

USING YOUR SNT TO
ACCESS AND KEEP PUBLIC
BENEFITS

The National Conference
Stetson University College of Law 2020
Mary Alice Jackson, Boyer & Boyer, Sarasota, FL

OBRA '93

- "SEEKING TO STAMP OUT ABUSIVE, MANIPULATION OF TRUSTS TO HIDE ASSETS AND THEREBY MANUFACTURE MEDICAID ELIGIBILITY, CONGRESS CREATED A COMPREHENSIVE SYSTEM OF RULES MANDATING THAT TRUSTS BE COUNTED AS ASSETS"
 - *Lewis v. Alexander*, 685 F.2d 325, 331 (2012)
 - *Sought to overturn PA statutes which were more restrictive than those written under OBRA '93*

LEWIS V. ALEXANDER 276 F.R.D.421

- The Medicaid program "is a cooperative federal-state program under which the federal government furnishes funding to states for the purpose of providing medical assistance to eligible low-income persons." *Pa. Pharmacists Ass'n v. Houston*, 283 F.3d 531, 533 (3d Cir. 2002) (citations omitted). Although states are not required to participate in the Medicaid program, "[i]f a state chooses to participate in the program, it must comply with the Medicaid Act and implementing regulations promulgated by the Secretary of Health and Human Services ('HHS')." *Id.* "Consequently, Medicaid is basically administered by each state within certain broad requirements and guidelines." *Johnson v. Guhl*, 166 F. Supp. 2d 42, 46 (D. N.J. 2001).

LEWIS, CONT'D...AND MEDICAID

- To be financially eligible for MA, a person must have income and resources below a threshold set by the Secretary of HHS. 42 U.S.C. § 1396a(a)(17). The treatment of trusts in this resource calculation is particularly complicated. As a general rule, trust assets are included in a person's resources for determining MA eligibility. See 42 U.S.C. § 1396p(d)(3). However, Congress has created an exception to this resource counting rule for trusts – called variously special needs trusts, supplemental needs trusts, or SNTs – that are established for disabled individuals and meet certain requirements

LEWIS, CONT'D...d(4)(A)

- Section 1396p(d)(4)(A) sets forth the requirements for a special needs trust. "This section provides that disabled persons under the age of 65 remain eligible for ongoing Medicaid assistance (MA) in spite of funds or other property held in an SNT, and can use SNT funds as a supplement to enhance the quality of their lives." *Norwest Bank of N.D., N.A. v. Doth*, 159 F.3d 328, 330 (8th Cir. 1998).

LEWIS AND SUPPLEMENTAL NEEDS

- A supplemental needs trust is a discretionary trust established for the benefit of a person with a severe and chronic or persistent disability and is intended to provide for expenses that assistance programs such as Medicaid do not cover." *Sullivan v. City of Suffolk*, 174 F.3d 282, 284 (2d Cir. 1999) (internal quotation marks omitted). These expenses — books, television, Internet, travel, and even such necessities as clothing and toiletries — would rarely be considered extravagant.
- *Lewis v. Alexander*, 685 F.3d 325 (2012)

OBRA '93 'EXCEPTION' SNTS

- Statutory pursuant to 42 U.S.C. § 1396p(d)(4)(A) and (d)(4)(C)
- (d)(4)(A) trusts are typically established for one beneficiary
- (d)(4)(C) trusts are “pooled” trusts; each beneficiary has a “sub-account”
- Quid pro quo – Medicaid payback
 - All benefits paid to the Beneficiary during his or her entire lifetime
 - POMS SI 01120.203.B.10

POMS SI 01120.200B

- First party or self-settled trust
- Defined in POMS as a “Grantor” trust (not the tax trust)
- “A trust in which the Grantor of the trust is also the sole Beneficiary of the trust”.

GRANTOR

- The person who provides the property to the Trust
- May be referred to as Establisher, Settlor or Trustor
- Must be the legal owner, have legal right to the property or be otherwise authorized to transfer the property to the Trust

GRANTOR

- A person may be the grantor even if the Trust is established by an agent or another person legally empowered to act on that person's behalf with funds or property that belong to the first person.

PATRICK

- Patrick, a 9 year old boy, is playing in the street near his house when he is attacked by two dogs. The dogs are identified as belonging to homeowners from the next street. Patrick sustained a head injury as well as other wounds.
- Four years later, the case against the owners and the homeowners association is settled and Patrick is awarded \$450,000 in damages.
- Patrick continues to experience sensory deprivation and learning disabilities.

DRAFTING THE SNT

- This is a first-party, self-settled, (d)(4)(A) irrevocable trust agreement for the benefit of Patches Salinas (the "Beneficiary") established by the actions of his mother, Paula Salinas, (the "Establisher"), and initial Trustee. This trust is created pursuant to 42 U.S.C. §1396p(d)(4)(A).

ALTERNATIVELY...

- On this 18th day of October, 2019, Patches Salinas (known herein as the “Establisher”) establishes this Trust for his sole benefit, with his mother, Paula Salinas, as the initial Trustee (the “Trustee”) whose address is 2018 Henry Rd, Austin, Texas 84840. [This trust is subject to Medicaid reimbursement as provided for under federal and state law].

THE LAWSUIT TAKES TEN YEARS –
SNT FAIRNESS ACT

Patches Salinas, a capacitated individual with a disability, establishes this Trust pursuant to the provisions of 42 U.S.C. § 1396p(d)(4)(A), as amended August 10, 1993 by the Revenue Reconciliation Act of 1993, Pub. L. No. 103-55 and as later amended by Section 5007 of the CURES Act, Pub. L. No. 114-255.

