambre's requests for preliminary and permanent injunctions should be reversed and DeCambre should be granted preliminary and permanent injunctive relief restoring her Section 8 benefits.

Dated: September 28, 2015

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains no more than 13,992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the Wordperfect X3 program.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Wordperfect X3 version 2005 in 14 point Times New Roman.

/s/ J. Whitfield Larrabee
J. Whitfield Larrabee

Dated: September 28, 2015

CERTIFICATE OF SERVICE

I, J. Whitfield Larrabee, certify that on September 28, 2015, the document(s) filed through the ECF system will be sent electronically to the below registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

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unable to live alone); 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. For a complete listing of items that are excluded from income please refer to 24 CFR 5.609(c).

Under HUD's current regulations some expenditures should be counted as income, while others may fall under an income exclusion or deduction.

SNT distributions excluded or deducted

Not all distributions from a SNT should be counted towards an applicant's annual income. The regulations at 24 CFR 5.609(c) and 24 CFR 5.611 allow several types of expenditures, such as unreimbursed attendant care expenses exceeding three percent of the applicant's annual income and temporary or sporadic payments, to be excluded or deducted from the applicant's annual income for eligibility or continued eligibility purposes. Those amounts and 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. Unlike Medicaid, 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.

SNT distributions can come in many categories including: trust administration fees, taxes, attendant care expenses, rent payments, and various non-food and non-shelter expenditures made on behalf of the beneficiary. Some of these expenditures should be counted as income, while others may fall under an income exclusion or deduction.

Example

For example, any expenditure made for one-time trust administrative fees such as costs related to the set-up of the SNT would likely be excluded from annual income under 24 C.F.R. §5.609(c)(9), because they are a nonrecurring payment. Whereas, expenditures made for regularly occurring administrative fees, such as the trustee's compensation, would count as annual income. Additionally, expenditures made to pay taxes and rental payments would be counted towards annual income, because they were made on beneficiary's behalf[1] and do not fall under any exception or deduction. The expenditures made for attendant care expenses, on the other hand, are deductible from income to the extent they meet the requirements of §5.611(a)(3)(ii).

The 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. Further, more complete information about some expenditures may be necessary for an accurate determination. To the extent that a beneficiary may be rendered ineligible for rental housing by certain trust expenditures, such as the trust expenses that are required as a matter of law, you may pursue a waiver request with our office.

[1] See 24 C.F.R §5.609(a)(1).

Please share this important information with your housing authority occupancy staff so that they can make proper determinations of how to treat disbursements from Special Needs Trusts.

Sincerely,

Donna J. Ayala
Director

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2015 Special Needs Trust National Conference

STRATEGIES FOR MAINTAINING PUBLIC HOUSING AND SECTION 8 ELIGIBILITY FOR PEOPLE WITH SPECIAL NEEDS TRUSTS

J. Whitfield Larrabee, Esq.
Brookline, Massachusetts
October 16, 2015

GOALS OF THE PRESENTATION

1. Learn about and discuss HUD income and exclusions for the Section 8 program and for tenants of federally supported public housing as they relate to special needs trusts.
2. Learn about and discuss recent cases interpreting income and exclusions under HUD regulations.
3. Learn about and discuss strategies for communicating with Public Housing Agencies (PHAs) during the certification and re-certification process.
4. Learn about and discuss techniques for requesting reasonable accommodations under the ADA and the Fair Housing Act.
5. Learn about and discuss strategies for responding to an unfavorable determination from a housing authority either increasing a tenant's rent contribution or determining the tenant is ineligible for assistance due to special needs trust expenditures.

THE DECAMBRE SAGA

1. How I came to know about these rules and regulations.
2. Kimberly DeCambre and the Brookline Housing Authority.

Some PHAs can be hostile toward people with special needs trusts.

Rattlesnake - Crotalus Cerastes

DeCambre v. Brookline Housing Authority, *Massachusetts Federal District Court, No. 14-13425-WGY (2015)(appeal pending, 1st Cir., No. 15-1458)*

Larrabee, HUD Section 8 /Public Housing Eligibility & SNTs

KIMBERLY DECAMBRE V.
THE BROOKLINE HOUSING AUTHORITY

1. In *DeCambre*, the Court found that it was a reasonable interpretation of HUD regulations for a Public Housing Agency to decide not to exclude all distributions from a special needs trust funded with lump sum personal injury settlement from a family's annual income.

   As a result, DeCambre received no benefit from the lump-sum exclusion.

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KIMBERLY DECAMBRE V.
THE BROOKLINE HOUSING AUTHORITY

2. The court found that the cost of the purchase of an automobile used by the SNT beneficiary, where the trust retained title to the vehicle, should not be included in a Section 8 participant's annual income in determining the family's annual income and Total Tenant Payment.

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KIMBERLY DECAMBRE V.
THE BROOKLINE HOUSING AUTHORITY

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

   Because the *Lewis* decision was a case involving Social Security, not HUD regulations, it is unclear whether the District Court's decision on this issue in *DeCambre* will be respected by other court's or by the First Circuit in the pending appeal.

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KIMBERLY DECAMBRE V. THE BROOKLINE HOUSING AUTHORITY

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

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Finley v. The City of Santa Monica

In *Finley*, the Court found that all distributions from a special needs trust funded with a lump sum personal injury settlement are excluded from annual income.

Finley v. The City of Santa Monica, Superior Court of California, BS127077 (2011)

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SECTION 8 AND PUBLIC HOUSING

1. The Housing Choice Voucher Program, ("Section 8" or "HCV" Program) and federally supported public housing both rely on the same HUD regulations to determine annual income. However, income eligibility limits for admission and continued assistance differ between Section 8 and public housing.

