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FIRST PARTY SPECIAL NEEDS TRUSTS

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A PRIMER FOR INJURED OR DISABLED PERSONS AND THEIR FAMILIES (SSI Recipients)

If you receive a settlement or judgment in a personal injury case, will this cause you to lose your public assistance? How can a disabled individual who qualifies for SSI and/or Medicaid maintain those benefits and still be provided with extra help? How can this person be provided with appropriate dental care, transportation, counseling and extra companionship? The answer is probably a **First Party Special Needs Trust**.

Note: This Primer deals with **First Party Trusts** for beneficiaries who are receiving **only SSI** (and AHCCCS) benefits in Arizona. If the beneficiary is receiving ALTCS long term care services, please refer to our **ALTCS Primer**. Trusts set up by “Third Parties,” e.g., a parent for a disabled child, are controlled by a different, more liberal set of rules; please see our **Third Party Trust Primer**.

There are many public benefits programs available to persons with disabilities, including **Supplemental Security Income (SSI), Public Housing, Food Stamps and Medicaid (known as AHCCCS and ALTCS in Arizona)**. In order to be eligible, the disabled individual can have only **limited assets and income**. If such an individual were to receive a personal injury settlement, gifts, or an inheritance, he or she would lose his or her public benefits eligibility. However, if funds are

placed in a properly designed Special Needs Trust (SNT)¹, eligibility can usually be maintained. The specific terms of the trust are critical, and should be prepared/reviewed by an experienced attorney.

To receive SSI an individual must meet three qualifications:

- 1) “Disabled” according to the definition used by Social Security; the individual must be unable to engage in substantial gainful employment.
- 2) Income must be less than \$674 (the 2010 figure) per month, and
- 3) Countable assets must be less than \$2,000.

Countable assets include bank accounts, CDs, stocks and bonds, promissory notes, cash value of life insurance policies, IRAs, etc. Non-countable assets consist primarily of a home of unlimited value, one vehicle per household used for transportation², household belongings and furniture, clothing, personal jewelry, and prepaid burial accounts.

In addition, SSI eligibility rules penalize an individual who transfers (gives away) his assets; the individual will lose SSI (and AHCCCS) eligibility for a period of time after the transfer. However, an exception was established in 1993 when Congress passed OBRA ‘93, specifically 42 USC § 1396p(d)(4)(A). This law allows a “disabled”³ person under the age of 65 years, or his or her legal representative, to maintain eligibility by transferring an unlimited amount of money into a First Party SNT.

The SNT holds assets for the benefit of a disabled beneficiary, but those assets are not directly available to the beneficiary. A **Trustee is in control** of the assets, and has the **discretion** to use the trust funds for the benefit of the beneficiary. The beneficiary cannot demand or compel any particular payments from the trust. The Trustee must comply with federal and state rules in determining how the trust assets are used for the beneficiary. So long as the Trustee complies, the trust legally does not belong to the beneficiary, and therefore does not count against the beneficiary for purposes of determining eligibility for Medicaid or SSI.

When a trust is set up with personal injury settlements, or other money that belongs

¹Such trusts are called by many names, including spendthrift trust, supplemental benefits trust, discretionary trust, special person trust, etc. The key factor is not the actual name of the trust, but the specific terms within the trust.

²Until the Social Security changes made March 9, 2005, the value of the vehicle was limited to \$4,500, with certain limited exceptions.

³The individual must meet the Social Security definition of permanent and total disability.

to the disabled person, the trust is a **first party trust**, and there are two critical limiting principles to understand:

1) Once money is placed in the trust, the beneficiary cannot withdraw it, or direct how the trustee will spend it. The trustee must have full legal control over the money, and although the trustee may consider requests made by or on behalf of the beneficiary, the trustee is free to say “no” to any request.

2) When the disabled beneficiary dies, any money remaining in the trust must be used to pay back the State Medicaid Agency for any services provided during the beneficiary’s lifetime. Only after the State has been paid back can the remaining funds (if any) pass on to the disabled person’s family.

The decision as to whether or not to create a First Party SNT will depend upon the individual facts in each case. How much money is involved? How important is it to maintain SSI or Medicaid eligibility? Are the types of things the disabled individual needs or wants permissible trust disbursements? An individual trust can also be complex and costly to administer. An available alternative is a Pooled Trust, in which a non-profit organization serves as trustee and manages a number of trusts together, “pooling” the investments. These are complex questions, and can best be answered in consultation with an attorney who specializes in special needs trust planning.

