



Seminar Outline

Special Needs Trusts: A Guide for Attorneys

I. Purpose

Special Needs Trusts are designed to permit financial resources to remain available to assist a disabled individual who receives, or may receive in the future, MH/MR and/or Medical Assistance and/or SSI benefits. They also protect such resources from immediate invasion by the Department of Public Welfare (or other providers of publicly-funded services) to reimburse the public treasury for the provision of MH/MR, MA or SSI benefits.

II. Types of Special Needs Trusts

- A. The first type is a "Common Law Discretionary Trust" which involves a Trust funded by a third party. The controlling cases regarding Common Law Discretionary Trusts using the resources of third parties are Lang v. Commonwealth, Department of Public Welfare, 515 Pa. 428, 528 A.2d 1335 (1987); Commonwealth Bank and Trust v. Commonwealth, Department of Public Welfare, 528 Pa. 482, 598 A.2d 1279 (1991); Snyder v. Commonwealth, Department of Public Welfare, 528 Pa. 491, 598 A.2d 1283 (1991); Estate of Rosenberg v. Department of Public Welfare, 545 Pa 27, 679 A.2d 767 (1996); Shaak v. Department of Public Welfare, 747 A.2d 883 (Pa. 2000); Estate of Taylor, 825 A.2d 763 (Pa. Cmwlth. 2003).
- B. The second type is an OBRA-93 Payback Trusts which is a "self-settled" Trust with the disabled beneficiary's own monies.

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- C. Finally, a Pooled Trust involves a non-profit fiduciary with a "mutual fund" type of program where the funds are invested in a common fund but with individual accounts.

III. May A Special Needs Trust Be Created Which Will Not Be Invaded By Public Authorities Under Present Law?

- A. Common Law Discretionary Trust -- At present, the answer is "Yes", so long as the Trust clearly reflects an intent that the corpus of the Trust not be available as a "resource" with regard to public benefits.
 - i. Lang (discretionary trust held not invadable to pay DPW for mental retardation benefits)
 - ii. Snyder (trust not an "available resource" for purposes of determining son's eligibility for medical assistance benefits).
 - iii. Compare, Commonwealth Bank (trust disqualified beneficiary for MA due to testator's legal duty to care for beneficiary, failure of trust to refer to public benefits as an available resource, and fact that principal could be spent without concern for remaindermen), Rosenberg (trust disqualified beneficiary for MA where intent of settlor was not clear regarding desire for future eligibility for public benefits), and Shaak (inter vivos trust found to be an "available resource", because the Settlor/Beneficiary "clearly intended that the Trust be used for her benefit during her lifetime" and principal could be used for "maintenance and welfare" of the Beneficiary).
- B. OBRA-93 Payback Trust--42 U.S.C. Section 1396p(d)(4)(A) explicitly permits creation/maintenance of certain inter vivos trusts for disabled MA recipients with their own funds.

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- C. The Pennsylvania Rules of Civil Procedure have recently been amended to explicitly permit the use of special needs trusts in resolving civil litigation. See Rules 2039 (minors), 2264 (incompetents), and 2206 (settlements in death cases where a minor or incompetent has an interest). See also, Local Rule 41.2 of the Rules of Civil Procedure for the Eastern District of Pennsylvania.
- D. Pooled Trust - discussed below

IV. Factors To Consider In Establishing A Common Law Discretionary Trust

- A. It must be clearly stated that (1) it is the intent of the settlor to supplement and not supplant public benefits and that such benefits be considered prior to distribution of any trust income or principal, (2) the trust is irrevocable, and (3) the trustee has total, absolute and unfettered discretion to pay, or refuse to pay, income or principal from the trust to the disabled beneficiary. Never instruct the trustee to make periodic (e.g. monthly) payments, as all payments should be discretionary and generally cannot be made for food, clothing or shelter under MA or SSI rules.
- B. The courts also appear to consider other factors, perhaps as indicia of the settlor's intent;
 - i. The existence of other beneficiaries;
 - ii. The existence of remaindermen with a statement of intent that the settlor wishes the trustee to attempt to preserve at least some assets for the remaindermen;
 - iii. The trustee is instructed to consider the interests of all other beneficiaries, including contingent beneficiaries, before making distributions;

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- iv. The lack of a duty of the settlor to support the disabled beneficiary.