2. Under the Section 8 program, tenants must find private landlords renting homes in the community who are willing to participate. Once the tenant family finds a cooperating landlord, the tenant generally pays 30% of their income towards the rent; this portion of the payment is called the Total Tenant Payment (TTP). 24 C.F.R. §5.628(a). The local PHA supplements the remaining rent by issuing a check directly to the landlord so that the landlord is paid the "fair market rent." 24 C.F.R. §888.111.

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SECTION 8 AND PUBLIC HOUSING

3. Both Section 8 and public housing programs have a rent ceiling, which generally limits the rent paid by a family to no more than 30% of their adjusted monthly family income . Where a Public Housing Agency requires a family to pay more than 30%, tenants can sue the PHA for violation of their civil rights under 42 U.S.C. § 1983. Johnson v. Housing Authority of Jefferson Parish, 442 F. 3d 356 (5th Cir. 2006); Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987).

4. At least annually, PHAs review tenant's income to determine their eligibility and to determine their rent contribution.

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IT IS ALL ABOUT INCOME!

Unlike Supplemental Security Income (SSI) and Medicare, which have resource limits, HUD is only concerned with income. There is no resource limit, although some assets valued at over $5,000 can result in actual or assumed interest income.

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WHAT ARE THE INCOME ELIGIBILITY LIMITS?

1. Extremely Low Income (30% of area median)
   At least 75% of initial admissions to Section 8.
2. Very Low Income (50% of area median)
   Remainder of initial admission to Section 8.
3. Low Income (80% of area median)
   Continuously assisted families in Section 8, and initial admission and continuing assistance for federally supported public housing

24 C.F.R. 5.603(a) and 24 C.F.R. § 982.201(b)(1)

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WHAT ARE THE INCOME ELIGIBILITY LIMITS?

Examples of annual income limits for continuously assisted Section 8 families:

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

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

24 C.F.R. 5.603(a) and 24 C.F.R. § 982.201(b)(1)

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TIP NUMBER 1!

Generally, as long as special needs trust expenditures do not cause family income to exceed the low income limit for beneficiaries who are continuously assisted, Section 8 clients will remain in the program.

However, trust expenditures that count as income will result in a reduction in their subsidy, 30% for every dollar increase in their income.

Possible Exception. If the family's income is so high that the subsidy is completely eliminated for six consecutive months, this may result in exclusion from the Section 8 program. HUD regulations mandate that if the PHA does not make subsidy payments for six consecutive months, the Section 8 Housing Assistance Payment contract is automatically terminated. See 24 C.F.R. 982.455.

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WHAT IS INCOME?

In order for trust expenditures to qualify as income to a family, 24 CFR § 5.609(a) requires that the expenditures :

1. "Go to, or on behalf of, the family head or spouse (even if temporarily absent) or to any other family member...and"
2. are "not specifically excluded in paragraph (c) of this section." 24 C.F.R. § 5.609(a)(1) and § 5.609(a)(3).

The first part of the definition of income generally seems to follow closely with what the IRS considers to be income.

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WHAT IS INCOME? continued

Income includes wages, salary, commissions, tips, bonuses, business income, interest, dividends, social security payments, unemployment insurance payments, pensions, disability or death benefits. Interest income on cash or "net family assets" over $5,000 is either actual interest or the "passbook savings rate" as determined by HUD.

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NEW ENGLAND HUD ADVISORY LETTER ON SPECIAL NEEDS TRUSTS

A 2007 advisory letter from the New England HUD office concerning special needs trusts states: "Those amounts and 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." If funds seem expended from a special needs trust seem to fall under an exclusion and are not likely to be available in the following year, it follows that they should be excluded from income.

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IN DETERMINING INCOME IN RELATIONS TO SPECIAL NEEDS TRUST EXPENDITURES, ITS ALMOST ALL ABOUT THE EXCLUSIONS!

- There are 17 exclusions set forth at 24 CFR § 5.609(c). Exclusions include things such as income from employment of children under 18, payments received for the care of foster children or foster adults, income of a live-in aide, medical expenses, temporary income, sporadic income, nonrecurring income, lump-sum additions to family assets, including insurance payments, inheritances, capital gains, and settlements for personal injuries and property losses.
- Unexpended assets of a special needs trust are not normally part of income under *DeCambre, Finley and HUD regulations.*

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TIP NUMBER 2!

It can be helpful in limiting income for the trust to retain ownership of as many assets as possible, allowing the beneficiary the use of the assets. For Social Security Treatment of Trust owned homes, see POMS Section SI 01120.200F. See also, Section 8/Homeownership Option, 24 CFR 982.625-982.643. This could include a car, a computer, a television, a cell phone and other property. When a trust retains ownership of property used by the beneficiary, it is more difficult or impossible for the Public Housing Agency to establish that the trust asset is income.

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LUMP SUM ADDITIONS TO FAMILY ASSETS

24 CFR 5.609(c)(9) excludes:

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

Whether the exclusion of lump-sum additions to family assets applies to expenditures of lump-sums made through a special needs trust is an unsettled area of the law at present, but may be decided by the First Circuit in DeCambre, most likely by September 2016.

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LUMP SUM ADDITIONS TO FAMILY ASSETS

24 C.F.R. § 5.603(b)(2), provides:

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

The Courts in *Finley* and *DeCambre*, and the local Public Housing Agencies, have disagreed whether § 5.603(b)(2) is an appropriate basis to include lump sums in a Section 8 family's annual income.

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TIP NUMBER 3!

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

In fact, there is no restriction on asking in advance about the treatment of any special needs trust expenditure.

A request for disclosure of the PHA's treatment of SNT expenditures can be framed as a request for reasonable accommodation under the ADA, Sec. 504 and the Fair Housing Act.

