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Disbursements from Special Needs Trusts

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1. General rules¹

1.1. What is a special needs trust? A special needs trust or supplemental needs trust (“SNT”) is one component of a lifelong support plan for a disabled² individual. The purpose of SNTs is to improve and enhance the beneficiary’s quality of life. For purposes of this memorandum, there are two types of trusts. The first is the self-settled or special needs trust; the second is the third-party or supplemental needs trust.

1.2. Self-Settled Trusts. If the trust is self-settled, then “sole benefit” disbursements are the only permitted disbursements; disbursements that are not for the sole benefit of the beneficiary result in a transfer penalty. *See* POMS SI 01120.201.E.1.b and E.2.b.

¹ This paper presumes familiarity with trusts, generally, and with special needs trusts, specifically. If readers require background information regarding special needs trusts, please refer to D. McGuffey, *Special Needs Trusts: Basics and Beyond* (February 2016), available at http://www.mcguffey.net/pdf/Special_Needs_Trusts_2016.pdf.

² In this memorandum, disabled means someone who has been determined to be disabled within the meaning of 42 U.S.C. § 1382c, which means he or she has a physical or mental impairment that prevents him or her from doing any substantial gainful activity, and that the impairment has lasted or is expected to last for a continuous period of at least 12 months, or is expected to result in death.

POMS SI 01120.201.F.2 provides: Consider a trust established for the sole benefit of an individual 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.

So long as disbursements satisfy the sole benefit rule, then any disbursement authorized by the trust agreement is permitted, although some may have consequences (e.g., loss or reduction of benefits).

1.3. Third Party Trusts. If the trust is a third party trust, then any disbursement consistent with the trust agreement is permitted, although certain disbursements may have consequences.

1.4. Identifying Needs. The best starting point for any trustee is to assess the beneficiary's needs. Know the beneficiary's underlying medical/health condition, daily routine, and any social, emotional, spiritual, physical or fiscal challenges. If the trustee is not in regular contact with the beneficiary himself or herself, then the trustee should have a point of contact who can speak for the beneficiary to voice needs. The trustee should develop a plan, to the extent practicable; to meet the beneficiary's needs over his or her lifetime. Regular communication is necessary for the trustee to make decisions regarding whether specific disbursements are appropriate.

1.5. Income, general rule. The primary consequence associated with trust is that some disbursements are deemed "income." On this issue, the same caution must be used for special needs trusts and supplemental needs trusts.

Whether disbursements are deemed as income is significant because the SSI program reduces the monthly SSI benefit by the amount of countable income. 20 C.F.R. § 416.410 (individuals); § 416.412 (couples); *see also* § 416.420 (determination of benefits).³ An individual (or couple) is not eligible for SSI if countable income exceeds the federal benefit rate. POMS SI 02005.001.C.3. Disbursements, therefore, impact beneficiaries in one of three ways: (1) they have no impact because they are not income; (2) they cause a loss of benefits; or (3) they cause a reduction in benefits.

³ The regulations provide: "[T]he amount of income you have is a major factor in deciding whether you are eligible for SSI benefits and the amount of your benefit. We count income on a monthly basis. Generally, the more income you have the less your benefit will be. If you have too much income, you are not eligible for a benefit." 20 C.F.R. § 416.1100.

1.5.1. What is income? Generally, income is any item an individual receives in cash or in-kind that can be used to meet his or her need for food or shelter. It also includes any item which can be applied, either directly or indirectly by sale of conversation, to meet basic needs of food or shelter.⁴ 20 C.F.R. § 416.1102 and § 416.1104; POMS SI 00810.005.A.1.

1.5.2. What is not income? Certain goods and services are expressly excluded and are not countable income. Among those goods and services are most medical care and services, most social services, receipts from the sale, exchange or replacement of a resource, income tax refunds, payments by credit life or credit disability life, proceeds from a loan, bills paid for an SSI recipient, replacement of income previously received, weatherization assistance, and receipt of certain noncash items. *See* 20 C.F.R. § 416.1103.