How Can the Trust Actually Benefit the Beneficiary?

The essential purpose of the SNT is to provide supplemental assistance to the disabled beneficiary, but not do anything which will jeopardize public benefit eligibility. The **purpose of SSI** is to provide the beneficiary with enough money (\$674.00/month in 2010) to cover the beneficiary’s **food and shelter** expenses. If a trustee (or any other person) provides a beneficiary with food or shelter, this counts as income to the beneficiary and will either disqualify or reduce SSI benefits. Similarly, if cash is provided to the beneficiary (which could be used to purchase food or shelter) this will also result in the reduction or disqualification from benefits (even if the beneficiary does not use the cash for food or shelter). Therefore, in SSI cases, the general rule for a Trustee of a SNT is never pay out of the trust for the beneficiary’s food or shelter and never give the beneficiary cash or anything easily convertible to cash. A trustee could, for example, purchase a TV, stereo system, furniture, or even an automobile for the beneficiary, but the trustee should not give the beneficiary cash to purchase these items.

Examples of Permissible Trust Distributions

These are only examples and other things could be appropriate depending upon your imagination and the special needs and desires of the beneficiary. The key point to remember is that the trustee should make arrangements to purchase these items for the beneficiary through “vendor payments”, rather than giving cash directly to the beneficiary to make the purchases:

A. Furnishings and Household Items

1. Durable medical equipment: wheelchair, deluxe walker, geri-chair, alternate pressure pump mattress to prevent bedsores, hydraulic lift.
2. Household furnishings: chairs, tables, television, stereo, kitchen supplies; A computer and additional software for beneficiaries who can use a computer. Items should qualify as entertainment, educational, vocational, or adaptations to make the home more accessible to the beneficiary.
3. Home remodeling, especially if done to accommodate a disabled person such as wheelchair ramps, grab bars in the bathroom, widened doorways.
4. Blankets, bedspreads, nicknacks, hobby items, framed photos or pictures, plants, games, art supplies.
5. Special shoes, arch supports, elastic hose, incontinence supplies, eyeglasses, hearing aids and batteries.

B. Services

1. Home care or other companion services to provide care or companionship and visitation or transportation.
2. Massage therapists, psychologists, psychiatrists, counselors, therapists, dental care.
3. Prepayment of cable TV or computer internet services, up to one year in advance.
4. Prepayment of hair care or other personal enrichment up to one year in advance.
5. Club or hobby memberships, magazines, subscriptions, health club membership.
6. Fresh flower delivery, especially for holidays and birthdays.
7. Alternative medical care such as acupuncture, hypnosis, relaxation therapy.
8. Professional services, including trustee's, accountant's, attorney's fees, and guardianship and conservatorship fees.
9. Prepayment of funeral and burial arrangements in an irrevocable contract.

C. Miscellaneous

1. Trips and travel, for recreational or therapeutic purposes. This can include airline travel and also travel for a companion if necessary for the well-being of the beneficiary. However, any airline tickets must not be refundable to the traveler.
2. Pet care including purchase of an animal, animal food and supplies, veterinarian bills.
3. Entertainment such as movies, outings, sporting events.

4. Special events such as a birthday or holiday party where the beneficiary would be the guest of honor and would entertain friends or other care facility residents.
5. Non-food household supplies and personal items such as laundry soap, toothpaste, toiletries, cigarettes, light bulbs, etc.

D. Logistics

Periodic bills such as cable TV, wages or companions or aides, club memberships, etc., can be sent directly to the trustee for payment. If the trustee lives with or near the beneficiary, the trustee can typically buy the magazines, hobby supplies, special shoes or other items and personally deliver them to the beneficiary. However, beneficiaries and trustees are often miles apart and a problem arises as to how to have funds available for the beneficiary's supplemental needs without giving cash to the beneficiary. The answer is to find a trusted friend or relative who is near the beneficiary and can fulfill this function. This person becomes an agent of the trustee and reports back to the trustee, often with receipts, on how the funds are being spent.

E. Things which **cannot** be paid for by a First Party SNT for an SSI recipient:

1. The trust must be for the "sole benefit" of the disabled beneficiary. No distributions may be made to or for other persons, not even dependents of the beneficiary.
2. Cash should not be given to the beneficiary;
3. The trustee should not provide "in kind" food or shelter to or for the beneficiary.
4. The Social Security Administration lists the following ten items as prohibited: food, mortgage (including property insurance required by the mortgage holder), real property taxes, rent, heating fuel, gas, electricity, water, sewer, and garbage removal.