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TEMPORARY, NONRECURRING OR SPORADIC INCOME

24 CFR 5.609(c)(9) excludes "temporary, nonrecurring or sporadic income (including gifts)" from annual income.

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SPORADIC INCOME

EXAMPLE # 1
FROM RENTAL HOUSING INTEGRITY IMPROVEMENT PROJECT

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

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

http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/rhiip/faq_gird

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SPORADIC INCOME

One definition from Webster's Dictionary describes sporadic to mean "occurring occasionally, singly, or in irregular or random instances and cannot be reliably predicted."

Sporadic also tends to mean irregular, scattered, isolated, occasional and infrequent.

Example of usage:

Public Housing Agency's only apply the sporadic exclusion sporadically.

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SPORADIC INCOME

Examples of possible expenditures that might fall into the temporary, nonrecurring or sporadic income exclusion are:

- Occasional Travel and Vacation Expenses;
- Occasional Purchase of Clothing, Appliances, Electronics, other gifts;
- Occasional Purchase Household Furnishings;
- One time payment for a root canal; (also may be excluded as a medical expense).

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LOANS AS NONRECURRING OR SPORADIC INCOME

EXAMPLE # 2
FROM HUD FAQ

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

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

http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/rhiip/faq_rfi

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

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MEDICAL EXPENSES AND REASONABLE ACCOMMODATIONS

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

Because disabilities are often or always the result of medical conditions, § 5.609(c)(4) provides a bridge between the United States Housing Act of 1937, 42 U.S.C. § 1437f (o)(2)(A)(I) ("The Housing Act"), which established the Section 8 program, and protections from disability discrimination contained in section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("§ 504"), section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 ("ADA"), The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604 ("FHA").

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DISABILITY DISCRIMINATION

HUD is an administrator of § 504 and the FHA, and has promulgated detailed regulations prohibiting discrimination against persons with disabilities in housing and in the provision of public services. 24 C.F.R. § 8.4. The ADA, which is enforced by the Department of Justice, also has numerous regulations providing protection to the disabled that are applicable to Section 8 participants. 28 C.F.R , part 35.

Denial of a reasonable accommodation by a PHA when one is requested is disability Discrimination under the ADA, the FHA and § 504.

Also, the use of eligibility criteria that tend to exclude an individual with a disability or a class of individuals with disabilities from equally participating in a PHA's programs is disability discrimination under the ADA. 28 C.F.R , part 35.

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DISABILITY DISCRIMINATION

In addition to ordinary medical or dental expenses that might be covered by a trust, the PHA probably must exclude from annual income trust expenditures on items such as hearing aids, care and support of assistance or emotional support animals, eye glasses, wheelchairs, medical equipment, physician or drug co-payments and heated pools needed for arthritis or joint problems.

By requesting that these items be excluded as a reasonable accommodation, the PHA is on notice that it might be discriminatory to include these expenses.

Majors v. Housing Authority of DeKalb County, 652 F.2d 454, 457-58 (5th Cir. Unit B Aug. 1981)(disfavoring emotional support animals may be discriminatory); Fair Housing of the Dakotas, Inc. v. Goldmark Prop. Mgmt., Inc., 778 F. Supp. 2d 1028, 1035-36 (D.N.D. 2011) (emotional support animals); 24 C.F.R. § 5.303(a); see also 24 C.F.R. § 960.705.

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TIP NUMBER 4!

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

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TIP NUMBER 5!

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

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TIP NUMBER 6!

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

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Special Needs Trusts National Conference

Friday, October 16, 2015
4:15 P.M.. – 5:00 P.M.

The Update: Cases, Rules, Statutes and any Other New Developments.

The Not to be Missed Annual Closing

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

- Materials
- PowerPoint

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

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Special Needs Update

17th Annual Special Needs Trusts – National Conference

October 16, 2014

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Agency actions:

POMS Changes – The Social Security Administration continues to develop its "Regional Trust Review Team" approach to evaluating special needs trusts. This year changes to POMS § SI 01120.202 ("Development and Documentation of Trusts Established on or After 01/01/00") solidified the review process developed in the Atlanta, Philadelphia and Seattle regions, and made the same process applicable in all regions.

As now constructed, the POMS section directs the Field Office technician to (in this order):

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.** (emphasis in original)

To follow POMS updates visit the POMS pages on the SSA website at https://secure.ssa.gov/apps10/reference.nsf/instructiontypecode!openview&restrictto category=POMT (note that updates are not archived; you must visit this page periodically or sign up at www.socialsecurity.gov/socialmedia/updates/

Court decisions:

Parents Establishing SNT Acted as Agents of Beneficiary

Draper v. Colvin, 779 F.3d 556 (8th Cir. 2015)
http://media.ca8.uscourts.gov/opndir/15/03/132757P.pdf

Stephany Draper is a traumatic brain injury patient who, at age 20, in 2008, settled a personal injury claim. She had signed a durable power of attorney naming her parents as her agents shortly after she turned 18. Her parents (without referencing the power of attorney) signed a special needs trust intended to comply with 42 U.S.C. §1396p(d)(4)(A). Her father signed the settlement agreement and directed transfer of the $429,259.41 in net settlement proceeds to the trust.

Stephany was receiving SSI payments, and qualified for Medicaid in South Dakota. Seven months after her settlement and establishment of the SNT, she received a notice from the Social Security Administration that she had lost her eligibility because her assets exceeded $2,000.

Stephany appealed the eligibility loss. An ALJ found that the trust was not an exempt asset, applying POMS SI 01120.203B(1)(g) (which requires the person establishing the trust to have the authority to do so). Since (according to the ALJ) the parents did not use their own funds to establish the trust (e.g.: "seed money"), they must have been acting as Stephany's agents rather than as parents – and the trust failed for having been improperly created.