1.6. Three types of income. Under the SSI rules, there are three types of income: (1) Unearned income; (2) In-kind support and maintenance (ISM); and (3) Earned income. POMS SI 00810.015. If a disbursement is income, then it will most likely result in a reduction of the SSI benefit, or a loss of the benefit. A planned loss of eligibility is acceptable, but an unplanned loss of eligibility may cause a hardship for the beneficiary (e.g., unplanned loss of Medicaid coverage while hospitalized).

1.6.1. Unearned Income. Unearned income is all income (cash and cash equivalents) that is not earned. POMS SI 00830.001.A. The first \$20 of unearned income is excluded each month. POMS SI 00810.420.A.1. Infrequent or irregular unearned income may, in some cases, be excluded. POMS SI 00830.050.B. If an exclusion applies,⁵ then unearned income is not income for SSI purposes. POMS SI 00830.050.C.1.

⁴ *See, e.g.,* POMS SI 00830.521 regarding travel tickets. *See* POMS SI 00830.522 regarding gift cards and gift certificates (“The value of a gift card/gift certificate is income in the month it is received if the gift card/gift certificate can be used to purchase food or shelter, or can be resold”); *see also* SI 01120.201.I.I.e, stating that gift cards and gift certificates are considered cash equivalents.

⁵ *See* POMS SI 00830.099 for a Guide to Unearned Income Exclusions, *and see* POMS SI 00830.165 for guidance regarding the treatment of other governmental assistance programs.

If at all possible, cash and cash equivalents in excess of \$20 per month should not be given to the beneficiary because cash results in a dollar-for-dollar reduction in benefits.

1.6.2. In-Kind Support and Maintenance. In-kind income is not cash, but is actually food, or shelter, or some item that can be used to get one of these basic need items. POMS SI 00810.005.A.3. Beginning March 9, 2005, clothing is not in-kind income. If the in-kind income consists of food or shelter, then it is known as in-kind support and maintenance (ISM). POMS SI 00835.001; SI 00810.020.A.2.b. If it is not food or shelter, but can be sold or converted, then it is other in-kind income. POMS SI 00810.020.A.2.b.

When a trust disbursement is treated as ISM, the presumed maximum value (PMV) rule generally applies.⁶ POMS SI 00835.300.A; SI 00835.360 (third party vendor payments). The PMV is an amount equal to one-third of the Federal benefit rate for an individual or couple, plus \$20 (in 2016, the Federal benefit rate is \$733 per month). POMS SI 00835.001.A.2. The PMV for 2016 is \$265, meaning ISM reduces the SSI benefit from \$733 to \$468.

1.6.3. Earned Income. Earned income consists of wages, net earnings from self-employment, payments for services performed in a sheltered workshop or work activities center, or royalties earned by an individual in connection with any publication, and honoraria for services rendered. POMS SI 00820.001. In many cases, earned income is irrelevant when administering a special needs trust because the beneficiary cannot work. For that reason, most problematic trust disbursements are categorized as unearned income or ISM.

1.7. Federal Authority for SSI Program. 42 U.S.C. §§ 1381-1383f; 20 C.F.R. §§ 416.101-416-2227 and Program Operations Manual System (POMS).

1.8. Georgia DCH Trust Unit Guidelines. The Department of Community Health is Georgia's Medicaid agency. The Trust Unit has adopted a four part test for determining whether disbursements are acceptable. The four part test is as follows:

⁶ POMS SI 00835.320 describes the procedure for rebutting the PMV rule.

1. **Member's benefit:** All trust expenditures must be made for the primary benefit of the member and not for other parties or family members; there must be an ascertainable benefit to the member for each trust expenditure.
2. **Appropriateness:** Expenditures must be appropriate (a) for the beneficiary given the beneficiary's age, physical condition, lifestyle and needs, and (b) for the trust, given the size of the trust and the nature and availability of trust assets and income.
3. **Consistency with trust guidelines and published policy:** Expenditures must be consistent with guidelines stated in the trust document, and with published federal and state policy and these Guidelines, as appropriate within the review criteria set forth in these Guidelines.
4. **FMV/reasonability:** The amount of each trust expenditure must be consistent with the fair market value or cost of similar services/goods available in the marketplace at the time of purchase or acquisition, and must be an amount that can be determined to reasonably meet the special needs of the beneficiary.

