BOGUTZ & GORDON

520.321.9700

3503 N. Campbell Avenue Suite 101
Tucson, Arizona 85719
800.688.2568 • fax 520.321.9797
BOGUTZANDGORDON.COM

ATTORNEYS

Brian C. Bjorndahl
Allan D. Bogutz
Benjamin J. Burnside
Teresa D. Hall
Bruce W. Martin
Craig H. Wisnom
•
Craig Gordon, Retired

CERTIFIED PARALEGALS

Antoinette L. Barry
Debra Hall
Wendy A. Lemcke
Becky Peer
Vera R. Reid

CARE MANAGERS

Beth Fuller, BSW
Melinda Oliver, LMSW

FIRST PARTY SPECIAL NEEDS TRUSTS
(ALTCS Recipients)

A PRIMER FOR INJURED OR DISABLED PERSONS AND THEIR FAMILIES

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 **ALTCS** long term care services in Arizona. If the beneficiary is only receiving SSI and AHCCCS acute care services, please refer to our **SSI 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 long term care Medicaid in Arizona (known as ALTCS) an individual must meet three qualifications:

1) A medical evaluation to assess the need for assistance with activities of daily living
2) Income must be less than $2,022 (the 2010 limit) per month[2], and
3) Countable assets for an individual must be less than $2,000; higher limits apply to married persons.

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 transportation, household belongings and furniture, clothing, personal jewelry, and prepaid burial accounts.

In addition, ALTCS eligibility rules penalize an individual who transfers (gives away) his assets; the individual will lose ALTCS eligibility for up to five years after the transfer (penalty period can be longer than five years but reporting required to ALTCS is for past five years only). 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

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[1]Such 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.

[2] Individuals with higher income may still qualify through use of an "Income Cap" (Miller) Trust, and special rules apply for married couples.

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

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 to the disabled person on ALTCS benefits, the trust is a **first party trust**, and there are three 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 legally free to say "no" to any request.

2) When the 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.

3) In Arizona, the Trustee is significantly restricted on how the money in the trust can be spent for the beneficiary. Since 1997, the AHCCCS Administration persuaded the State Legislature to pass and amend A.R.S. § 36-2934.01, which contains the following **exclusive list of permissible trust disbursements**[4]:

For a trust that qualifies pursuant to subsection A of this section, the trustee shall not make any disbursements from the trust other than for the following:

1. Reasonable legal and professional expenses related to the trust including:

   (a) Trust taxes.

   (b) Trust investment fees.

   (c) Reasonable professional expenses, including trustee, accounting and attorney fees related to the administration of the trust.

2. The post eligibility share of cost as computed pursuant to section 36-2932.

[4]Further explanation of permissible trust disbursements is found at Section 804.00 C of the AHCCCS Eligibility Policy Manual (www.ahcccs.state.az.us/Publications/Eligibility).

3. For trusts created pursuant to section 1917(d)(4)(B)[5] of the social security act, a disbursement to the beneficiary equal to the personal needs allowance as computed pursuant to section 36-2932.

4. Health insurance premiums, medically necessary medical expenses and special medical needs of the beneficiary including:

   (a) Expenses required to make the home accessible to the person.

   (b) The purchase and maintenance of a specially equipped vehicle titled to the trust or to the beneficiary with a lien against the vehicle held by the trust in an amount equal to the current market value of the vehicle.

   (c) Durable medical equipment.

   (d) Over-the-counter supplies and medications, including diapers, lotions and cleansing wipes.

   (e) Personal care services that are determined to be medically necessary by the beneficiary's physician and that are provided by a person who is registered by the administration to provide the services including a financially responsible relative[6] of the beneficiary. Trust disbursements for personal care services provided by a financially responsible relative shall not exceed the administration's fee for service rate for the personal care services. For the purposes of this subdivision, "financially responsible relative" means the spouse of the beneficiary or, if the beneficiary is a child under eighteen years of age, the parent of the beneficiary.

5. Maintenance payments for the spouse or family in accordance with 42 United States Code section 1396r-5(d)(1) and (2) and section 36-2932, subsection L.

6. Guardianship and conservatorship fees for the trust beneficiary based on the fair market value of the services provided.

7. The following expenses for the benefit of the beneficiary, excluding gifts to, payments for or loans to other persons, whether these are in cash or in kind:

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[5] This is the Income Cap or "Miller" trust used when an ALTCS applicant is over the income cap limit ($2,022.00 in 2010).

[6] Senate Bill 1184, signed by the Governor on May 1, 2007, changed the law to allow trust disbursements to compensate family members for medically necessary personal care

(a) Entertainment, educational or vocational needs or items that are consistent with the person's ability to use these items.

(b) Other expenses that are individually approved by the director.

(c) Living expenses for food, clothing and shelter. If home property or other real property is purchased by the trust it must be titled to the trust.

(d) Income taxes owed on income from trust investments or on income of the beneficiary that is assigned to the trust when an actual tax liability is established.

(e) Provision for burial expenses that is limited to one of the following methods:

(i) Purchase of a prepaid burial plan funded by an irrevocable life insurance policy, irrevocable burial account, irrevocable trust account or irrevocable escrow account.

(ii) Purchase of life insurance to fund a burial plan for the beneficiary with a face value that does not exceed one thousand five hundred dollars after allowing deductions for burial plot items as defined by the administration.

(iii) Funding a burial fund account in an amount not to exceed one thousand five hundred dollars.

(f) Travel expenses for a companion, if a companion is required to enable the beneficiary to travel for non-medical reasons.

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 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. In determining eligibility for ALTCS, AHCCCS uses the SSI rules which define the provision of **food and shelter** as in-kind income. If a trustee (or any other person) provides a beneficiary with food or shelter[7], this counts as income to the beneficiary and may disqualify the beneficiary 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 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. In ALTCS cases the income limit is higher but the same general distribution rules apply. 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 trust disbursements are only permissible if listed on the limiting Arizona Statute - A.R.S. § 36-2934.01(B) - which is quoted above:

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

[7]Until Social Security changed the rules on March 9, 2005, gifts or distributions of **clothing** also counted as in-kind income.

1. Home care or other companion services to provide care or companionship and visitation or transportation. But note the restriction in A.R.S. § 36-2934.01(B)(4)(e) - such services must be “medically necessary” and provided by a “person registered [trained] by the administration.” Family members can be paid if they are so registered and their fee does not exceed the administration’s rate.
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 and attorney’s fees, guardianship and conservatorship fees for the trust beneficiary based on the fair market value of the services provided.
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. Another option is to set up a charge account for the beneficiary at a local merchant, with the bills being sent to the trustee.

Things which **cannot** be paid for by a First Party SNT. AHCCCS lists the following items as impermissible disbursements at Section 804.00 E of the Eligibility Policy Manual:

- Gifts, payments or loans to or for the benefit of anyone other than the beneficiary in cash or in kind;
- Child support and alimony payments;
- Paying all of the shelter costs for a shared household;
- Income taxes (unless an actual tax liability is established);
- Vacation expenses for family members;
- Payments on past debts;
- Health insurance premiums for other individuals; and
- Burial funds that do not meet the requirements at MS 804.00.C.