

**SPECIFIC DISTRIBUTIONS FOR
SUPPLEMENTAL NEEDS TRUSTS**

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I. INTRODUCTION

This paper will discuss distributions from Special Needs Trusts and the potential effect such distributions may have on the eligibility of the beneficiary for public benefits. There are several other factors that are important for a trustee to consider before making any distribution from a trust. These factors include such considerations as what distribution standards are contained in the trust and if any types of distributions are mandated or prohibited by the expressed language of the trust instrument itself. These issues must be examined before any distribution is contemplated. For the purposes of this paper it will be assumed that the trust document allows a distribution for the types of items that we will be discussing.

Another important consideration in assessing the impact of a distribution from a Special Needs Trusts is the different eligibility rules for various public benefits programs. The rules for SSI, Medicaid, and programs like subsidized housing (HUD) differ in their treatment of income and resources when determining the eligibility of an individual. This paper will assume that our beneficiary is currently receiving Supplemental Security Insurance (SSI) benefits. A trustee must keep in mind however that the specific program from which the trust beneficiary is eligible may treat a specific distribution differently than as set forth in this paper.

II. LAWS AND REGULATIONS GOVERNING SPECIAL NEEDS TRUSTS

In order to achieve the desired result in making distributions from Special Needs Trusts the ultimate goal of improving the quality of life for the beneficiary must always be foremost in the mind of the trustee. Step one in achieving that goal is to make sure that the beneficiary maintains eligibility for government programs that provide income and medical benefits, namely SSI and Medicaid. In most cases the distribution standards mentioned in paragraph one above will have been drafted with the intention of allowing distributions to improve the quality of life of the beneficiary. Making a distribution while ignoring the rules regarding obtaining and maintaining benefits under these federal benefit programs will often frustrate the ultimate goal even if the immediate effect is to provide some short-term improvement in the quality of the beneficiary's life. The rules for obtaining eligibility for SSI and Medicaid are extremely complex. Well known author and expert on public benefits David J. Lillesand puts it this way:

“In other words there are two ways the practicing Social Security attorney can adversely affect the client: draft the trust improperly, so that it is not approved by SSA, and draft a trust in a way that restricts the trustee from providing the full benefits due the client according to the SSA rules.”

Lillesand's advice to attorneys drafting such trust put an onerous burden on the draftsman.

The trust terms must allow the trustee freedom to make disbursements that will provide the fullest benefits commensurate with the ability of the assets to support such largess, all the while doing so under SSA's rules. Once the trustee is confident in their understanding of the draftsman's language they must put these carefully worded articles into practical use. To do so requires the knowledge of the laws and rules effecting these actions. The sources of SSA's mandates concerning these trust are contained in a patchwork system of Federal law, regulations and policies. No one item can be considered without understanding the relationship to the others in SSA's system.

A. Federal Law and Regulation

The Social Security Act was passed in 1935 and created what is known to most people as the federal retirement program. The act has been expanded by Congress many times. In 1939 benefits for spouses and children of a retired worker were added along with benefits for the survivors of a deceased worker. Later, benefits were added for disabled workers (1956) and in 1965 Medicare was created. The Medicare Act is divided into two separate benefit programs: Part A 42 U.S.C. § 1395c-1395i and Part B 42 U.S.C. § 1395j-1395w. Title II of the Social Security Act contains the provisions for Disability Insurance Benefits (DIB) codified at 42 U.S.C. 401 et seq. Title XVI of the Social Security Act, 42 U.S.C. 1381-1383f. is the law creating the Supplemental Security Income (SSI) program. The Supplemental Security Income (SSI) program was passed as an amendment to the Social Security Act in 1972. The Medicaid program laws are found at 42 U.S.C. 1382 et seq. These statutes provide the law that creates the programs but the Social Security Administration promulgates regulations that implement the law and control the workings of the programs.

The regulations concerning the SSI program are found at Code of Federal Regulations (Employees' Benefits) Section 20, Chapter III. 20 C.F.R. . 416.101-2227. There is not a single regulation that addresses Special Needs Trusts. Special Needs Trusts are covered like all other trusts in the section dealing with "resources". The resource rules for trust and other assets are found at 20 C.F.R. 416.1201-416.1266.¹

The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) created the specific statutes that define what has become known as Special Needs Trusts. The law basically created safe harbor provisions for these types of trusts at 42 U.S.C. 1396p (d) (4) (A) and (C). The sections are very short. If a trust is created in compliance with these sections the assets of the trust will not be counted as an available resource for Medicaid eligibility purposes. On December 14, 1999 President Clinton signed into law the Foster Care Independence Act of 1999 (H.R. 3443). This law adopted the Medicaid trust rules for the SSI program. The Medicaid program uses most of the same rules as the SSI program for

¹ Lillesand, David, *SSI Analysis of Special Needs Trusts Using the POMS*, Stetson University College of Law Special Needs Trust IV. (Oct.18, 2002).

financial eligibility determinations these regulations are found at 42 C.F.R. §§ 440.1 - 440.180.

