



Overview of Supplemental Needs Trusts

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Supplemental Needs Trusts, also called a special needs trust, is a trust in the United States that is designed to provide benefits to, and protect the assets of, physically disabled or mentally disabled persons and still allow such persons to be qualified for and receive governmental health care benefits, especially long-term nursing care benefits, under the Medicaid welfare program. Supplemental or Special Needs Trusts are frequently used to receive an inheritance or personal injury litigation proceeds on behalf of a disabled person in order to allow the person to qualify for Medicaid benefits.

Medicaid law Background

Medicaid is the Federal program administered by the states which provides health care for those that can't afford it. See 42 U.S.C. § 1396 et seq. Federal law establishes certain mandatory requirements which each state must adopt in its local Medicaid program, and the states are also given options to elect certain other components in the health care plan which they may decide to provide. Accordingly, Medicaid does vary from state to state in certain aspects, but there are also mandatory Federal law provisions.

One significant governmental benefit which is available only through Medicaid is long-term nursing care which includes care for the physically disabled and the mentally disabled. Long-term nursing care can be extremely expensive. Medicaid is a welfare program. To qualify for Medicaid and its long-term nursing care benefits, the applicant must be “poor” and there is a limit to the countable assets which he or she can own. To qualify for Medicaid, the applicant must meet the asset guidelines for Supplemental Security Income (“SSI”). SSI allows a single applicant to own no more than \$2,000 in countable assets and a married applicant to own no more than \$3,000 in countable assets. Certain assets are specifically exempted and are not countable.

Trusts as Medicaid countable assets

A trust is a legal arrangement in which legal title to assets is held by a trustee under certain defined restrictions of a governing instrument (usually a will or a written trust agreement) for the benefit of another party known as the beneficiary. Trusts can be used as a vehicle to make assets available to a beneficiary but still significantly restrict them. Recognizing the gray area which trusts can provide concerning the ownership of assets, Federal Medicaid law places significant restrictions on the types of

trusts which can be used to preserve assets of a beneficiary and still qualify the beneficiary for governmental benefits.

Prior to the enactment of the Omnibus Budget Reconciliation Act of 1993 (O.B.R.A), P.L. 103-66, it was possible to create a self-settled, discretionary trust for the benefit of the settlor and still allow the settlor to qualify for Medicaid's long-term nursing care benefits. These trusts were called "special needs trusts" or "supplemental needs trusts" because restrictive language in the trust agreement allowed the trustee to pay only for the support needs of the settlor-beneficiary which the government did not pay. The trust was not for the unrestricted, general support of the beneficiary which is typical in normal estate plans. Special needs trusts were perceived by the United States Congress to be abusive and were effectively abolished by O.B.R.A.

In general, with limited exceptions, regardless of the purposes, provisions, or discretion contained in the trust, a self-settled trust which is created after August 11, 1993 will be treated as an available asset which can disqualify the settlor-beneficiary from Medicaid. 42 U.S.C. § 1396p(d)(2)(C). This means that generally a person cannot create his or her own trust, transfer his or her own assets into the trust, and still be qualified for Medicaid.

Medicaid exempt trusts

Since the effective date of O.B.R.A., only a limited number of trusts can now be used and still preserve an applicant's Medicaid eligibility. One major distinction should be made when analyzing Medicaid trusts. Trusts created by the disabled beneficiary (or a third party with legal authority over the disabled beneficiary) with the disabled person's own assets for the disabled person's own benefit are classified as first-party, self-settled trusts. These types of trusts must be distinguished from trusts created by a third party for the benefit of a disabled individual with the third party's own assets (such as a grandparent creating a trust for a grandchild). Legal restrictions generally exist for first-party, self-settled trusts which do not exist for third-party trusts.

First-party, self-settled trusts

Most self-settled trusts holding the disabled beneficiary's own assets created after August 11, 1993 are countable resources for Medicaid. The Medicaid statute, however, provides for three specific types of trusts which can be funded with the applicant's own assets and which will not disqualify the applicant from Medicaid. These trusts are called "D-4A Trusts" after the subsection of the law which authorizes them. They are also called "Federalized Special Needs Trusts" because the Federal Medicaid statute makes them available in every state.

Because of the requirement that the State be reimbursed for medical assistance, D-4A Special Needs Trusts may have limited utility when the goal is to pass assets of the disabled individual to family members. The main benefit of the D-4A Trusts is to provide a quality of life for the Medicaid beneficiary. Assets can be held in the trust and used to pay for the beneficiary's special and supplemental needs which the government does not provide, while Medicaid pays the significant medical bills. If the medical assistance provided during life does not turn out to be costly, then upon the death of the beneficiary, there is a chance that assets may be preserved in the trust and pass to loved ones.

Disabled Individual's Special Needs Trust

Under the provisions of 42 U.S.C. § 1396p(d)(4)(A), a Disabled Individual's Trust will not be counted as a Medicaid asset even when it is funded with the applicant's own assets. The requirements for the trust are that the individual must be under age 65 at the time the trust is created (and funded), and disabled under the Social Security definition. Further, the trust must be for the "sole benefit" of the disabled individual. The trust must be created by a parent, grandparent, guardian, or court. Upon the death of the individual, the State Medicaid agency must be reimbursed for the costs of the medical assistance which was provided by Medicaid during the disabled individual's lifetime. This is often called the "payback" provision.