2. Relatively safe disbursements

Disbursements from the trust other than those described below in Section 3 (SI 01120.200E.1.a.) and Section 4 (SI 01120.200E.1.b.) are not countable income. Most fall within the exception in 20 C.F.R. § 416.1103(g) if the goods or services received are exempt. Disbursements may take the form of educational expenses, therapy, medical services not covered by Medicaid, phone bills, recreation, entertainment, etc., (*see* SI 00815.400).

Disbursements from the trust to a third party that result in the beneficiary receiving non-cash items (other than food or shelter) are not income if those items would become a totally or partially excluded non-liquid resource if retained into the month after the month of receipt (*see* SI 00815.550 and SI 01110.210).

If a trust buys a car for the beneficiary and the beneficiary's spouse already has a car which is excluded for SSI, the second car is income in the month of receipt since it would not be an excluded resource in the following month.

For example, a trust purchases a computer for the beneficiary. Since the computer would be excluded from resources as household goods in the following month, the computer is not income (*see* SI 01130.430).

Among possible "safe" expenditures are:

- A home⁷ (See section 7 below)
- Dental treatment
- Occupational therapy
- Nursing care
- Travel
- Private case management
- Vacations
- Telephone services
- Subscriptions and services (e.g., cable television)
- Education
- Furniture
- Adaptations to home or apartment
- Pre-paid Burial
- Clothing
- Cameras
- Pets and pet care
- Yard services
- Land contiguous to the home
- Health care equipment
- Diagnostic equipment
- Dietary needs
- Entertainment
- Cultural experiences
- Movies
- Household equipment
- Radios, stereos and instruments
- Caretaker expenses
- Automobile and repairs
- Adaptations to vehicles
- Professional services
- Computers
- Gym membership
- Housekeeping services
- Insurance for home, vehicle or liability
- Health treatment
- Rehabilitative expenses
- Health insurance premiums
- Eyeglasses
- Companionship
- Bringing friends or family to visit the beneficiary
- Music/Concerts
- Appliances
- Training
- Recreation
- Gasoline
- Books
- Property for self-support
- Game systems
- Guardianship fees
- Dry cleaning and laundry services
- Over the counter medications

3. Unsafe disbursements

3.1. Cash. Cash (other than a \$20 per month disregard) paid directly from the trust to the individual is unearned income. POMS SI 01120.200.E.1. Similarly, disbursement of a cash equivalent, such as a refundable airline ticket, is unearned income. The result is a dollar-for-dollar reduction in SSI benefits.

3.2. DCH Review of Specific Expenditure Categories. Certain categories of expenditures raise questions regarding whether they are for the sole benefit of the

⁷ Many State Medicaid programs closely scrutinize home purchases.

SNT beneficiary. DCH's Trust Unit identifies the following are problematic: (1) trust expenditures not clearly for the sole benefit of the beneficiary; (2) caregiver wages; (3) housing expenses; (4) vehicle expenses; and (5) egregious expenditures. Review of these expenditures typically requires justification. Examples from the Trust Unit's Financial Review Guidelines and Protocol are as follows:

Acceptable: Trust pays for one family member to accompany the beneficiary on a vacation trip.

Unacceptable: Trust pays for all five members of the beneficiary's family to accompany the beneficiary on a vacation trip.

Acceptable: Trust pays parent for three hours of specialized care, five days per week, when an agency caregiver is not available.

Unacceptable: Trust pays parent for 24/7 caregiving.

Acceptable: Trust pays for improvements to parents' home to make it accessible for the beneficiary.

Unacceptable: Trust pays for remodeling and redecorating of the parents' bedroom.

Acceptable: Trust purchases handicap equipped van to accommodate beneficiary.

Unacceptable: Trust purchases Mercedes for beneficiary's father "because beneficiary would want him to have it."