Stephany appealed to the Social Security Appeals Council. During the interim period, her parents secured a state court order *nunc pro tunc* modifying the trust to show the parents as establishers as parents, not as agents. After the Appeals Council denied her appeal, Stephany then sought District Court review.

The South Dakota Federal District Court upheld the Social Security denial of eligibility. Stephany then appealed to the Eighth Circuit Court of Appeals.

The Eighth Circuit affirmed the holding of the District Court, denying eligibility. First, the Circuit Court discussed the proper use of POMS in analyzing the trust. While the Circuit Court noted that the federal statute does not explicitly resolve the controversy, it determines that POMS are agency determinations generally entitled to deference under *Skidmore v. Swift Co.*, 323 U.S. 134 (1944).

On the merits, the appellate court ruled that Stephany's parents did not create an "empty" or "dry" trust – it was initially and immediately funded with Stephany's personal injury settlement. Thus, the POMS interpretation that her parents acted as her agents in establishing the trust is supported by the record.

Stephany had maintained that, even if that argument was correct, the later state court action modifying the trust cured any error committed at the time. The appellate court disagreed with that argument as well, agreeing with the POMS and the Social Security Administration that the court order could not change the role under which the parents acted at the initial establishment of the trust. Furthermore, the later court order did not amount to a court establishment of the

trust, since it only "assigned itself a retroactive role in the already-established" trust.

Two points jump out from this important decision:

1. The Social Security Administration, the ALJ, the District Court Judge and now the Eighth Circuit all took precisely the same tone: the POMS tells you how to establish these trusts (requiring parents to use their own funds as "seed" money) and you should just follow that process, and
2. An incredible amount of excellent work was done in the losing cause by Ron Landsman, Craig Reaves, and South Dakota lawyers Thomas Simmons and Marc Feinstein as *amici curiae* for the National Academy of Elder Law Attorneys and the Special Needs Alliance.

SNT Payback Still Required for Under-55 Beneficiary

Herting v. California Dep't. of Health Care Services, #H040220 (Cal.App. 3/27/2015) http://www.courts.ca.gov/opinions/documents/H040220.PDF

Alexandria Pomianowski was the beneficiary of a self-settled special needs trust when she died at age 23 in 2013. The trustee of her SNT maintained that, since all the Medicaid services she had received had been before she turned 55, federal estate recovery rules prevented any post-death recovery from her SNT.

At Alexandria's death, the trust held $1,294,453.23 in cash. The state Medicaid agency filed a claim for reimbursement of $417,812.43. The trustee filed a final accounting with the court supervising administration of the trust, in which she requested denial of the state's claim. The Medicaid agency objected, and the court approved the accounting but allowed the Medicaid claim. The trustee appealed.

The state Court of Appeals affirms the trial court ruling, noting that there is a distinction between estate recovery rules and special needs trust requirements. Notwithstanding the limitation on estate recovery, the special needs trust must include a payback provision in order to qualify under 42 U.S.C. §1396p(d)(4)(A).

That result may seem obvious to most, but is important because California has a prior decision which confuses special needs trust and estate recovery rules. In the California Court of Appeals case of *Shewry v. Arnold*, 125 Cal.App.4th 186 (2004), a different division of the same court held that the state's right of reimbursement from a SNT must be secondary to the federal limitation preventing recovery against the estates of beneficiaries with children with a disability. The *Herting* court notes that the trust balance in *Shewry* had already been distributed to the beneficiary's (disabled) daughter, and so the estate recovery rules could be applied rather than the SNT requirements.

3rd-Party Trustee Not Permitted to Transfer Assets to Pooled Trust

Harrell v. Badger, #5D14-1145 / 5D14-3469 (Fla.App. 7/24/2015)
http://www.5dca.org/Opinions/Opin2015/072015/5D14-1145.clar%20op.pdf

Rita Wilson's will left a portion of her estate in trust for the benefit of her son David Wilson. The trust directed monthly distribution of income for David's benefit, and permitted invasion of principal for "support, maintenance and education or to meet emergencies such as illness." If David predeceased Rita, the bequest would instead revert to Rita's sisters JoAnn and Barbara.

Although Rita's will named JoAnn and Barbara as co-trustees, they declined to serve and a neighbor of David's, Charles Badger, was appointed as successor trustee by the court. Charles was ordered to post a $300,000 bond and to file semi-annual accounts.

His bond was not posted for over a year, and he filed just one account, at about the same time he posted the bond. Within a month, Charles had hired attorney Linda Littlefield (since disbarred and convicted of theft) to arrange transfer of David's trust to a pooled trust managed by Linda and Ross Littlefield. The joinder agreement permitted the pooled trust to retain any amounts remaining at David's death.

Over the next few months, Charles, his wife and David signed a "care agreement" allowing for payments to Charles' wife for care of (oddly) Charles and (oddly) naming David as trustee of an unspecified trust. Charles listed sold the house held as part of the trust, using his wife as real estate agent and paying her a 5% commission, without approval of any court. Net sale proceeds were transferred to the pooled trust.

Four years later – and after the arrest of the Littlefields and realization that they had taken all the assets of the pooled trust for their own use – Charles filed a motion to terminate the trust and approve the transfer to the pooled trust. The trial judge ruled that, since Rita's will allowed for invasion of principal for any reason, and since Charles relied on his lawyer's advice, the trust could be terminated. The trial court also noted that the complaining parties – JoAnn and Barbara – had actually suffered no damages, since they would not have received anything anyway, as the trust would have been exhausted caring for David. The trial judge approved the payment to Charles' wife for real estate services, and even entered an $85,000 judgment against JoAnn and Barbara for attorney's fees incurred by David.