It is important to note that the Disabled Individual's Trust must be created by a parent, grandparent, guardian, or court. The statute does not allow the disabled individual to create his or her own trust, even if he or she is otherwise legally competent. Action by a third party is required in creating the trust. In this regard, these types of special needs trusts are often established by a court on behalf of a disabled person as a part of or ancillary to a serious personal injury lawsuit.

"Miller" Trust

A "Miller" Trust can be used to qualify a Medicaid applicant with income in excess of the eligibility limit (not imposed in all states) for long-term care assistance from Medicaid. Such a trust is not really a "special needs" trust at all, and is not funded with the beneficiary's assets. The Miller trust can be named as recipient of the individual's income, from a pension plan, Social Security, or other source. The Miller trust takes its name from the Colorado case of *Miller v. Ibarra*, 746 F. Supp. 19 (D. Colo. 1990), and is specifically sanctioned by 42 U.S.C. § 1396p(d)(4)(B). As with a self-settled special needs trust (referred to above as a "Disabled Individual's Trust"), upon the death of the beneficiary, the State Medicaid agency must be paid back for its medical assistance from any remaining assets in the Miller trust. An older name for the Miller trust, still occasionally used, is "Utah Gap" trusts, reportedly coined by a Colorado advocate describing the gap between the income cap for eligibility and the actual cost of nursing home care as similar to the yawning chasm between mesas dotting the Southern Utah landscape. The Miller trust is only significant in those states which impose an income cap on Medicaid long-term care eligibility; ironically, Utah is not one of those states. Income caps are in place in about half of the states.

Charitable Pooled Income Special Needs Trust

A Charitable Pooled Income Special Needs Trust is authorized by 42 U.S.C. § 1396p(d)(4)(C). Again, the individual must be disabled under the Social Security definition. Unlike the other exempt trusts which can be administered by a private trustee who is an individual (such as a family member), the Pooled Income Trust is run by a nonprofit association, and a separate account is maintained for each individual beneficiary. All accounts are pooled for investment and management purposes. The trust (or more accurately, an account in the pooled trust) may be created by a parent, grandparent, guardian, or court, and it can also be created by the disabled individual himself. Upon the death of the disabled individual,

the balance is either retained in the trust for the nonprofit association or paid back to the State Medicaid agency for its medical assistance.

In some states, a disabled individual over age 65 is entitled to transfer assets to a pooled trust and then be immediately eligible for Medicaid. In other states, the transfer must be made before the disabled individual attains the age of 66.

Third-party trusts

Medicaid law governing trusts is designed to prevent disabled individuals qualifying for benefits while still retaining full control over their assets. A third party, however, is still free to plan with his own assets and either give them outright to a disabled individual or tie them up and restrict them in trust as he sees fit. Accordingly, trusts which are created by a third party with the third party's own assets to benefit a beneficiary who is on Medicaid have their own separate rules and treatment.

Generally, a properly drafted third-party, discretionary trust is not countable as an asset available to the beneficiary receiving Supplemental Security Income (SSI) and/or Medicaid benefits. Such a trust must be created by a party other than the SSI/Medicaid beneficiary, must not receive any assets belonging to the beneficiary, and must be restricted (not accessible or available) to the beneficiary. The operative principle is whether the trust assets or income are available to the beneficiary. If appropriate trust language is used (and the appropriate language varies from state to state), Medicaid will not treat the resources in the trust as a countable resource. Typically, a third-party trust provides that the trustee is given unfettered discretion to distribute (or not to distribute) principal or income for the benefit of the disabled beneficiary. Often, the trustee is directed only to make distributions for the "supplemental" or "special" needs of the beneficiary or as long as the distributions do not disqualify the beneficiary from governmental benefits. Frequently the trustee will be specifically prohibited from making distributions which provide the beneficiary with food or shelter (the two disqualifying categories under SSI and Medicaid regulations). There is no requirement that the trustee be so restricted, however; it may be preferable in most cases to permit the trustee to make the decision to make distributions which reduce or even eliminate public benefits in cases where the availability of trust resources is more important than continued eligibility for SSI and Medicaid.

A third-party special needs trust should not be drafted as a general support trust or mandate distribution of current income to the beneficiary. In such a case, the trust can be deemed to be "available" and can disqualify the beneficiary from Medicaid. The Medicaid beneficiary should not be given any power to revoke the trust or direct the trustee to make distributions to the beneficiary. The trust can be revocable by the third-party settlor. This means that a parent can fund a trust for a disabled child with the parent's assets and give it a test run, revoking it later and re-acquiring the assets if the parent decides that it is not serving its purpose. Finally, the third-party trust does not need to include a D-4 "payback" provision reimbursing the State for the medical assistance of the beneficiary upon the beneficiary's death.

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