B. Program Operations Manual System (POMS)

The POMS is a huge set of instructions that SSA publishes to guide all of its employees in handling Social Security matters. Although the POMS has no official status, it is not law and cannot be relied upon like a duly promulgated regulation it is the law as far as most SSA claims representatives are concerned. The POMS will be the source that an employee of the SSA will turn to in evaluating all issues concerning the drafting and administration of a Special Needs Trusts. It is available online at <http://policy.ssa.gov/poms.nsf> . If you cannot remember the URL you can go to www.SSA.gov and navigate to it easily.

C. Social Security Rulings

The Social Security Administration also issues what are called Social Security Rulings. The rulings are published periodically by the Social Security Administration and are binding on all components of SSA. 20 C.F.R. 402.35 (b) (1). These rulings along with the regulations mentioned above constitute the official interpretation of the Social Security Act by the agency. There are no rulings on Special Needs Trusts.² The rulings are very poorly indexed but are available at www.ssa.gov .

D. Texas Laws and Regulations

There are two Texas statutes that are critical to an understanding of Special Needs Trusts in Texas. These are Section 867 of the Texas Probate Code entitled Creation of Management Trust and Section 142.005 of the Texas Property Code entitled Trust for Property. All Special Needs Trusts created by State Courts in Texas will be created pursuant to these statutes.

E. Medicaid Eligibility Handbook and Texas Administrative Code

Although the most important program rules to be concerned with when dealing with Special Needs Trusts maybe SSI related, the specific rules governing the Texas Medicaid program must be considered when administering a Special Needs Trusts for a disabled person in Texas. The Medicaid program is a joint federal/state program and the general rules and eligibility requirements are set forth by the federal law. Notwithstanding that premise, states are allowed to promulgate their own regulations for administering the Medicaid program in their particular state. If a beneficiary were to need long term care benefits at some point in their life, then the rules of the Texas long term care program would be the rules upon which the beneficiary's eligibility would depend. The regulations of the

² *Id.* at p. 7.

Texas Medicaid Program are promulgated under the Texas Administrative Procedure Act. Medicaid regulations in the Texas Administrative Code can be accessed through <http://www.sos.state.tx.us> The TAC sections dealing with Medicaid can be found at 40TAC Social Services and Assistance. The Department of Human Service rules are found in the Medicaid Eligibility Handbook (MEH) which can be purchased or viewed online at <http://www.dhs.state.tx.us/handbooks/meh/1000/1110.htm>.

III. SPECIFIC DISTRIBUTIONS FOR SERVICES

A. Loans

In some trusts the trustee may be authorized to make loans to the beneficiary of money or property. What effect will a loan have on the benefits of a person eligible for SSI? Under current SSA policies a loan is not countable as income under the SSI program. 20 C.F.R. 416.1103(f). In the past SSA differentiated between loans for cash and loans of in-kind items. After many unsuccessful court battles wherein SSA had tried to count in-kind loans as income SSA issued SSR 92-8p providing that in-kind loans would not be considered income to the borrower. SSR 92-8p sets forth how SSA will determine the validity of a loan (namely that it must be enforceable under state law). It is the best policy to have a loan agreement in writing but under the rules an oral agreement can be considered valid if Texas law would recognize it as an enforceable contract.

B. Household Expenses

The POMS at SI 00835.465 contains a list of 10 different items that are to be considered when computing household operating expenses for what is called inside ISM (in-kind support and maintenance) or the CMV (current market value) of household costs for outside ISM. The section further states that:

When computing household operating expenses for inside ISM or the CMV of household costs for outside ISM, the following **10** items are the **only** ones used in the applicable computations.

Food

Mortgage (including property insurance **required** by the mortgage holder)

Real property taxes (less any tax rebate/credit)

Rent

Heating fuel

Gas

Electricity

Water

Sewer

Garbage removal

NOTE: Condominium fees in themselves are not household costs. However, condominium fees may include charges which are household costs (e.g., garbage removal). To the extent that such charges are identifiable, use them in the computation of inside and outside ISM.

The section of the Federal Regulations that describe In-Kind Support and Maintenance starts with a definition of “shelter” as set forth at 20 C.F.R. §416.1130. The definition of “shelter” includes these ten items also. Therefore, any other household items that would be considered nonessential other than these specific ten items should not be countable as ISM. If a disbursement for any other item related to household operating expenses is made it would have no effect on the eligibility of the beneficiary.