The Florida Court of Appeals fundamentally disagreed with the trial judge's view of the facts. It ruled that the trial court's reliance on Florida law on decanting was

inappropriate, since the Florida statute requires the beneficiaries of the recipient trust to be the same as the original trust, and also requires notice to beneficiaries. The appellate court also disapproved the payment to Charles' wife for real estate services, and remanded the matter to the trial court for computation of the amount Charles should be ordered to return to the trust.

Ahlborn Lives

State of Colorado v. S.P., 2015 COA 81
http://www.cobar.org/opinions/opinion.cfm?opinionid=9824&courtid=1

S.P. was injured in a snowboarding incident and received $142,779 in Medicaid benefits in treatment of her injuries. She sued the ski area and settled her case for $1,000,000. The state Medicaid agency clearly held a lien for reimbursement of a portion of her care – the question to be determined was how to calculate the state's claim.

S.P. maintained that the correct methodology was that ultimately approved in *Arkansas Dep't of Health & Human Svces v. Ahlborn*, 547 U.S. 268 (2006). Applying that calculation, S.P. argued that the correct claim should be determined as a fraction of the net settlement proceeds. The numerator of the fraction would be the Medicaid payment and the denominator the total (stipulated) potential damages claim of $4.9 million. The Medicaid agency argued that the numerator should be based on the billed rate for services provided by the Medicaid providers, which would increase the state's reimbursement claim by a factor of approximately 5.

The trial court ruled that the numerator should be based on the actual Medicaid payments, but that it should be applied to the gross settlement amount (rather than the net amount). Once that figure was calculated, the trial court applied a 12.5% reduction based on a Colorado statute allowing up to a 25% contribution to the costs of pursuing the litigation. The final reimbursement figure: $25,375.

Both sides appealed. The Medicaid agency insisted that the numerator should be based on the billed value of services, arguing that S.P. could not maintain in one proceeding (the underlying personal injury action) that the value of those services was as billed and then pivot and argue in the second action (the reimbursement calculation) that the value should be vastly lower. S.P. insisted that she had never "owned" the gross settlement amount and so should not have a portion of the reimbursement claim be calculated based on that figure. The Court of Appeals was not impressed with either position and affirmed the trial court's calculation.

Child Support Obligation Not Reduced Because of SNT

Guthrie v. Guthrie, 2015 Ark.App. 108, 455 S.W.3d 839
http://law.justia.com/cases/arkansas/court-of-appeals/2015/cv-14-575.html

James and Vicki Guthrie divorced in 1998, and Vickie was awarded custody of their three children – including J.G., who is autistic. James (whom the dissolution judge noted was not "motivated to work full time") was ordered to pay $738 in monthly child support for the three children.

When the youngest child turned 18 and graduated from high school, James sought to terminate his child support obligation. Vicki agreed that support for the two other children could end, but argued that J.G., then 24, required full-time care and was a disabled adult child entitled to a support award.

James argued that he was financially able to support his son, but that he should not be ordered to do so because J.G. received $710/month in Social Security benefits and was the beneficiary of a $19,000 special needs trust (while he, James, was living on Social Security retirement benefits and the income on $450,000 of investment assets). The court ordered him to pay the support-chart figure of $467 plus an upward deviation for a total of $508/month. James was also ordered to pay $4,000 toward Vicki's attorney's fees.

James appealed, arguing that when J.G. turned 18 his support obligation automatically terminated and, in any event, J.G.'s needs are being met by Medicaid, his Social Security payments and his special needs trust. The Court of Appeals, noting that Arkansas does not have a statute specifically authorizing continuation of child support past majority, ruled that the common law recognized support awards for the benefit of disabled adult children. Once that threshold was crossed, the appellate court ruled that "Given the amount of J.G.'s Social Security benefits, the relatively modest balance of his special-needs trust, and Vicki's testimony, we cannot say that the circuit court erred in ordering James to provide continuing support to J.G." The Court of Appeals does remove the upward adjustment on James' support order.

Attorney Disciplined Over Failure to Set Up SNT as Ordered

Dayton Bar Association v. Washington, 2015-Ohio-2449
https://www.supremecourt.ohio.gov/ROD/docs/pdf/0/2015/2015-Ohio-2449.pdf

Attorney Cheryl Washington represented Sherrill Boone, mother of Juawawno Boone, in connection with a guardianship of the person and estate. Juawawno was set to receive approximately $125,000 as part of a nationwide class action, a figure which was disclosed in the proceedings Ms. Washington filed. She did not, however, seek court approval of the settlement itself.

Over the next few months, Ms. Washington received four checks on Juwawno's behalf, and deposited a total of $170,982.76 in her IOLTA trust account. She did not maintain adequate records, did not establish a separate interest-bearing account, did not establish and fund a special needs trust to protect Juwawno's public entitlement benefits, and (perhaps most damningly) allowed her IOLTA account to dip below the amount of Juwawno's settlement payments from time to time over the next year.

After Sherrill Boone hired new counsel to establish and fund the special needs trust, Ms. Washington issued a $75,056.21 check drawn on her IOLTA account to "Sherrill Boone, Guardian of Juawawno Boone." That check bounced but Ms. Washington replaced it with a cashier's check.

The probate court (acting on the new attorney's request) approved the class action settlement and appointed a new SNT trustee, who objected to Juawano's mother's final accounting. Meanwhile, Ms. Washington distributed an additional $30,921.25 to the SNT trustee in two checks. The disciplinary opinion is unclear as to what became of the remaining $65,000 or so of settlement proceeds.

The Ohio Supreme Court disciplined Washington for her actions in the Boone case and one other, unrelated matter. She was suspended from the practice of law for six months, but that suspension was stayed for a one-year period of monitored probation.

