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TOP TEN THINGS TO KNOW ABOUT FIRST PARTY SPECIAL NEEDS TRUSTS

BOGUTZ & GORDON, P.C. offers the following list of the ten most important things to know about First Party Special Needs Trusts under 42 USC §1396p(d)(4)(A), also known as special treatment trusts, supplemental benefits trusts, and OBRA '93 settlement trusts. Such trusts allow a person with more than the minimal \$2,000 of countable assets to retain eligibility for Medicaid, known as ALTCS and AHCCCS in Arizona.

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10. Have your cake and eat it too. Make no mistake about it, a First Party Special Needs Trust is a deliberate attempt to allow an injured party to continue to qualify for Medicaid while still benefitting from the proceeds of a settlement. To many, including eligibility workers, this will be viewed as a “trick” or a “subterfuge.”
9. The trust beneficiary must be "disabled." Disability is determined pursuant to the definition of disability found in the Social Security Act. 42 USC §416(i)(1) and §423(d)(1) (A) define disability as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continued period of not less than 12 months." Only a person already eligible for Supplemental Security Income (SSI) or Social Security Disability (SSDI), or who would be eligible for one of these programs, could potentially benefit from a First Party Special Needs Trust.
8. The trust beneficiary must be under the age of 65 at the time the trust is established. Additional amounts can be added to the trust at later times so long as the beneficiary is under the age of 65. The trust will continue to be unavailable resource after the beneficiary passes the age of 65, but no additional assets may be added to the trust at that time. Only assets belonging to the disabled individual (beneficiary) can be put into the trust. Trust funding can either be done by the disabled individual himself, if competent, or by the Court through a conservator.

7. The trust may only be established by a parent, grandparent, legal guardian, or a court, and a third party must serve as Trustee. This means that the injured person can neither be the grantor to sign the initial trust document, nor serve as Trustee. In many cases the court will be involved to approve the settlement, appoint a guardian/conservator, create the trust, and/or supervise the Trustee. Complex legal, administrative and tax rules make selection of the Trustee very important. Often a professional trustee familiar with special needs trusts is the best choice.
6. First Party Special Needs Trusts are not limited to personal injury settlements. Any funds a disabled under-65 Medicaid applicant owns or receives from any source -- such as an inheritance -- can be sheltered through this trust. It is also possible to create the trust at a later time, e.g., when settlement proceeds have dwindled and there is a desire to qualify for Medicaid and protect the remaining settlement proceeds.
5. Tax considerations. If properly drafted, the trust should present no tax difficulties and be treated as a "grantor" trust for tax purposes. However, care is necessary, since improper drafting can create unwanted gift tax and reporting consequences, particularly in the case of large settlements.
4. A First Party Special Needs Trust does not get around the AHCCCS or ALTCS lien. See A.R.S. §36-2915 (AHCCCS) and A.R.S. §36-2956 (ALTCS) regarding liens against personal injury settlement proceeds for hospital, medical, long term care and treatment. Resolution and negotiation of such liens will have to be done in the normal fashion in connection with the settlement, and only the remaining proceeds can be placed into the special needs trust. The trust will therefore only benefit the disabled individual regarding future medical and long term care costs.
3. Distributions can be made only for the disabled beneficiary. Distributions cannot be made to or for the benefit of other family members of the disabled beneficiary. Trust distributions will normally be limited to supplemental items such as recreation, transportation, counseling, companion and personal care, education, non-covered medical and dental services. Distributions of cash made directly to the beneficiary, may count as "income" and reduce or eliminate SSI, ALTCS, or AHCCCS benefits.
2. Additional limitations apply when the trust beneficiary receives ALTCS (with or without SSI) Benefits. The Arizona legislature, at the urging of the AHCCCS Administration, has passed and twice amended a special statute to regulate distributions from First Party Special Needs Trusts for ALTCS recipients. See ARS § 36-2934.01(B), and the AHCCCS Eligibility Policy Manual (www.ahcccs.state.az.us/Publications/Eligibility) at § 804.00 C & E. The Trustee must sign a statement acknowledging responsibility to comply with these restrictions, and must submit regular budgets of "anticipated trust disbursements".
1. This is a pay back trust. The trust must provide that the State Medicaid Agency (AHCCCS/ALTCS) will have a claim against all amounts remaining in the trust upon the

death of the beneficiary up to an amount equal to the total medical assistance paid on behalf of the beneficiary by the State Medicaid Agency. This claim must be paramount to all other trust distributions upon the death of the beneficiary, including funeral expenses, administration expenses, and distributions to heirs or other family members.