

**Special Needs Trusts and Planning  
Alternatives**

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## Overview

This outline will discuss the use of trusts and planning for the elderly and disabled, especially as it pertains to government eligibility for programs based upon financial need and also consider non-trust alternatives.

### **I. WHEN IS A SPECIAL NEEDS TRUSTS UTILIZED?**

#### **FINANCIAL NEED — BASIC ELIGIBILITY**

In order to plan for a person with disabilities it is critical that the program(s) under which the person is receiving benefits are confirmed as the eligibility standards vary. This outline will not go into any great detail in identifying the different programs, but will refer to some basic eligibility standards and a process to analyze planning alternatives.

Some, but not all governmental programs base eligibility on financial need. Two examples are social security supplemental income (SSI) and Medicaid (Title XIX).

#### **Income eligibility**

SSI has an income limit. And in income cap states Title XIX also has income eligibility limits.

Other programs, such as social security disability income (SSDI) and Medicare are tied to disability and NOT based on financial need. As a result analysis of income and resources is not required in these programs.

#### **Resource Eligibility**

Both SSI and Medicaid utilize the methodology of the social security administration to determine countable resources and noncountable resources. Assets such as cash, investments, life insurance, and other hard assets, "count". Under both SSI and XIX, a person may have only \$2,000 in countable resources in order to satisfy resource eligibility.

Generally, a home, household goods, an automobile, health equipment, ABLE accounts, and prepaid burial accounts do not count. Likewise a special needs trust as defined by federal is a noncountable resource.

The Centers for Medicare and Medicaid website specifically discusses the separate treatment of special needs trusts in determining Medicaid eligibility in the State Medicaid Manual at section 3259.7, indicating "these trusts are generally treated according to the rules of the cash assistance programs, the State's more restrictive rules under [section] 1902(f) of the Act, or more liberal rules under [section] 1902(r)(2) of the

Act, as appropriate.” Ctrs. for Medicare & Medicaid Servs., The State Medicaid Manual Ch. 3 § 325–3259.8 p. 45, <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-ManualsItems/CMS021927.html?DLPage=1&DLEntries=10&DLSort=0&DLSortDir=ascending>.

The regulations concerning social security are contained in the Social Security Program Operations Manual, commonly referred to as POMS which is available online.

The following planning worksheet may be used to help analyze the alternatives when financial need based programs are involved.

**Planning worksheet**

<b>Income</b>	<b>Resources</b>	<b>Noncountable Resources</b>
Pension	Cash, investments etc	Home, household goods, health equipment, auto, and prepaid burial accounts, ABLE accounts, Special Needs trusts, Medicaid qualified annuity
Social security		
SSI Eligibility	SSI Eligibility	
XIX Eligibility	XIX Eligibility	

**Acquisition of Non Countable Resources**

One of the planning alternatives is to use countable resources to purchase, or fund noncountable resources, including the possible creation, or funding, of a special needs trust.

Under federal rules for SSI and Title XIX, there is a list of resources which are considered noncountable. These include a home, an automobile, household goods and furnishings, property reasonably related to self support of the applicant, health aids, ABLE accounts, and prepaid burial funds. 20 CFR 416.1210.et seq.

ABLE Accounts are relatively new. In 2014 Congress passed legislation authorizing the establishment and use of ABLE accounts. ABLE is an acronym for About Better Life Experiences. Contributions to an ABLE account are limited to \$15,000 per year. And if the balance exceeds \$100,000, some, or all, benefits will be reduced or curtailed until the account balance is reduced to \$100,000 or less. See 26 USC 529A.

Under federal and state law, a strategy which is available is the annuitization of one's resources. The process of annuitization involves the use of otherwise countable assets such as cash or investments to purchase an annuity which meets Medicaid regulations. In order to satisfy Medicaid regulations,

the annuity must be nonrevocable and nonassignable, no change in beneficiary can be made and the monthly payments must be substantially equal and fixed. In addition, the annuity contract must name the institutional spouse as a beneficiary, and must also name the State providing Medicaid benefits as a beneficiary. 42 USC 1396 p(C)F and G. If all of these criteria are met the annuity is considered a noncountable resource.

## II. SPECIAL NEEDS TRUSTS.

OBRA established three trusts, a first party special needs trust, an income assignment trust, and a pooled trust. The citation for the federal legislation is 42 USC 1396p(d)(4)(A),(B) and (C) which provides:

- (A) trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.
  