Payments to providers for phone bills, cable TV bills, Internet connections and other items not specifically listed as income can be paid without effecting eligibility. Payments for home maintenance services, house cleaning, painting and plumbing repairs and services are also permitted.

C. Payments to Spouse or Parent for Attendant Care

A disbursement to a family member such as a spouse or parent is appropriate to compensate the caregiver for care given above what would normally be expected to be their duty under support obligations.³ In many instances the caregiver will forego employment outside the home to provide care for a child that they know is superior to the type of care that can be purchased through home health agencies. The amount paid should be based on the going rates for such services by person with the same training and expertise as the family member. The trustee should be careful however if a deeming situation exists between a parent and a child as the increased income of the parent may effect the eligibility of the child. It may also be important for the trustee to pay for health insurance, disability insurance and life insurance for a caregiver.⁴ If the caregiver were to become disabled or pass away the proceeds from such a policy would then be used to purchase the care lost for the beneficiary.

D. Payments for Medical and Supportive Services, Supplies and

³ Berstein, Roger M., *Special Needs Trust: Administration and Compliance*, NAELA Quarterly (Summer 2001) Vol. 14 No. 3 at page 13.

⁴ *Id.*

Equipment

Payments for medical care, dental care and services are not considered income by SSA. Additionally, payments such as personal care or supportive home care will not be considered income. If the beneficiary has private medical insurance then payments of the premiums for such insurance is not considered income to the beneficiary. 20C.F.R. §416.1103 (a).

Medical services are those services which are directed toward diagnostic, preventive, therapeutic, or palliative treatment of a medical condition and which are performed, directed, or supervised by a State licensed health professional. The term "medical services" also includes any room and board (i.e., food and shelter) provided during a medical confinement (SI 00815.100), as well as in-kind medical items such as prescription drugs, eyeglasses, prosthetics and their maintenance, etc. For SSI purposes, in-kind medical items also include devices intended to bring the physical abilities of a handicapped individual to a par with a nonhandicapped unaided individual (e.g., electric wheelchairs, modified scooters). Furthermore, for SSI purposes, in-kind medical items include specially trained animals (e.g., seeing eye dogs) and their maintenance (e.g., dog food). Under this definition, an automobile or van intended for street use would not be considered wholly a medical item but any modifications made to an automobile or van in order to accommodate a physically handicapped individual would be a medical item and therefore the modification would not be income upon receipt. (See SI 01130.600 ff. for resource guidelines.) Transportation to and from medical treatment is also considered a medical service.

E. Payments for Social Services

Payments from a trust for "social services" are not considered income to a beneficiary under the rules of the SSI program. There are differing opinions among acknowledged experts in the field, in both governmental and nongovernmental agencies, as to what constitutes a social service. For SSI purposes, use the following definition: A social service is any service (other than medical) which is intended to assist a handicapped or socially disadvantaged individual to function in society on a level comparable to that of an individual who does not have such a handicap or disadvantage. SI 00815.050. Social services embraces the concept of Vocational rehabilitation. Vocational rehabilitation refers to a set of social services (not income) that is directed at bringing the abilities of the handicapped up to par with those of the nonhandicapped. However, if part of the vocational rehabilitation includes vocational training, treat both as a social service (i.e., not income).

F. Educational and Vocational Services

The trust can pay for any tuition, fees and supplies needed for educational opportunities for the beneficiary. Payments cannot include housing expenses or food

expenses such as dorm fees. Tutors or job coaches to assist the beneficiary in obtaining employment are allowable expenses. 20 C.F.R. §416.1124

G. Payments for Personal Services

Payments from a trust for personal services are not considered income by the SSI program. Specific examples of personal services set forth in the POMS at SI 00815.150 include the following:

- Mowing the lawn;
- Doing housecleaning;
- Going to the grocery; and
- Babysitting.

H. Payments for Weatherization Assistance

In order to assist a family or a beneficiary indirectly with monthly household expenses that would otherwise be considered income (see B. Above) it may be helpful to make improvements to the home to make it more energy efficient. The Regulations at 20 CFR 416.1103(l) specify that weatherization assistance (e.g., insulation, storm doors, and windows, etc.) is not income. It may be possible to extend this exemption to include lots of items that would improve the overall living conditions of the beneficiary.

IV. SPECIFIC DISTRIBUTIONS FOR GOODS

The previous paragraph discussed the impact of distributions for the purchase of services but what impact does the purchase of goods have on the eligibility of the beneficiary? In most cases, if the basic rules are followed, a distribution if made directly to a vendor for the purchase of an item will not effect eligibility or the amount of benefits the beneficiary receives.

The basic rule is, any noncash item given to a beneficiary other than food, clothing or shelter which would be an excluded or partially excluded resource if kept by the beneficiary will not be income to the person. 20 CFR 416.1103(j).