V. OBRA-93 Payback Trusts

- A. OBRA-93 amendments to the Medical Assistance rules require that at least where the beneficiary's own monies are used:
 - i. The Trust must be created irrevocably for the sole benefit of a disabled individual under age 65.
 - ii. the trust must be created by the beneficiary's parent, grandparent, guardian or a court;
 - Pennsylvania's Act 42 of 2005 now requires that "before the funding of a Special Needs Trust, all liens and claims in favor of the Department for repayment of cash and Medical Assistance shall first be satisfied." 62 P.S. Section 1414(d). No provision in the Social Security Act requires that all such liens be satisfied prior to the creation of a Special Needs Trust, although where the Special Needs Trust is funded through the proceeds of a personal injury action, Pennsylvania and federal law have long required that Medical Assistance paid on account of the accident be repaid before any recovery is paid to the plaintiff or a Trust for the plaintiff. Query: Does this mean that all prior Medical Assistance expenditures must be repaid before funding the Trust, including Medical Assistance payments which were unrelated to an accident which gave rise to the recovery which will fund the Trust? It would appear that DPW has no formal "lien" to recover for Medical Assistance payments except 1) from a litigation fund to repay Medical Assistance for benefits provided as a result of the accident, 62 P.S. §1409(b)(1), and 2) for Medical Assistance provided after the age of 55. 62 P.S. §1412. With respect to DPW's claims concerning cash assistance, see 62 P.S.

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§1974. Only time will tell exactly how DPW will interpret this new provision.

- iii. The Trustee must have total discretion to pay, or refuse to pay, resources of the Trust to the beneficiary;
- Pennsylvania Act 42 of 2005 provides at 62 P.S. Section 1414(b)(2) that a Special Needs Trust may only be funded with a disabled person's own money where "the beneficiary [has] special needs that will not be met without the Trust." Query: When is this determination made, and does this mean that a disabled beneficiary's monies may not be used to create a Special Needs Trust if that person's "special needs" can be met with that person's own monies or with other resources? No similar provision exists under 42 U.S.C. Section 1396p(d)(4).
- Pennsylvania Act 42 of 2005 requires that "any expenditure from the Trust must have a reasonable relationship to the needs of the beneficiary." 62 P.S. Section 1414(b)(3)(ii). This provision appears to be designed to curb real or imagined "excesses" in the use of self-funded Special Needs Trusts for extravagant luxuries. However, the Act provides no guidance as to what constitutes a "reasonable relationship to the needs of the beneficiary."

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- iv. the trust must state that monies in the trust at the beneficiary's death be made available to repay the state for Medical Assistance payments made on behalf of the beneficiary during his/her lifetime. Upon the death of beneficiary, the Trustee must contact:

Department of Public Welfare
Third Party Liability Casualty Unit
Special Needs Trust Depository
P.O. Box 8486
Harrisburg, PA 17105
(717) 772-6257

- Pennsylvania Act 42 of 2005 requires that "upon the death of the beneficiary or upon the earlier termination of the Trust, the Department and any other State that provided Medical Assistance to the beneficiary must be reimbursed from the funds remaining in the Trust up to an amount equal to the total Medical Assistance paid on behalf of the beneficiary before any other claimant is paid; provided, however, that in the case of an account in a Pooled Trust, the Trust shall provide that no more than fifty (50%) percent of the amount remaining in the beneficiary's Pooled Trust account may be retained by the Trust without any obligation to reimburse the Department." 62 P.S. Section 1414(b)(3)(iii). This provision appears contrary to federal law on several scores. First, federal law requires reimbursement to the Department only upon the death of the beneficiary, and not upon other circumstances which terminate the Trust, although it is conceivable that courts would interpret the federal law in a manner consistent with Act 42 to avoid abuses such as where the Trust is terminated just prior to the death of the disabled beneficiary. Second, the Social Security Act provides no basis upon which the Department can demand that Pooled Trusts repay fifty (50%) percent of Medical Assistance paid on behalf of the disabled beneficiary of a Pooled Trust; to

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the contrary, federal law requires that where a Pooled Special Needs Trust vehicle is used, the entire residuary of the Trust remain in the Pool for the benefit of other individuals with disabilities. 42 U.S.C. §1396p(d)(4)(C).

- v. Pennsylvania Act 42 of 2005 requires DPW to determine whether the Trust conforms with “any regulations or statements of policy adopted by the Department to implement this section.” 62 P.S. Section 1414(b)(4). Query: Does this mean that even informal policy statements of the Department become binding law in determining the legality of Special Needs Trusts? This circumstance presents real concerns, especially given the current policy of the Department in stretching federal law beyond the express mandate of the Social Security Act through the provisions of Act 42.
- vi. Pennsylvania Act 42 of 2005 provides that “if at any time it appears that any of the requirements of [Act 42] are not satisfied or the Trustee refuses without good cause to make payments from the Trust for the special needs of the beneficiary...the Department or other public agency may petition the court for an Order terminating the Trust.” 62 P.S. Section 1414(c). This provision apparently gives broad authority to not only the Department, but any “other public agency” to petition the Court to terminate the Trust if it believes that, for example, the beneficiary’s special needs can be met without the Trust or that expenditures from the Trust have not had a “reasonable relationship to the needs of the beneficiary”. Therefore, it is possible that agencies such as County Mental Health/Mental Retardation Administration or other social service agencies might petition the court to terminate the Trust in order to avoid providing public entitlements.