Plaintiff's Lawyers Not Entitled to Fees from SNT

Searcy Denney Scarola Barnhart & Shipley, P.A. v. State of Florida, #4D13-3497 (Fla.App. 7/15/2015) http://www.4dca.org/opinions/July%202015/07-15-15/4D13-3497.op.pdf

Aaron Edwards was catastrophically brain injured during his birth at a Lee Memorial Health System facility in 1997. The law firm of Searcy Denney *et al.* represented Aaron and his parents in an action against the facility, and after a five-week jury trial won a judgment of over $30 million combined. However, the jury also found that Lee Memorial was a state agency, which meant that damages were limited to $200,000.

Searcy Denney submitted a claims bill to the Florida legislature and marshalled the bill through the legislative process. After a strong public campaign, the legislature ordered appropriation of $10 million to Aaron, plus an additional $5 million to be paid out over time to his special needs trust. The claims bill specifically provided that "the total amount paid for attorney's fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed $100,000."

The law firm, lobbyists and others working on behalf of Aaron and his family then submitted a petition to the guardianship court overseeing the SNT, requesting that $2.5 million of the initial $10 million deposit be distributed to them for fees, arguing that they were entitled to a 25% fee. The guardianship court, however, ruled that it lacked authority to make approve such an award.

The Florida Court of Appeals, in a divided opinion, affirms the guardianship court ruling. One appellate judge, the author of the opinion, ruled that the Florida legislature's limitation on fees did not impair contractual rights and did not prevent access to justice. One judge specially concurred, expressing his distaste for the Florida Supreme Court precedent cited by the opinion's author. The third appellate judge would have ruled the legislative limitation on fees unconstitutional.

Trust Decanting Approved Over Divorcing Spouse's Objections

Ferri v. Powell-Ferri, 317 Conn. 223 (2015)
https://scholar.google.com/scholar_case?case=13295525171825211427

This decision does not actually involve a special needs trust, but does endorse the validity of trust decanting, even in a case in which it appears that the effect of the decanting works to the detriment of the trust beneficiary's spouse. The trust ruling is part of a divorce action, interestingly.

Nancy Powell-Ferri and Paul John Ferri, Jr., were embroiled in a divorce proceeding. Meanwhile, Paul was approaching age 35, at which time he would be entitled to an outright distribution from his father's trust (which amounted to something like $60 to $70 million). That trust was established in 1983 and named Paul's brother Michael as a trustee. In 2011, while the underlying divorce action was still pending, Michael and his co-trustee created a new discretionary trust (the 2011 trust) and transferred most of the 1983 trust's assets to that new trust. Paul took no action to prevent or reverse that action.

Nancy filed a cross-complaint against Paul, claiming that his failure to take any action violated the mandatory injunction preventing him from transferring any marital assets. The divorce judge found that Paul had taken no role in the creation of the new trust or the decanting.

Meanwhile, the trustees of the new 2011 trust filed a declaratory judgment action seeking a ruling that they had validly exercised their authority. Nancy filed a counterclaim alleging fraud and conspiracy. After the trial court dismissed those claims, she filed an amended answer alleging breach of fiduciary duty, breach of loyalty, and tortious interference with an expectancy, and seeking her own declaratory judgment that the transfers were ineffective.

The trial court granted Paul's motion for summary judgment, ruling that he had taken no action to diminish the marital estate, and that there was no obligation that he take affirmative action to prevent diminution. Nancy appealed.

The Connecticut Supreme Court declines to recognize a cause of action against a divorcing spouse for failure to take affirmative action to prevent third parties from reducing the marital estate. The court does note that the divorce trial judge might "keep that transfer in mind when forming the mosaic of orders in the dissolution proceeding."

Trust Protector Permitted to Change Provisions During Litigation

Minassian v. Rachins, 152 So.3d 719 (Fla.App. 2014)
http://www.4dca.org/opinions/Dec%202014/12-03-14/4D13-2241.op.pdf

In another important case not directly involving a special needs trust, the Florida Court of Appeals approves the extensive powers given to a trust protector even in the midst of litigation. Even more tellingly, the trust protector was appointed by the trustee, who was then defending a breach of trust lawsuit.

Zaven Minassian created his trust in 1999 and restated it in 2008. He and his wife were sole trustees, and the trust included a provision allowing the trustee to name a trust protector "to protect … the interests of the beneficiaries as the Trust Protector deems, in its sole and absolute discretion, to be in accordance with my intentions". Upon Zaven's death, the trust would become irrevocable and, upon his wife's later death, his children would receive the balance of the trust estate in further trust.

In 2010 Zaven died and his wife Paula became sole trustee. Thereafter, Zaven's children Rebecca Rachins and Rick Minassian brought an action against Paula, alleging that she was improperly administering the trust. Paula sought dismissal of the challenge, noting that the trust itself provided that she, as trustee, was to "be mindful that my primary concern and objective is to provide for the health, education, and maintenance of my spouse, and that the preservation of principal is not as important as the accomplishment of these objectives". The trial court declined to dismiss the action.

Paula then exercised her power to name a trust protector, and she appointed the attorney who originally drafted the trust. He amended the trust to eliminate any provision permitting the children to challenge Paula's actions as trustee. The trial court, unamused, ruled that the purported amendment was ineffective.

The Court of Appeals, however, reversed the trial court's disallowance of the trust protector's actions. Noting that the language of the trust itself permitted the trust protector to (a) resolve any ambiguities and/or to (b) effect Zaven's intentions, the

appellate court observed that the drafting attorney was uniquely qualified to accomplish the latter and that his actions were within the language of the trust itself. The amendment was approved, and the matter remanded for a determination that the trust protector's actions were valid and effective.

Unreported and Trial Court Decisions of Note

Elias v. Colvin, US District Court of Middle District of Pennsylvania (July 27, 2015) https://casetext.com/case/elias-v-colvin-2

Susan Elias appealed her loss of Supplemental Security Income benefits, which had been based on the availability of her special needs trust assets. The Federal District Court judge noted that she held a debit card which deducted directly from the SNT's bank account, and that she had actually used the debit card for transactions that would be disqualifying. Her SSI denial was upheld.

