

**AN OVERVIEW OF PUBLIC BENEFITS,  
SPECIAL NEEDS TRUSTS,  
and  
“ALLOWABLE DISBURSEMENTS”**

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and is not to be considered legal advice.

## **I. INTRODUCTION**

In evaluating the needs of a client who is elderly or disabled, it is important to determine for which benefit programs the client is currently or potentially eligible. Many, but not all, benefit programs are conditioned on the recipient meeting certain medical or disability criteria, as well as qualifying financially. Those benefit programs that are so conditioned are “needs-based.” There are four primary federal programs that provide essential benefits to the elderly and disabled: (1) Social Security, (2) Medicare, (3) Supplemental Security Income (SSI), and (4) Medicaid (in Arizona, Arizona Health Care Cost Containment System or “AHCCCS”).

Due to the foregoing, it is imperative in planning for a client who is elderly or disabled to take into account the impact of the availability of income and/or resources on the client’s current or prospective eligibility for the various needs-based public benefit programs. The availability of other sources of income and/or resources may cause the client to suddenly lose eligibility for public benefits, with resulting interruption or loss of medical care or other necessities. Though income and/or resources available to the client may be used for the items and services lost from benefit programs, the result may be exhaustion of the client’s income and/or resources, without any improvement in his/her quality of life. In fact, some governmental benefits are simply not available to private purchasers; the ubiquitous nature of government services is especially notable in the care and treatment of the developmentally disabled.

## **II. PUBLIC BENEFITS OVERVIEW**

As discussed above, many, but not all, benefit programs are conditioned on the recipient meeting certain medical or disability criteria, as well as qualifying financially. Those benefit programs that are so conditioned are “needs-based.” There are four primary federal programs that provide essential benefits to the disabled.

### **A. Social Security Disability Insurance (“SSDI”)**

- 1) Must qualify as “disabled,” i.e., “unable to engage in substantial gainful activity” for at least 12 months or expected to be unable to do so for that duration;

- 2) Must be “fully insured” or disabled before age 22 and have a retired, disabled, or deceased parent who is “fully insured”;
  - a) Benefit = 50% of disabled or retired parent’s SS benefit;
  - b) Benefit = 75% of deceased parent’s SS benefit.
- 3) **Not** based on financial need!

**B. Medicare**

1. Must be over age 65, entitled to Social Security or Railroad (“RR”) disability benefits for 24 months, or diagnosed with end stage renal disease or Lou Gehrig’s disease;
2. If determined eligible for SS or RR disability benefits, must wait 5 months before begin to receive benefits;
3. **Not** based on financial need!

**C. Supplemental Security Income (“SSI”)**

1. Must be aged (over age 65), blind, or disabled;
2. Limited to \$2,000 countable resources for single, \$3,000 for married;
3. Home, vehicle, household goods and personal effects, and burial arrangements are excluded resources;
4. Federal maximum benefit rate in 2008, is \$637/mo for single and \$956/mo for married;
5. Provision of shelter and/or food will reduce benefit by 1/3<sup>rd</sup> (the “One-Third Reduction” rule or “VTR”) or 1/3<sup>rd</sup> + \$20 (the “Presumed Maximum Value” rule or “PMV”) depending on living arrangements;
6. First \$20 of *unearned* income disregarded; first \$65 of *earned* income disregarded;
7. Income and resources of spouse and parent of minor child are “deemed” or attributed to the claimant;
8. If eligible for at least \$1 of SSI, then categorically or automatically eligible for Medicaid or Arizona Health Care Cost Containment System (AHCCCS) benefits (acute care, not long term care or Arizona Long Term Care System (“ALTCS”));

a) Note, if a beneficiary of a first party SNT, then AHCCCS is of the opinion that it has authority to independently review the SNT and, if not in compliance with state law, specifically, A.R.S. § 36-2934.01, then AHCCCS acute care benefits may be discontinued despite continued eligibility for SSI;

i) AHCCCS relies, in part, on the Program Operations Manual System for the SSA, specifically, section SI 01130.202.E, for authority to independently review eligibility when a trust is involved.