A. Excluded Resources

1. Home

A home is an exempt item if it meets certain requirements. Namely, the dwelling must serve as the persons principal place of residence. It can be real or personal property, fixed or mobile, and located on land or water. SI 01130.100 But a home is considered shelter so if a house is purchased by a trust and given to the beneficiary it will be considered income in the month received and will be valued under the PMV rules.

2. Automobile

An automobile can be an excluded nonliquid resource under certain circumstances. If the trust were to purchase an automobile that meets the requirements it would not be food, clothing, or shelter and therefore would not be counted as income.

3. Life Insurance Policy or Burial Policy

A life insurance policy and a burial insurance policy that do not generate a cash surrender value are not counted as income to the beneficiary it purchased directly by a trust and given to the beneficiary. The policies must meet certain requirements but the purchase of a preneed burial for the beneficiary is considered by many experts in this area to be the first and foremost desirable item for a trust to purchase for a beneficiary.

4. Burial Space

A burial space or agreement which represents the purchase of a burial space held for the burial of the individual, his or her spouse, or any other member of his or her immediate family is an excluded resource, regardless of value. SI01130400. A burial space is a(n):

burial plot;

gravesite;

crypt;

mausoleum;

casket;

urn;

niche; or

other repository customarily and traditionally used for the deceased's bodily remains.

The term also includes necessary and reasonable improvements or additions to such spaces, including but not limited to:

vaults;

headstones, markers, or plaques;

burial containers (e.g., for caskets); and

arrangements for the opening and closing of the gravesite.

For example, a contract for care and maintenance of the gravesite, sometimes referred to as endowment or perpetual care, can be excluded as a burial space.

5. Personal Effects and Consumable Items

Personal items with an equity value of less than \$2000.00 other than food, clothing, or shelter are exempt. Personal effects are items of personal property that are worn or carried by an individual or that have an intimate relation to him or her. These items would include things like tooth paste, shampoo and other grooming supplies, educational or recreational items such as books, musical instruments, or hobby materials. Disbursements must be directly to a vendor for the item and there is no specific list of items so many things could be purchased for a beneficiary and excluded under this category.

6. Household Goods and Furniture

Household goods are items of personal property customarily found in the home and used in connection with the maintenance, use, and occupancy of the premises as a home. They include, but are not limited to: furniture, appliances, television sets, carpets, cooking and eating utensils, dishes, etc. The equity value of these items must be limited to \$2000.00.

7. Airline and Other Transportation Tickets

A disbursement to purchase any commercial transportation ticket, for domestic travel by a beneficiary or their spouse or parent whose income is subject to deeming is not countable income to a beneficiary if . Domestic travel is travel among the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. As long as the ticket is received as a gift and is not converted to cash is not counted as income. If such a ticket is converted to cash. A ticket for non-domestic travel is not considered income to a beneficiary if the ticket cannot be cashed in or refunded and used to obtain food clothing or shelter. It does not matter that the non-domestic ticket was not cashed in possibility of a refund renders it as countable income.
SI 00830.521

V. DISTRIBUTIONS OF CASH

Distribution of cash to a beneficiary can be a very touchy subject to deal with for both trustees and beneficiaries. The beneficiary may demand that they be given cash out of the trust as it is “their money” and they want to have some of it to spend. In most cases a Special Needs Trust will be drafted with provisions that prohibit the trustee from providing “support” to the beneficiary. Other language may strictly prohibit the trustee from making any cash distributions to the beneficiary. If the trust has been drafted to allow the trustee to make distributions of cash to the beneficiary what is the impact of such distributions on eligibility for benefits? The general rule is that a distribution of cash to a beneficiary will be considered income to the beneficiary. It will reduce the amount of SSI the beneficiary receives on a dollar for dollar basis and if the cash distribution is large enough it can completely eliminate the eligibility for SSI in a given month. However there are some exceptions to this general rule.

The first exception is what is known as the \$20.00 disregard. Income is defined as earned income (wages, bonuses) and unearned income. The first \$20.00 of any unearned income in a month other than income in the form of in-kind support and maintenance received in the household of another is not counted as income. If the beneficiary has less than \$20 of unearned income in a month but has earned income in that month, the rest of the \$20 exclusion will reduce the amount of countable earned income. 20 CFR 416.1124 (12)(c).

The second exception is referred to as “infrequent and irregular income”. Unearned Income is exclude as “infrequent income” if it is \$20.00 or less and is received no more than once in a calender quarter from a single source. Unearned income is excluded as “irregular income” if the beneficiary could not reasonably expect to receive it. Using these rules a disbursement could be made for \$20.00 per month or \$20.00 per quarter and the receipt of the money would not reduce the SSI benefits of the beneficiary. SI00810.410.

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