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vii. Pennsylvania Act 42 of 2005 requires that "at the death of the beneficiary or upon earlier termination of the Trust, the Trustee shall notify and request a Statement of Claim from the Department, addressed to the Secretary." 62 P.S. Section 1414(e). This provision again refers to "earlier termination of the Trust" in a manner which does not fully mirror federal law.

B. Where SSI eligibility is also an issue, and the beneficiary's own monies are used to fund the trust, the SSI Guidelines consider the trust to be revocable (and thus an available asset) unless a second beneficiary (or possibly a contingent beneficiary) is named.

VI. Pooled Trusts - Authorized by 42 U.S.C. Section 1396p (d)(4)(C) and 62 P.S. Section 1965.1 et. seq.

A. Must use non-profit agency as Trustee.

B. Under the federal statute no payback is required, but resources remain in the pooled trust after the death of the beneficiary for the benefit of persons with disabilities. See discussion regarding payback from pooled trusts in the preceding section.

C. Query: Must the disabled beneficiary be under age 65?

VII. Thorny Issues in the Creation and Maintenance of Special Needs Trusts

A. Creation of Special Needs Trusts - Preliminary Issues

1. Must DWP approval for the Trust be obtained?

a) Is the money arising from litigation involving a minor or incapacitated person? In what county?

b) What will DWP require?

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- (i) notice of expenditure of principal
- (ii) some limits on types of expenditures

2. Should you create a SNT if
 - the beneficiary is marginally disabled?
 - the beneficiary does not currently receive SSI or Medical Assistance, but may in the future?
 - the trust corpus is relatively small -- can you spend down without losing eligibility (even if only for one month)?
 - the trust corpus is so large that SSI and MA could be irrelevant (and can the SNT be drafted in such a way as to pay out monies for food, shelter, clothing and cash payments until the beneficiary goes on to MA/SSI)
.-.Other health benefits are available (e.g. Medicare, Adult Basic 1-800-GOBASIC)
3. Whose money is it, anyway? OBRA-93 Trust vs. Common Law Special Needs Trust – The Payback Issue
 - a) inheritance not yet paid out
 - b) injury settlement
 - c) past Social Security award
 - d) compensatory education fund
 - e) reversionary interest in property
 - f) can you combine - and is it ever wise to combine -- assets of the person with disabilities and assets of others?
 - g) life insurance companies are now marketing to families with persons with disabilities
4. What do you tell the Trustee about administering the Trust?

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5. Must the Settlor have the legal authority to manage the assets of the disabled beneficiary? What are the differing demands of DPW, SSA, MR/MR?
6. What Social Security number do you use?
7. Who should be the contingent beneficiaries?
8. How do you get the court to act as settlor for the trust when no parent, grandparent or guardian is available?

B. Larger Trusts

1. Should you use a corporate or non-corporate trustee?
2. Which corporate trustee is best? Issues to consider are fees, customer service history, knowledge of SNTs and disability issues, and investment strategies.
3. Financial demands upon the trustee by the beneficiary and the family can be vexatious, and can include salaries for family members to care for the disabled beneficiary, housing for entire family, family vacations, vehicles not specially designed for the disabled beneficiary food, clothing, rent/mortgage, or cash for disabled beneficiary, furniture, electronic equipment, professional services.

C. Smaller Trusts

1. Trustee
 - a) Can you find a corporate trustee?
ARC Community Trust (610) 265-4700 (King of Prussia)
ARC Family Trust (412) 995-5000 (Pittsburgh)

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- b) Will the Court appoint a non-corporate trustee in matters involving a minor or incapacitated person?

PA R.C.P., Rules 2039 and 2064. Counsel must also determine who should be the non-corporate trustee? Will the Court approve a family member, friend, financial planner, or attorney? Are conflicts of interest involved?

- c) Can you keep a trustee happy if the beneficiary or his/her family is demanding? Issues can involve payment of fees to trustee, investment counseling, and supportive/intervention/casework services.

2. Beneficiary

- a) Should the trustee accede to requests which will quickly deplete the corpus?
- b) Can principal be invaded? Will DPW object?
- c) How should the corpus be invested?

D. Improper SNTs – can they be “fixed”?

E. Payback Issues

- 1. Planning for payback during trust administration.
- 2. Dealing with DPW at the termination of the Trust.

If you would like to receive an electronic copy or more information regarding this topic, please visit our website at <http://www.mcandrewslaw.com/> or call (610) 648-9300.

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