- (B) A trust established in a State for the benefit of an individual if—
  - (i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),
  - (ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter; and
  - (iii) the State makes medical assistance available to individuals described in section 1396a(a)(10)(A)(ii)(V) of this title, but does not make such assistance available to individuals for nursing facility services under section 1396a(a)(10)(C) of this title.
  
- (C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:
  - (i) The trust is established and managed by a non-profit association.
  - (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
  - (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.
  - (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

It must be noted that the OBRA '93 trusts pertain to self-settled trusts. Trusts established by a fiduciary or a court on behalf of an incapacitated individual have routinely been treated by the DHS as self-settled.

Stepping back from the special needs trust for a moment to gain perspective, it is important to be aware of the general rules pertaining to trusts and how they affect eligibility for government benefits. Generally, if a person is applying for benefits and the person is entitled to income, or principal from the trust, the income and / or principal will be considered "countable" to the person. Depending upon the amount of his or her total income and resources, counting the trust income and resources may push her, or him over the eligibility limits.

As noted above, for SSI and Medicaid a person may only own a limited amount of countable resources in order to be eligible.

If a person is the grantor of a revocable trust, the assets are available to the individual and are counted for eligibility purposes. 42 USC 1396p(d)(3)A. For nonrevocable trusts, the amount distributed to the beneficiary, or available to the beneficiary will be considered as available income or resources. 42 USC 1396p(d)(3)B.

In addition, if the trust was established within the five (5) year look back period, all of the corpus will be considered available. The transfer of assets statute provides as follows:

“if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i) (or, in the case of a noninstitutionalized individual, for the services described in subparagraph (C)(ii)) during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).” 42 USC 1396p(C).

There are exceptions to the transfer rules such as transfers to a spouse, to a disabled or dependent child, to a sibling with an equity interest in a home, for the transfer of a home to a son or daughter who lives with a parent and provides care for at least two years. 42 USC 1396p(C)(2).

It is important to note that the transfers must be for the sole benefit of the individual. This includes transfers to a trust solely for the benefit of an individual who is under 65 years of age. 42 USC 1396p(C)(2)B.

**CAVEAT:** The Center for Medicaid and Medicare Services (CMS) has taken the position that although a pooled trust does not count for purposes of eligibility, a transfer to the trust by a person who is sixty five (65) years of age or older is a prohibited transfer. The 8th Circuit has ruled in one case that the CMS position is correct. Centers for Special Needs Trust Administration Inc. v. Olson 676 F3rd 688(8th Cir).

Persons may seek the establishment of a trust which will allow her, or him, to preserve the trust assets while also allowing her, or him to maintain eligibility for government benefits based on financial need. The OBRA 1993 trusts mentioned above satisfy this goal. In addition, trusts established by third parties, or testamentary trusts (trusts established under a decedent's will) are not required to be as narrowly drawn as the OBRA 1993 trusts. Please remember that any distribution from any trust may be considered countable for income or resource purposes and that the trust should be drafted with this concern in mind.

There is a key distinction between a Pooled Trust and a regular Special Needs Trust. In a Special Needs Trust under 42 USC 1396p(D)(4)(a), there is a payback provision which requires any remaining assets in the trust at the time of time of death to be paid to the State providing medical assistance, to the extent of the assistance provided. In contrast, in a pooled trust, at the death of the life beneficiary, the funds in the beneficiary's sub-account may be retained by the trust. If the funds are retained by the trust, the trust may use it for the benefit of other beneficiaries of this Pooled Trust, to provide benefits for indigent disabled persons, either by adding them as beneficiaries of the trust, or making a direct payment for such indigent person by paying for equipment, medication or other services.

Refer to chart in Appendix showing the different types of special needs trusts.

The trustee is generally granted broad discretion for the use of the trust within the framework of balancing current needs and wants of the beneficiary with anticipated future needs,

It is important for the trustee to NOT allow the beneficiary unrestricted access to assets in the trust. In one case the trustee gave the beneficiary a debit card. The SSA determined that this access rendered the trust an available resource. Elias v. Colvin 2015 US Dist LEXIS 97321 (MD Pa. July 27, 2015).