Stahl v. Commissioner of Social Security, US District Court of Southern District of Ohio (September 9, 2015)

The District Court upholds Social Security's determination that the James J. Stahl Trust Agreement failed to establish a valid (d)(4)(A) trust because (a) it includes a provision permitting termination and distribution of the trust if the trust's purposes are "frustrated," and (b) it requires payback only to the State of Ohio Medicaid program. The Court specifically cites POMS SI 01120.201F(2) as setting forth the three requirements for a trust to be validly constituted.

Pulido v. Cemak Trucking, #D065789 (Aug 12, 2015) http://www.courts.ca.gov/opinions/nonpub/D065789.PDF

In a civil action, the plaintiff introduced evidence about future costs which would result from her injuries – including an estimate that the cost of establishing and managing a special needs trust would likely be about $87,502. The defendant did not object at the time, but argued on appeal that such damages should not be considered. The appellate court ruled that the defendant had not preserved its objection for appeal.

Block v. The Law Offices of Ben F. Barcus & Associates, PLLC, #71742-1-1 (Wash.App. July 27, 2015) http://www.courts.wa.gov/opinions/pdf/717421.pdf

Sarah Block was severely injured in 2005, and her mother Terri hired attorney Ben Barcus to represent her daughter in a personal injury action. That action settled in 2006, and a special needs trust was established. The SNT was administered subject

to Washington law covering accounting and court approval requirements for the intervening years. In 2013, Terri (acting as her daughter's guardian) filed suit against Barcus and the attorney representing her in the initial guardianship proceedings. Those claims were dismissed as barred by the statute of limitations and Terri appealed. The Washington Court of Appeals upholds the dismissal, finding that the applicable statutes of limitations on her various counts had run out years before and were not tolled by her daughter's incapacity.

Haywood v. Edwards, #317114 (Mich.App. 10/14/2014)
http://www.michbar.org/file/opinions/appeals/2014/101414/58285.pdf

The Kim Marie Edwards Irrevocable Special Needs Trust was established in 2009, with Kim's mother Jannie as trustee. Jannie was unable to qualify for a court-required bond, however, and Mark Haywood was named as successor trustee. In 2012 Jannie hired attorney Christy Pudyk to seek removal of Mark as trustee, alleging that he had failed to keep Kim informed, failed to protect the trust's assets and failed to maximize income. That petition was dismissed by agreement after the parties "reached an understanding." Jannie then sought reimbursement of the attorney's retainer of $2,600; the court-appointed GAL recommended denial, and the trial court agreed. The Michigan Court of Appeals affirms the trial court's determination denying the reimbursement.

In the Guardianship of Hollis, #14-13-00659-CV (Tex.App. 11/04/2014)
http://law.justia.com/cases/texas/fourteenth-court-of-appeals/2014/14-13-00659-cv.html

Compass Bank, as trustee of a special needs trust for the benefit of Brandy Hollis, approved payment of $67,000 for construction of a pool at Brandy's parents' home. In connection with the next annual accounting, the trial court scheduled a show-cause hearing challenging the approval and ordered Compass Bank to secure a lien or property interest in the parents' home. Although unsure that such a move should be required, Compass Bank complied. The court then removed Compass Bank for "gross mismanagement" for seeking payment of its attorney's fees in connection with the pool question. The Texas Court of Appeals reverses, holding that the trial court abused its discretion by elevating the alleged misbehavior to the level of "gross mismanagement." Note that the trial court had also disallowed the payment of the attorney's fees in question, and Compass Bank's appeal did not include that denial.

Estate of Horton, #B253487 (Cal.App. 1/15/2015)
http://www.courts.ca.gov/opinions/nonpub/B253487.PDF

Elaine Abbott, conservator of the person and estate of Carla Horton, moved for authority to create a (d)(4)(A) special needs trust for Carla. The court denied authority and the conservator appealed. During the pendency of the appeal Carla turned 65 and the appellate court asked the conservator's counsel to supplement her pleadings and to explain why the appeal should not be dismissed as moot. The conservator's counsel responded by instead requesting authority from the Court of Appeals to create a (d)(4)(C) (pooled) trust. The Court of Appeals denied the request as not the proper subject of the pending appeal, which it dismissed. The appellate court noted that the conservator could, if she thought it appropriate, file a new petition for approval of a pooled trust in the probate court.

People v. Wynne, #B251478 (Cal.App. 4/13/2015)
https://scholar.google.com/scholar_case?case=14394115133425236363

This criminal appeal upholds the conviction of a SNT beneficiary for stalking and threats against (among others) the trustees of his SNT. There is little legal argument of importance in this opinion, but it might give considerable comfort to troubled trustees elsewhere.

Healy v. Healy, #A14-1823 (Minn.App. 6/22/2015)
http://law.justia.com/cases/minnesota/court-of-appeals/2015/a14-1823.html

During the original divorce proceedings, the parents of an adult special needs child agreed that child support payments could be made to a SNT. Later the child's father moved for a reduced spousal maintenance figure, arguing that his ex-wife could earn $40,000 per year if she had not chosen to work far fewer hours at a much lower rate of pay to act as paid caretaker for the child. In response, the mother moved for review of the child support order and an increase in the monthly payment, arguing that the SNT had proven to be "inefficient and cumbersome." The trial court declined to change the SNT arrangement or the monthly payment, and on appeal the Minnesota Court of Appeals agreed.