Acceptable: Trust pays for hot tub for hydrotherapy prescribed by beneficiary's doctor.

Unacceptable: Trust installs heated, covered in-ground pool with full landscaping to provide hydrotherapy to beneficiary.

4. Disbursements with consequences

Unless prohibited by the Trust agreement, disbursements for food or shelter are permitted. However, they do have consequences. POMS SI 01120.200.E.1.b provides: Food or shelter received as a result of disbursements from the trust by the trustee to a third party are income in the form of in-kind support and maintenance and are valued under the presumed maximum value (PMV) rule. (See SI 00835.300 for instructions pertaining to the PMV rule. See SI 01120.200F for rules pertaining to a home.)

A disbursement to the beneficiary to pay for food or shelter is in-kind support and maintenance calculation, and typically results in a reduction of SSI benefits. If the beneficiary is living in his home, or if he has rental liability then it is subject to the presumed maximum value rule.

POMS SI 00835.465 provides that the following 10 items are the only ones deemed to be food or shelter:

- 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

If a trust pays a credit card bill for the trust beneficiary, whether the individual receives income depends on what was on the bill. If the trust pays for food or shelter items on the bill, the individual will generally be charged with in-kind support and maintenance up to the PMV. If the bill includes non-food, non-shelter items, the individual usually does not receive income as the result of the payment unless the item received would not be a totally or partially excluded non-liquid resource the following month. SI 01120.201.1.1.d.

5. Disbursements that should be permitted, but might be controversial

Although one could argue that payment of court ordered alimony, child support and care for a minor child violates the sole benefit rule, absent a definitive ruling from

Social Security or Medicaid, that view is overly limited and ignores the debtor-creditor nature of the relationship. Alimony, child support and care for a minor child are State imposed obligations. Each constitutes a charge against the beneficiary and, if unpaid, can result in a contempt citation. Payment of valid debts is permitted without penalty. In fact, other POMS provisions indicate that an applicant's income is reduced by the amount the applicant is required to pay. *See* POMS SI 00830.418 (alimony) and SI 00830.420.B.2 (child support). Therefore, one can argue that payment of the obligation is in the best interests of the trust beneficiary (to avoid a contempt citation), rather than simply viewing it as a payment to another individual.

6. Reimbursements to a third party

POMS SI 01120.200.E.1.d provides: Reimbursements made from the trust to a third party for funds expended on behalf of the trust beneficiary are not income. However, to avoid violating the sole benefit rule, the Trustee should require adequate documentation that the expense was incurred and that the expense being reimbursed was for the beneficiary.

7. Trust provides a home

There are times when it is appropriate to provide housing, or assistance paying for housing. Under those circumstances, the following rules apply.

7.1. Treatment of home purchased by exempt trust. If the trust is not a resource for SSI purposes and the trustee purchases a house,⁸ the house is not a resource regardless of whether the beneficiary lives in the house. However, if the beneficiary lives in the house, the beneficiary is considered to be living in his or her own home for purposes of any ISM calculation because the beneficiary owns an equitable interest in the trust.

7.2. Treatment of home purchased by countable trust. If the trust is a resource to the individual, and if the beneficiary lives in the home, then the home is subject to exclusion under SI 01130.100.

⁸ The trustee should be mindful that (d)(4)(A) trusts must include a payback clause. Therefore, if the trust owns the family home, the home is at-risk when the beneficiary dies.

7.3. No ISM for beneficiary while living in trust owned home. The beneficiary does not have ISM in the form of rent-free shelter while living in a home in which he or she has an ownership interest. Accordingly, there is no rent-free shelter ISM if the trust owns the home. (See SI 01120.200F.1.). Also, since the beneficiary is deemed to own the home, rent payments by the beneficiary to the trust have no effect on the SSI payment.

7.4. Home Purchase and Mortgages. ISM is charged during the month a home is purchased, but is subject to the presumed maximum value (PMV).

Although there is no continuing ISM beyond the month of purchase related to rent-free shelter, if the trust makes monthly mortgage payments, those payments are ISM in the form of shelter. (See SI 01120.200E.1.b.)