**D. Combination SSDI/SSI Benefits**

An individual who is disabled may be eligible for both SSDI and SSI. This scenario arises in those instances where an individual who is eligible for SSDI receives a benefit amount less than the full Federal Benefit Rate, which is \$637 per month in 2008, and who meets the financial eligibility requirements of the SSI program. In such instances, the first \$20 of the SSDI benefit amount is disregarded in determining the SSI benefit amount. Thus, an individual who is eligible to receive a combination benefit will receive a total benefit of \$657 per month in 2008.

Note, the value in receiving a combination benefit is that the individual will be categorically or automatically eligible for Medicaid benefits by virtue of his SSI eligibility despite the fact that he/she will not be Medicare-eligible until 24 months after first receiving SSDI.

**E. AHCCCS**

1. Provides medical assistance for indigent who meet income requirements; typically, no resource limits apply (other than for Medical Expense Deduction program);
2. Provides medical assistance for those who are disabled and eligible for SSI;

(a) Note, effective 10/1/06, AHCCCS will provide temporary medical assistance for a nominal premium to individuals who are

eligible for and receiving SSDI benefits but not yet Medicare-eligible if they have been eligible for AHCCCS at some time during the prior 24 months;

3. Provides medical and long term care assistance for those who are medically and financially needy through the Arizona Long Term Care System (“ALTCS”) (see “*Basic Numbers*” handout attached hereto as Exhibit “A” for specifics re: eligibility requirements);

(a) ALTCS contracts with a program contractor or health plan to provide benefits to the elderly and physically disabled;

(b) ALTCS contracts with the Division of Developmental Disabilities (“DDD”) of the Arizona Department of Economic Security (“ADES”) to provide benefits to the developmentally disabled;

ii) Even if not ALTCS-eligible, may be DDD-eligible if cognitively impaired, autistic, epileptic, or have cerebral palsy;

iii) All individuals who are eligible for DDD services may not necessarily meet the ALTCS *medical* eligibility requirements;

iv) If not eligible for ALTCS because do not meet financial requirements, then DDD can discontinue services or, if in an out-of-home placement, it will more likely, charge the individual for the services it provides.

#### **F. Special Education**

Pursuant to the Individuals with Disabilities Education Act (IDEA), children with disabilities are entitled to a free appropriate public education through age 21 that emphasizes special education and related services designed to meet their unique needs, and prepare them for employment and independent living. For a copy of the IDEA, go to [www.ade.az.gov/ess/idea/reauthorization/default.asp](http://www.ade.az.gov/ess/idea/reauthorization/default.asp) or call telephone number (602) 542-4013.

### **G. Behavioral Health Services**

The Arizona Department of Health Services/Behavioral Health Services (ADHS/BHS) contracts with a Regional Behavioral Health Authority (RBHA) to provide behavioral health services to individuals who are Title XIX or Title XXI eligible and have certain behavioral health conditions that can benefit from medically necessary behavioral health services. For individuals who are not Title XIX or Title XXI eligible, they may be eligible for such services if identified as having a serious mental illness. For more information, contact ADHS/BHS at telephone number (602) 381-8999 or go to [www.hs.state.az.us/bhs/index.htm](http://www.hs.state.az.us/bhs/index.htm).

### **H. Children’s Rehabilitative Services**

A program of the Arizona Department of Health Services (ADHS), Children’s Rehabilitative Services (CRS) provides medical treatment, rehabilitation, and related support services to medically and financially qualified people who have certain medical, disabling or potentially disabling conditions that have the potential for functional improvement. To be eligible for such services, the individual must be an Arizona resident under age 21 and have a physical disability, chronic illness, or a condition that is potentially disabling. For more information, go to [www.azdhs.gov/phs/ocshcn/crs/crs\\_az.htm](http://www.azdhs.gov/phs/ocshcn/crs/crs_az.htm).

## **III. SPECIAL NEEDS TRUSTS**

### **A. Federal Law and Trusts**

Before federal law was revised in 1993, Medicaid law included the concept of a “Medicaid Qualifying Trust” (aka “MQT”). The MQT was unfortunately named, since determination that a trust was an MQT resulted in **disqualification** for Medicaid. In any event, essentially any trust established by an individual for his or her own benefit was treated as an available resource and/or income to the extent that discretion **could** be exercised in favor of the settlor, notwithstanding the adverse nature of the trustee and without regard to whether distributions were actually made. The rules governing SNTs changed drastically with adoption of OBRA ’93.