Update

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No Social Security COLA

- For only the third time in its history, Social Security will see no cost of living increase in 2016
- http://ssa.gov/news/press/factsheets/colafacts2016.html
- Still, some things do change:
  - QC $1,220 → $1,260
  - SGA $1,090 → $1,130
  - Maximum SS retirement $2,663 → $2,639
  - Part B premiums $104.90 → $104.90 for 70% of participants; up to $159.30 for new enrollees, up to $1,000+ for high earners

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Special Needs Trust Fairness Act of 2015

- S 349 – Grassley (R-IA) passed Senate on 9/9/15 by "unanimous consent"
- HR 670 – Glenn Thompson (R-PA) and Frank Pallone (D-NJ)
- 9/9/15 – passed Senate
- 9/18/15 – hearing in House Energy and Commerce Subcommittee on Health
- Several new House sponsors – Rick Courtney's testimony may have made a big difference

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SSA Modifies POMS

- POMS constantly undergo changes
  - Check on recent POMS updates
  - Subscribe to POMS update notices
  - Note no archiving of old versions
  - Note no strikeout / bold change-tracking
- Who says they don't have a sense of humor? See POMS SI 01120.202:
  - Example 3: Bill Murray
  - Example 5: Arnie Becker

Sample POMS Change

- POMS SI 01120.201.F.2.c demonstrates how to consider trustee fees in a "sole benefit" trust
  - Before September 28, the "note" encouraged eligibility workers to question fees charged by family member trustees
  - Thanks to Mary Alice Jackson, David Lillesand and others, that sly dig has been removed

ABLE Act

- Still waiting …
- June 26 IRS notice of proposed rule-making – public hearing October 14
- Final IRS regulations due end of October
- Statutes adopted in most states (see The ARC website)

Cases

Cumberland & Erly, LLC v. Nationwide Mut Ins. Co., DC Md, 9/3/2015

- Federal Dist. Ct. memorandum decision
- Law firm sues insurance co. under employee dishonesty policy for $157,268.75 taken from SNT (for which firm was trustee) by legal assistant at firm
- Nationwide Mutual claimed:
  - No insurable interest as trustee
  - Loss by law firm (reimbursement of funds) not directly caused by employee dishonesty
- Summary judgment for law firm against insurer

Home Care Assoc. of Am. V. Weil, #15-5018 (DC Circ., 8/21/15)

- Fair Labor Standards Act case questioning whether domestic-service worker exemption for companionship or live-in care
- DofL changed regulations to cover third-party hired companions and live-in workers in 2013, citing profound changes in workplace
- Trade association for home-care agencies sued in 2014
- District Ct: 3rd-party employers can't be covered
- Ct of Appeals reverses
- Upshot: companions and live-in workers paid through agencies covered by min wage, hour limitations

Risk Management Strategies, Inc. v. Texas Workforce Commission, #03-13-00560-CV, (Tex.App. May 22, 2015)

- RMS provides caregivers for SNT trustees (banks); caregivers often family members
- Texas unemployment commission alleged RMS was "payrolling" for the real employers, the bank trust departments
- RMS sought judicial review; trial court dismissed on sovereign immunity
- Ct of Appeals reverses on one point, remanding for an opportunity to amend
- Significance outside Texas?

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Elias v. Colvin, #07-27-2015 (DC PA 7/27/15)

- SSI recipient had debit card with direct access to 1st-party SNT assets, used it for housing and other expenses
- ALJ found trust did not meet requirements to be a SNT, and was a countable resource
- District Court gave deference to POMS secs. SI 01120.203 and SI 01120.200
  - BUT beneficiary's actions were in contravention of trust terms
  - Should penalty be invalidation of trust, or cessation of benefits?
- Remand

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Harrell v. Badger (Fla.App.) p 4/413

- Testamentary trust for David, Charles appointed as trustee
- Charles transfers assets to pooled trust
- Charles' wife charges under care agreement, lists and sells house
- Trial court: complaining relatives wouldn't have gotten anything anyway – dismissed
- Ct App: "decanting" to pooled trust impermissible, Charles surcharged

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Draper v. Colvin (8th Circ) p 1/410

- Parents establish d4A SNT for Stephany
- SNT assets: proceeds from PI settlement
- SSA: parents acted as agents of Stephany, not as parents – SNT defective
- Parents get *nunc pro tunc* validation from local court of parents as establishers
- SSA: SNT still defective
- District Court concurs
- Circuit Ct of Appeals: POMS entitled to deference, SNT defective

Guthrie v. Guthrie, Ark.App. p 6/415

- After the youngest of James and Vicki Guthrie's three children turned 18, James sought to terminate child support
- JG, age 24, is autistic and receives $710/mo in SSI **and** has $19,000 SNT
- James agrees he can afford to support JG
- Trial court: pay $508/month *plus* Vicki's legal fees
- Court of Appeals: reduced to $467/month

Minassian v. Rachins (Fla.App.) p 9/418

- Not a SNT case, but involving a trust protector's powers
- Trust for widow with strong language indicating intent to benefit widow
- Widow is trustee
- In litigation with step-children, trustee appoints drafting lawyer as trust protector; he modifies trust to eliminate claims
- Trial judge says not on my watch
- Ct of App says read it and weep

Dayton Bar Assoc. v. Washington (Ohio) p 6/415

- Attorney Cheryl Washington represents mother in establishing guardianship
- Washington receives $170K+ in settlement proceeds, places them in IOLTA account
- When new counsel gets authority to establish and fund SNT, Washington's IOLTA check (for $75K+) bounces
- Ultimately Washington distributes a total of $105K+
- Suspended from practice for 6 months, but with one-year stay

More Resources

- Special needs trust Q&A: flemingandcurti.com/FAQs/SpecialNeeds.html
- Fleming & Curti website and weekly newsletter: issues.flemingandcurti.com/
- Special Needs Alliance resources: www.specialneedsalliance.org/resources www.specialneedsalliance.org/taxes.pdf