7.4.1. Outright purchase of a home

If the trust, which is not a resource, purchases the home outright and the individual lives in the home in the month of purchase, the home would be income in the form of ISM and would reduce the individual's payment no more than the PMV in the month of purchase only, regardless of the value of the home. (See SI 01120.200E.1.b.)

7.4.2. Purchase by mortgage or similar agreement

If the trust, which is not a resource, purchases the home with a mortgage and the individual lives in the home in the month of purchase, the home would be ISM in the month of purchase. Each of the subsequent monthly mortgage payments would result in the receipt of income in the form of ISM to the beneficiary living in the house, each valued at no more than the PMV (see SI 01120.200E.1.b.).

7.4.3. Additional household expenses

If the trust pays for other shelter or household operating expenses, these payments would be income in the form of ISM in the month the individual has use of the item (see SI 00835.350). Countable shelter expenses are listed at SI 00835.465D.

7.4.4. Home Improvements

If the trust pays for improvements or renovations to the home, e.g., renovations to the bathroom, to make it handicapped accessible or installation of a wheelchair ramp or assistance devices, etc., the individual does not receive income.

Disbursements from the trust for improvements increase the value of the resource and, unlike household operating expenses, do not provide ISM. (See SI 01120.200E.1.c.).

8. ABLE Accounts?

POMS § SI 01130.740(C)(4): “Do not count ABLE account disbursements as income – A disbursement from an ABLE account is not income but is a conversion of a resource from one form to another [citation omitted]. Do not count disbursements from an ABLE account as income of the designated beneficiary, regardless of whether the disbursements are for nonhousing QDEs [qualified disability expenses], housing QDEs, or non-qualified expenses.”

At present, the SSA has not provided guidance regarding how it would treat a disbursement from a (d)(4)(A) trust to an ABLE Account. However, a third-party trust or a family member could fund an ABLE Account. If done, then food and housing costs could be paid from the ABLE Account without ISM.

9. Mismanaged Trusts

9.1. Disbursements that violate the sole benefit rule. In *Hobbs v. Zenderman*, 579 F.3d 1171 (10th Cir. 2009), the State Medicaid agency terminated a special needs trust beneficiary’s Medicaid benefits. Steffan Hobbs was severely injured in an auto accident and was disabled. Litigation followed, which settled for approximately \$2.5 million.

Under the terms of a litigation settlement, \$1.1 million of a \$2.5 million settlement was placed in a special needs trust. Among its features, the trust provided: "Expenditures may be made directly to any of [Hobbs'] family members, or any other person who takes [Hobbs] into his or her home or provides special care or attention to him, to compensate such person for the reasonable value of services provided and to reimburse such person for costs associated with shelter, care, or attention." The Trust used \$750,000 to purchase an annuity paying \$2,479 per month and most of those funds were paid to Steffan's mother for "extraordinary care."

The New Mexico Department evaluated the trust, issuing a letter in 2004 which stated that administration of the trust had disqualified Steffan from Medicaid eligibility. New Mexico policy prohibited the trust from purchasing a family home, furnishings and compensating a parent for taking care of a disabled child. The Department suggested amending the trust.

Subsequent correspondence between Hobbs' attorneys and the Department made it clear that the Department, in setting its policy, relied on provisions in the State Medicaid Manual requiring that a special needs trust be "for the sole benefit" of the disabled individual. When negotiations failed to result in approval of the trust, Hobbs' attorneys requested that a decision be issued on Hobbs' Medicaid application. A denial was then issued and the case went to fair hearing where the ALJ affirmed the denial. The ALJ premised his decision, not on whether payment to a family member invalidated the trust per se, but because payment to Mrs. Hobbs was for services she was legally obligated to provide as parent.