CHECK-BOX PROVISIONS

- Sole benefit of the beneficiary
- Absolute discretion of Trustee
- Medicaid payback if first-party trust
- Spendthrift clause

SOLE BENEFIT
POMS SI 01120.201F

- Consider a trust established for the **sole benefit** of the Beneficiary if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life.
- Don't consider a trust that permits the trust **corpus or income** to be paid to, or for the benefit of, a beneficiary other than the SSI applicant or recipient to be sole benefit

SOLE BENEFIT PURCHASES

- When the trust makes a payment to a third party for goods or services, the goods or services must be for the primary benefit of the trust beneficiary. You should not read this so strictly as to prevent any collateral to anyone else.

SOLE BENEFIT PROTECTION

- Purchased goods that require registration or titling, for example a car or real property, must be titled or registered in the name of the beneficiary or the trust(ee) unless State law does not permit it.

TRUSTEE DISCRETION

- When the authority of the Trustee is such that the trustee has full discretion as to the time, purpose, and amount of all distributions. The trustee may pay all or none of the trust as he or she considers appropriate to, or for the benefit of, the trust beneficiary. The trust beneficiary has no control over the trust.

DRAFTING FOR RESTRICTIONS ON BENEFICIARIES

- Neither the beneficiary nor any person acting as his or her legal representative shall have any right, power, or authority to amend, revoke, assign, liquidate or terminate the Trust for any reason. In addition, the Beneficiary cannot direct the use of the funds for his support, maintenance, or compel a distribution from the trust for any purpose.

RE-PAYING MEDICAID

- Pay-back, claw-back, estate recovery
- 42 U.S.C. 1396p(b)
- “The Trustee shall pay any remaining assets up to an amount equal to the total amount of Medical assistance paid on the Beneficiary’s behalf”. *Use this drafting language*
- Each state entitled to repayment; Pro rata if necessary
- No recovery if surviving spouse or minor or disabled child

UNLIMITED PAYBACK

- Medicaid payback also cannot be limited to any particular period of time; for example, payback cannot be limited to the period after establishment of the trust.
- POMS SI 01120.203.B.10

DRAFTING FOR NO FOOD, SHELTER OR HEALTH

- The Trustee may, in its sole and absolute discretion make distributions to or for the benefit of the Beneficiary to meet the Beneficiary's need for food, shelter or health even if such distributions may result in an impairment or diminution of the Beneficiary's receipt or eligibility for government benefits or assistance if the Trustee determines that the Beneficiary's needs will be better met if such distribution is made, and it's in the Beneficiary's best interests to suffer the consequences of the impairment or diminution.

REVOCABLE?

- If a third party is the grantor of the trust, and the individual at issue (an applicant, recipient, or deemor) is the beneficiary of the trust, the trust is not a resource to the beneficiary merely because the trust is revocable by the grantor. In a third party trust situation, the focus should be on whether the individual at issue can terminate the trust and obtain the assets for himself or herself.

SPENDTHRIFT CLAUSE

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

EARLY TERMINATION

- ~~Termination before the death of the beneficiary.~~ Commonly, such clauses provide for termination of the trust when, for example, the beneficiary is no longer disabled or otherwise becomes ineligible SSI and Medicaid, or when the trust fund no longer contains enough assets to justify its continued administration.
 - Remember, beneficiary cannot terminate trust

E.T. REQUIREMENTS

- Upon early termination, the State(s), as primary assignee, would receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s); •
- Other than payment for permissible expenses no entity other than the trust beneficiary may benefit from the early termination; **all** remaining funds are disbursed to the Beneficiary;
- The early termination clause gives the power to terminate to someone other than the trust beneficiary.

INHERIT THE WIND...

- But nothing else – 42 U.S.C. 1396p(d)(4)(1)
- An individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust **other than by will**
- Spousal share trust under Will

THIRD PARTY SNT

- A **third-party trust** is a trust established with the assets owned by someone other than the trust beneficiary (or his or her spouse).
- No Medicaid payback
- Create a 3d party trust when you can

INTRODUCTION TO 3d PARTY

- This Trust Agreement is created by Bruce N. and Maude S., (the "Grantor"), for the benefit of their son, George, an individual with a disability as defined under 42 U.S.C. §1382c (hereinafter the "Beneficiary"). The address of the Grantor is 630 Tito's Boulevard, Austin, Texas 78769. This Trust Agreement is a third party irrevocable special needs trust and George is the sole beneficiary of the Trust Agreement (hereinafter "the Trust"). Bruce N. and Maude S. shall serve as initial Co-Trustees.

THIRD PARTY DISCRETIONARY SNT

- Not a statutory creature
- Many were used prior to 1993
- Testamentary; and
- Stand-alone

WHEN A SNT IS A RESOURCE

- The principal of a SNT is a resource **for SSI purposes** if the Beneficiary has legal authority to revoke or terminate the Trust and then use the funds to meet food or shelter needs.
- Drafting tip: *The beneficiary has no authority/right to revoke or terminate this trust.*

TRUST IS ALSO A RESOURCE IF

- The Beneficiary is permitted to sell his or her interest in the Trust
- Beneficiary can direct the use of the trust assets
- Mandatory periodic payment when paid is a resource

BASIC RESOURCES

- SSA POMS:
 - SI 01120.199
 - SI 01120.200
 - SI 00120.201
 - SI 00120.202
 - SI 00120.203
- 42 U.S.C. §1396p(d)
- Treatises