In another case the trustee had made distributions for trips to Disney World, tickets to Britney Spears concert, and the purchase of a snowmobile for the beneficiary. The trial court disallowed the expenditures. The Court of Appeals found that the trial court's standard of review was arbitrary. The trust documents permitted expenditures for travel, vacations, entertainment and reasonable luxuries. In Re the Irrevocable Supplemental Needs Trust of Jennifer Collins A 04-1018 (Minn. Court of App. Dec 14, 2004)

In a 10th Circuit case the special needs trust appeared to be properly drafted but the problem occurred with the administration of the trust. The trustee made expenditures for routine things such as home furnishings, home maintenance and life insurance on a parent of the beneficiary. Because these were not considered special needs, it was determined that the trust had not been administered "for the sole benefit" of the disabled individual and therefore would be considered a countable resources for purposes of eligibility. Hobbs v. Zenderman, 2009 WL 2750707 (C.App. 10 N.M. 3). The Hobbs case points out how important it is not only for the trust to be properly drafted but properly administered.

We will revisit the planning worksheet initially discussed above, and will insert the following facts:

Husband, institutionalized spouse (IS): is 82 years of age, and has income of \$1500 per month from social security and pension. Wife, community spouse (CS), is 80 years of age, and has income of \$900 per month. For purposes of our discussion we will assume that the IS meets the income test.

The couple has countable resources of \$150,000. They have a loan balance on a home equity line of credit.

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<b>Husband's Income (IS)</b>	<b>Wife's Income (CS)</b>	<b>Countable Resources</b>		<b>Noncountable Resources</b>
SS & Pension \$1500  This is less than income eligibility limit	SS and pension \$900	Cash, investments etc  \$150,000		Home, household goods, health equipment, auto, and prepaid burial accounts  Special Needs Trust  Annuities which satisfy Medicaid regulations
	Minimum monthly Needs allowance is \$3090	<b>Attribution:</b> Divide countable resources equally between IS and CS, so IS will be allocated \$75,000	CS will also be allocated \$75,000	
		<b>Eligibility will be Granted when IS has countable resources of \$2000 or less. Spend down of IS resources is necessary</b>		
		<b>Spenddown options:</b> (1) Pay for care and living expenses, (2) pay down debt; (3) pay for services; (4) purchase non countable resources including annuity which meets regulations; (5) consider special needs trust  CS The result reduces IS resources to \$2,000	CS retains countable resources of \$75,000          CS retains resources of \$75,000	<b>Resulting in:</b>  Debt is reduced; Burial funds purchased; Annuity purchased for benefit of CS



## **Net result**

After paying down debt, purchasing prepaid burial and qualified annuity, the resources of the couple are now within resource eligibility limit of \$75,000 for CS and \$2,000 for IS. Under the Medicaid rules, federal government is not requiring both spouses to become impoverished because one spouse, the IS, needs care.

## **III. OTHER CONSIDERATIONS:**

### **Estate Recovery**

Federal law requires the States to undertake estate recovery. Under this law the state is required to make an attempt to recover any assets which remain in the name of the beneficiary at the time of his or her death if in fact the beneficiary has received medical assistance under the Medicaid program during his or her lifetime. 42 USC 1396p(b)(4).

In some states the estate recovery is limited to the probate estate under state law, while other states have elected the optional language under the federal act which includes

other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement. 42 USC 1396p(b)(4)B.2.

Thus, the assets may not count for purposes of determining eligibility, but the assets do count for purposes of estate recovery. This is important because there is no guarantee that there is a uniform treatment of the assets. In Iowa it was argued that it was inequitable to consider a trust noncountable during lifetime and subject it to estate recovery. That argument was unpersuasive and the court found that the assets in a trust which had been noncountable during lifetime were available for estate recovery at the death of the beneficiary who had received Medicaid assistance. Matter of Estate of Eleanor Gist, 763 NW 2d 561 (Iowa 2009).

Caveat: This outline is provided for general discussion purposes only. Consult with an attorney to determine how to best develop and implement your own plan.

