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THIRD PARTY SPECIAL NEEDS TRUSTS (SUPPLEMENTAL BENEFITS TRUSTS)

A PRIMER FOR FAMILY MEMBERS

How can parents ensure that their disabled adult child will not be neglected after they die? How can a disabled individual who qualifies for SSI, Medicaid (AHCCCS/ALTCS in Arizona) or other public benefits, be provided with extra help? Can this include appropriate dental care, transportation, recreation, counseling and extra companionship? The answer is probably a **Supplemental Benefits Trust**.

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 substantial gifts, an inheritance, or money from any other source, he or she would lose eligibility. However, if funds are placed in a properly designed Supplemental Benefits Trust (SBT)[1], eligibility can be maintained. The specific terms of the trust are critical, and should be prepared/reviewed by an experienced attorney.

When a SBT is set up for a disabled, handicapped, or mentally ill person by someone else, it's called a **Third Party Trust**. Typically the trust is created and the money comes from parents or other family members. The SBT can be created in a Will, in the parents' own Revocable Living Trust, or even as a stand-alone document. Money can be put into the SBT by any third party, but cannot be put into the trust by the disabled individual or his/her spouse.

[1]Such trusts are called by many names, including spendthrift trust, special needs 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.

If the money already belongs to the disabled individual (e.g., a personal injury settlement after an accident), that money would have to be put into a First Party Special Needs Trust that must have significantly different and less advantageous terms and features[2].

A Third Party SBT holds assets for the benefit of a disabled beneficiary, but those assets are not directly available to the beneficiary. An independent person (known as **the trustee**) is in control of the assets, and has **discretion** to use (or not use) the trust funds for the benefit of the beneficiary. The beneficiary cannot demand or compel any particular payments from the trust. The trust legally does not belong to the beneficiary, and therefore does not "count" in determining the beneficiary's public benefit eligibility.

All trust assets must be maintained in separate accounts in the name of the trust, e.g., "The Jimmy Jones Supplemental Benefits Trust, by Sally Smith, Trustee". Typically a new tax identification number is obtained specifically for the trust, and the trust must file separate income tax returns on federal form 1041. It is important that no funds belonging individually to the beneficiary or the trustee be co-mingled with funds of the trust.

What Public Benefits Programs are Involved?

The most common programs are **SSI**, **ALTCS**, and **AHCCCS**. SSI provides supplemental income of up to $674.00[3] per month, and most importantly, triggers eligibility for AHCCCS. AHCCCS provides health insurance, including doctor, hospital, and prescription drug coverage. ALTCS provides long term nursing care and/or group home housing. SSI is a federal program administered by the Social Security Administration. ALTCS and AHCCCS combine to form Arizona's version of the Medicaid Program, which is a federal/state partnership. To be eligible for SSI, an individual must be "disabled" or over age 65, have income of less than $674 per month, and have countable assets of less than $2,000. For ALTCS, a person must need long term nursing care or supervision, have income of less than $2,022 per month, and have countable assets of less than $2,000. AHCCCS eligibility is quite complicated with many different coverage groups such as Kidscare, Families with Children, Freedom to Work, etc. Notably, the SSI-MAO program allows a disabled person not on SSI to qualify for AHCCCS with income of less that the Federal Poverty Level ($902.50 for a household of one in 2010), with no limitation on countable assets.

Rules the Trustee Must Follow

In making distributions from the trust, the trustee[4] must be mindful of what constitutes "countable income" and "countable assets". The key is to provide ONLY what is permissible and ONLY on the terms allowed by the source of the public benefits. Typically this means the trustee needs to understand the SSI rules, which are used as a basis to determine eligibility for both SSI and ALTCS.

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[2]Bogutz & Gordon has two separate Primers on First Party Special Needs Trusts, one for ALTCS recipients, and one for recipients of only SSI.

[3]This is the eligibility figure for calendar year 2010. The amount changes annually.

[4]Although often not understood, the same rules apply not only to trustees but also to parents or any other third parties who desire to help SSI or ALTCS beneficiaries.

The purpose of SSI is to provide the beneficiary with enough money to cover the beneficiary's basic needs - essentially food and shelter expenses[5]. 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 the person 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, the general rule for a trustee of a SBT 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. There may be exceptions to this general rule, but that should be done only through careful planning and implementation with the advice of counsel.

SSI and ALTCS recipients are limited to no more than two thousand dollars of countable assets. 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 if used for transportation[6], household belongings and furniture, clothing, personal jewelry, and pre-paid burial accounts. A trustee could, for example, purchase a TV, stereo system, furniture, or even an automobile for the beneficiary, but the trustee could not give the beneficiary cash to purchase these items for himself.

Planning for the Future

Most Third Party SBTs are created (and funded) through a Will (or Living Trust) - the SBT typically doesn't actually start until after the parent or other donor has died, although such a trust certainly could be established to receive funds during the grantor's lifetime. The trust usually lasts as long as the disabled beneficiary lives. The choice of who should be the trustee is a very important one. There also needs to be contingent trustee(s) named and a mechanism to replace the trustees should unforeseeable events occur. The trust should also be flexible enough to accommodate changes in the beneficiary's physical or mental status, and also changes in the law or structure of public benefits programs. A properly drafted and managed Supplemental Benefits Trust can be a valuable tool for enriching the life of a beneficiary, while maintaining potential eligibility for SSI, AHCCCS, ALTCS, and other programs.

How Can the Trust Actually Benefit the Beneficiary?

Payments from the SBT must be designed to **supplement rather than replace public benefits**. The trustee, at the trustee's discretion, may pay for things not provided by public benefits programs such as medications, medical equipment and therapy not provided by Medicaid, educational instruction, musical instruments, travel, entertainment, and other supplementary items. Each case is different, and a trustee should work closely with an attorney familiar with public benefits law in the state in which the beneficiary resides.

Listed below are some **examples** of items which can be purchased or paid for through a supplemental

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

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

benefits trust. Many 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 beneficiary cannot be given **cash** and trust funds cannot be used to pay for the beneficiary's **food or shelter**.

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.
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. Pre-payment of cable TV or computer internet services up to one year in advance.
4. Pre-payment 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.

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. 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.
4. 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 of companions or aides, club memberships, etc., should be sent directly to the trustee for payment. If the trustee lives with or near the beneficiary, the trustee can typically buy the cigarettes, hobby supplies, special shoes or other items and personally deliver them to the beneficiary. However, beneficiaries and trustees are often miles apart and the 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, of 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.