After the SSI program also terminated benefits, Hobbs, through his parents, filed a Section 1983 action in federal district court. Hobbs sought an injunction prohibiting the Department from treating the trust as a countable asset and for declaratory relief that the trust complied with 42 USC § 1396p(d)(4). The district court rejected Hobbs' argument and the case was appealed to the Tenth Circuit. On appeal, Hobbs conceded (in his reply brief) that States may evaluate trust administration. Thus, the Court was in the position of "assuming without deciding that the statute at issue permits States to evaluate and assess the administration of a special needs trust and to place restrictions on what special needs funds may be used for in determining Medicaid eligibility." The appeal, then, focused on whether the Department violated Section 1396a(a)(10) by imposing a standard more restrictive than SSI and because the determination was made using ad hoc rules rather than published rules. In ruling on these issues, the Court cited *Keith v. Rizzuto*, 212 F.3d 1190 (10th Cir. 2000) as support for the proposition that States need not count special needs trusts when determining Medicaid eligibility, but may opt to do so. The court then held that because States may consider special needs trusts during the eligibility determination, there was no right to enforce (d)(4)(A) under

Section 1983. In rejecting Hobbs' argument concerning ad hoc rules, the Court found no violation of Hobbs' rights unless there was no ascertainable standard; here, however, the court found that the standard was known: the trust would be exempt if it benefitted no one but Steffan, whether at the time established or any time in the future.

9.2. Beneficiary control of the trust. In *Elias v. Colvin*, 2015 U.S. Dist. LEXIS 97321 (M.D. Penn. July 27, 2015), SSI benefits were terminated because the trustee allowed the beneficiary to control disbursements. Improper administration, not the agreement itself, was the problem.

In 2008, Susan Elias and her husband divorced. As part of the divorce settlement, a special needs trust was established to receive a portion of her husband's pension. Elias was the sole beneficiary and her father was trustee, with Elias's daughter as successor trustee.

In 2011, the SSA determined the trust was countable and alleged an overpayment of \$18,137. At a hearing Elias testified that when her father became ill in 2009, she used the trust to pay an occasional doctor's bill, three telephone bills and her insurance. She alleged she never used the trust to pay for anything else, but acknowledged that she had a debit card.

At hearing, Elias brought up cessation, arguing that going forward Plaintiff should not be denied benefits due to a finding that the Trust temporarily operated outside the permitted parameters. Elias argued the debit card was destroyed in 2011, and that even if the trust was improperly used previously, it was in compliance with the requirements of a special needs trust not later than September 2012 when Elias' daughter became trustee. The ALJ found the trust was a countable asset due to Elias's direct control, and rejected the cessation argument, finding she was not eligible for SSI after January 2009.

The district court, in reviewing the ALJ's decision, agreed that the trust was a countable asset while it was misused from January 1, 2009 through April 1, 2011. However, the POMS do not address whether a trust, once misused, loses its exempt status forever and the case was remanded for further consideration on that issue.

10. Other benefits programs

10.1. Medicare set-asides

When a Medicare beneficiary recovers funds for payment of future Medicare covered medical bills (usually through injury litigation), Medicare's interest must be considered. *See* 42 U.S.C. §1395y(b)(2). There is no consensus at this time on the use of Medicare set-aside trusts in any context other than worker's compensation cases. Generally, a Medicare set-aside trust is used when (1) a plaintiff is a Medicare beneficiary and (2) the plaintiff will incur future care related to the underlying lawsuit or injury which would otherwise be covered by Medicare.

If deemed appropriate, a Medicare set-aside trust can be nested within the SNT as a sub-trust. If a MSA sub-trust is established, then disbursements from the sub-trust should only be made for Medicare covered medical expenses. *See, generally*, B. O'Brien, *An Update on Liability Medicare Set-Asides*, presented at 2014 Special Needs Trust – The National Conference (Stetson University October 17, 2014); *and see* R. Williams and K. Camerlengo, *Medicare Set-Aside Accounts for Future Medical Expenses in Personal Injury Claims* (May 16, 2016), available at <http://www.claimsjournal.com/news/national/2016/05/16/270817.htm>.