## APPENDIX

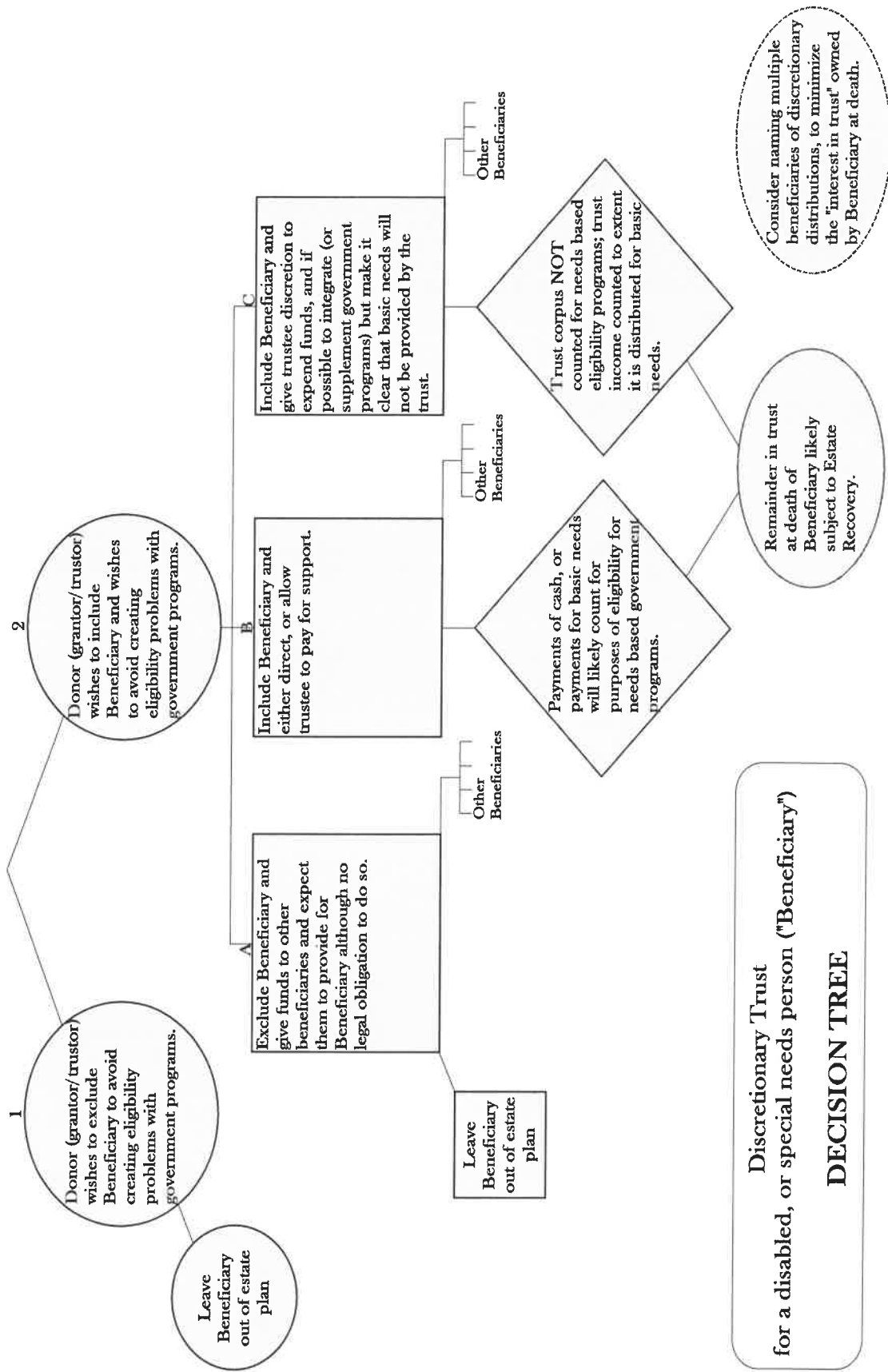
**SPECIAL NEEDS TRUSTS**

§ 7.02(2)

**Special Needs Trust Attributes**

Type	Statutory Authorization	Who Establishes?	Whose Funds?	Payback Provision	Age Limit	Frequently Used For
Payback Trust	42 U.S.C. § 1396p(d)(4)(A)	Parent Grandparent Legal Guardian Court Individual	Individual with Disability	Yes	Funded by 65	Personal injury settlement or inheritance
Qualified Income (Miller Trust)	42 U.S.C. § 1396(d)(4)(B)	Individual	Pension, Social Security, etc., plus earned income of Individual with Disability	Yes	No	To Qualify for Medicaid in Income Cap States
Pooled Trust	42 U.S.C. § 1396p(d)(4)(C)	Parent Grandparent Legal Guardian Court Individual	Individual with Disability	Depends on Joinder Agreement	No, but penalty period if 65 or older in some states	Smaller amounts of personal injury settlements or inheritance
Third-Party SNT	Not Specifically Authorized	Third-Party (not individual)	Third-party (not individual)	No, but estate recovery must be addressed	No	Parent planning for child Testamentary gift to disabled individual; Coordinate testamentary gifts

The chart can be found at § 7.02[2] *Tax Estate and Financial Planning for the Elderly*, Regan, Morgan and English (2018)



Discretionary Trust  
for a disabled, or special needs person ("Beneficiary")  
**DECISION TREE**