1. OBRA '93. The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) addressed what Congress saw as a glaring loophole in Medicaid eligibility rules. It provided that any transfer into trust by a Medicaid applicant would not only incur a transfer penalty, but that the maximum penalty (the 36-month “lookback” period which, as a result of the Deficit Reduction Act of 2005 is now extended to 60 months) would be extended for trust transfers (to 60 months). It also provided that any revocable trust established by an applicant, regardless of terms or age, would be transparent for Medicaid eligibility purposes; that is, that revocable trusts would be treated as fully available to the beneficiary. Irrevocable trusts, though they triggered a longer look-back period, would be ignored for eligibility calculations except that any discretion vested in the trustee would be treated as fully exercised. OBRA '93 included three critical exceptions, however. Codified as 42 U.S.C. §1396p(d)(4), the three exceptions were:

(a) Irrevocable special needs trusts for beneficiaries under age 65 which include a provision directing repayment of Medicaid advancements upon the death of the beneficiary. 42 U.S.C. § 1396p(d)(4)(A).

(b) Irrevocable trusts holding only the income of a beneficiary and designed to qualify the beneficiary for Medicaid despite the fact that the beneficiary’s income exceeds the state’s “income cap.” 42 U.S.C. § 1396p(d)(4)(B). These trusts, popularly known as “Miller” trusts, are critically important for long-term care eligibility, but will not be discussed here.

(c) Irrevocable trusts held as part of a pooled trust arrangement, and providing that the beneficiary’s share of the pooled trust will repay the state “[t]o the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust...” 42 U.S.C. § 1396p(d)(4)(C).

2. Foster Care Independence Act of 1999. OBRA '93 affected only eligibility for long-term care Medicaid. For over a decade, the Supplemental Security Income program (SSI) included no penalty for transfers at all. Since SSI recipients are categorically eligible for Medicaid (that is, they do not have to qualify for Medicaid separately), at least some beneficiaries could qualify for Medicaid benefits without complying with OBRA '93. This magic could be accomplished by making a transfer of assets, then qualifying for SSI and automatically receiving Medicaid benefits.

In 1999, Congress moved to close this opportunity. Included in the Foster Care Independence Act of 1999 was 42 U.S.C. § 1382b(c)(1)(A)(iv), which provided transfer penalties for gifts made by SSI recipients or applicants. The same Act, however, created an exception mirroring the Medicaid law contained in OBRA '93; in fact, 42 U.S.C. §1382b(c)(1)(C)(ii)(IV) explicitly references the Medicaid trust exceptions.

The result of these provisions is that SNTs are clearly permitted under both SSI and Medicaid regulations—the two most important public benefits programs for most beneficiaries. The requirements, though simple, are restrictive, and care must be taken to avoid treatment of SNT assets and distributions as available resources or income, respectively.

**B. First Party “Special Needs Trusts” – Individual and Pooled**

1. Basic requirements for an individual SNT are the following:
  - (a) Must be established before age 65;
  - (b) Beneficiary must be disabled according to the SSA, medically eligible for ALTCS, or determined “Seriously Mentally Ill” by the RBHA;
  - (c) Must be established by a parent, grandparent, guardian/conservator or court of law; and

i) Beneficiary must be competent to delegate authority to parent, grandparent and, if not, may do so via Single Transaction Authority pursuant to A.R.S. § 14-5409;

ii) SSI takes the position that, if a parent or grandparent establishes the trust via a power of attorney, then they have done so in an agency capacity and, thus, the trust is not validly established;

iii) If established by a parent or grandparent, then SSI requires that the parent or grandparent fund the trust with his or her own assets, at least nominally;

a. Note, AHCCCS does not permit commingling of the beneficiary and a third party's assets and, thus, if a SNT is established by a parent or grandparent, the beneficiary may very well be disqualified from SSI or AHCCCS. Pick your poison!