10.2. Housing subsidies

The rules relating to housing benefits differ from the SSI and Medicaid rules, as was discovered in *Decambre v. Brookline Housing Authority*, 2016 U.S. App LEXIS 10738 (1st Cir. June 14, 2016). Brookline Housing Authority ("BHA") counted all disbursements from Decambre's special needs trust as income in determining Decambre's housing subsidy under Section 8. BHA did so based on its reading of 24 C.F.R. 5.609. Decambre appealed, with BHA affirming its decision. Decambre then filed a lawsuit in State court, which was removed to federal court. The federal district court affirmed, although noting the housing authority should clarify its determination. Decambre then appealed to the First Circuit.

The First Circuit Court of Appeals initially held Decambre could enforce the subsidy determination under Section 1983. Then, turning to the merits of Decambre's claim, the Court found that not all disbursements from a SNT are income. The Court analyzed relevant federal statutes and regulations, framing the question on appeal as: "did DeCambre's irrevocable trust principal, which would have been classified as a "specifically excluded," *id.*, "[l]ump-sum addition[]" to family assets," *id.* § 5.609(c)(3), had it been paid directly to DeCambre, retain or regain that classification despite having first been routed through an SNT?" The Court held that placing tort settlements in a SNT does not change or alter their character or cause loss of the exemption preventing lump sums additions to family assets from being counted as income. Placement of lump sum payments in a trust merely delays access. The Court concluded that BHA improperly counted disbursements of principal as income. The court declined to rule on the more limited argument that specific disbursements (e.g., for medical expenses) should be excluded under other exemptions.

11. Post-death disbursements

Post-death disbursements from a third-party trust are made consistent with the trust agreement.

Post-death disbursements from a (d)(4)(A) or (d)(4)(C) trust must payback Medicaid prior to making any other disbursement, except allowed disbursements associated with winding up the trust.

POMS SI 01120.203.B.3.a provides: Upon the death of the trust beneficiary, the following types of administrative expenses may be paid from the trust prior to reimbursement of medical assistance to the State(s): Taxes due from the trust to the State(s) or Federal government because of the death of the beneficiary;⁹ Reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.

⁹ Where applicable, the beneficiary's estate may claim an estate tax deduction for Medicaid payback claims. See I.R.C. § 2053(a)(2).

POMS SI 01120.203.B.3.b provides that the following post-death disbursements are not permitted prior to reimbursing Medicaid: Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate; Inheritance taxes due for residual beneficiaries; Payment of debts owed to third parties; Funeral expenses; and Payments to residual beneficiaries.

If the beneficiary received medical assistance from more than one state, and if the trust residuary is insufficient to satisfy all payback claims, then each claim should be paid on a pro-rata basis.

12. Practice Tips

12.1. Get receipts. Trustees are frequently asked to reimburse family members, guardians and others who make purchases for a beneficiary. Doing so could get you into trouble for violating the “sole benefit” rule unless you can prove the expenditure was for the beneficiary. The best practice is to pay bills directly and avoid reimbursements, but if reimbursements are unavoidable, get receipts.

12.2. Records. Keep accurate records. Your records will be most accurate if they are prepared on a monthly basis.

12.3. Prepare annual returns. In most cases, the statute of limitations does not begin running on trust disbursements until a return is prepared and delivered to the beneficiary, or the beneficiary’s legal representative. You will also need to file an annual return with DCH’s Trust Unit.

12.4. Avoid the appearance of self-dealing, or protecting the remainder beneficiary to the detriment of the life beneficiary. If the trustee reimburses himself or herself, there may be an appearance of self-dealing. The trustee is setting himself, herself or it up for a breach of fiduciary duty suit. Avoid reimbursements. Also, while it is important to balance disbursement requests against the risk of depleting the trust, where the trustee is a remainder beneficiary, or is related to a remainder beneficiary, the trustee should avoid the appearance of protecting the trust principal to the detriment of the life beneficiary. Remember, the purpose of these trusts is to improve quality of life for a special needs individual.

12.5. Spend from the (d)(4)(A) first. If the beneficiary has multiple trusts, remember the (d)(4)(A) has a payback clause. Spend from it first.

12.6. True Link cards. If your beneficiary needs the ability to make purchases independently, consider using a True Link card. These cards can be customized to block certain purchases, such as food or shelter.