(d) Trust must state that Medicaid gets reimbursed the cost of medical services it has provided upon the trust's termination, which, in Arizona, is the capitated rate of about \$3,000/mo for long term care assistance and up to \$500/mo for medical assistance only regardless of level of care and services actually utilized;

(e) SSI also requires the trust to be irrevocable, which is not merely a matter of stating such, but a matter of state law, specifically, whether or not a state recognizes the *Doctrine of Worthier Title*; Arizona has abolished such doctrine so should be a non-issue;

2. Basic requirements of a pooled SNT are the following:

(a) Beneficiary must be disabled according to the SSA, medically eligible for ALTCS, or determined "Seriously Mentally Ill" by the RBHA;

- (b) Beneficiary can be any age but if transfers funds after age 64, then a transfer penalty will result (consider impact of DRA!);
  - (c) Beneficiary transfers own funds to a non-profit 501(c)(3) organization as trustee;
  - (d) Trustee manages funds as part of a pooled trust for disabled persons;
  - (e) Must be irrevocable;
  - (f) Trust can be created or “joined” by beneficiary, as well as parent, grandparent, guardian/conservator, or court;
  - (g) At the time of termination, the non-profit organization may retain a portion of the trust fund and, to the extent it does not, AHCCCS is entitled to reimbursement;
  - (h) Arizona pooled SNTs include the following:
    - i) Jewish Family and Children’s Services in Tucson;
    - ii) Arizona Charities Pooled Trust, which permits already established non-profits to join and invite the respective populations they serve (and others) to fund the pooled SNT.
3. Other requirements you should know about!
- (a) If funded with personal injury settlement, all liens must be satisfied **prior** to funding a SNT;
  - (b) If a structured settlement annuity policy is purchased, the payee must be the trust, not the individual, his guardian, or conservator.

#### IV. “ALLOWABLE DISTRIBUTIONS”

##### A. Distributions of “Income”

Although the trust corpus of a special needs trust is exempt as a resource for purposes of the disabled beneficiary’s public benefits eligibility, the public benefit programs, namely, Supplemental Security Income (SSI) and Medicaid or

AHCCCS, count as income any distributions from a disability trust for food, shelter, or anything that can be converted into such, like cash. Case law makes clear that distributions made for purposes of supplemental needs are not “income” and, thus, do not make the trust an available resource.<sup>i</sup> Such distributions, although they do not disqualify the trust from special treatment, may result in a reduction or loss of benefits.<sup>ii</sup> Note, the definition of “income” is derived from SSI methodology, which the Center for Medicare and Medicaid Services (formerly known as the Health Care Financing Administration or “HCFA”) and case law require Medicaid to follow in Section 1634 or SSI states such as Arizona.<sup>iii</sup> “Shelter” is further defined by SSI methodology as room, rent, mortgage, property taxes, homeowners’ insurance, utilities, sewerage, and garbage collection services. With the foregoing in mind, distributions can be made for household expenses, such as telephone, housekeeping, etc. without any impact on benefits.

In light of the above, it is imperative that such trusts be drafted in such a way so as to make it clear that any and all distributions are within the sole and absolute discretion of the trustee and that does not contain language that requires the trustee to make certain distributions or can be interpreted as providing for mandatory distributions to or on behalf of the beneficiary. In addition, language that can be interpreted as providing for the basic support needs of the beneficiary, such as “basic living needs”, “welfare,” or “essential dietary needs” should be avoided. At the same time, the language should not be overly restrictive by expressly disallowing distributions for “food, shelter,” or basic support needs.

To the extent distributions for food, shelter, or cash are made, the trustee can minimize the impact on public benefits eligibility, specifically, SSI eligibility, by making distributions directly to the provider so as to qualify the distribution as “in kind” income, for which SSI presumes a maximum value (PMV). The PMV is equivalent to one-third (1/3) of the maximum SSI benefit amount plus \$20, if the individual does **not** receive **both** food and shelter from the household in which he/she lives. If the individual receives **both** food and shelter from the household in which he/she lives, then the value of the one-third reduction rule

(VTR) applies, thereby reducing the SSI benefit by one-third (1/3). This results in a reduction of benefits by that amount, rather than dollar for dollar. Note, SSI does disregard \$20.00 per month of unearned income, thereby allowing for monthly cash distributions of \$20.00 without any impact on the SSI benefit amount.

In cases where the special needs trust holds title to real property in which the beneficiary is living, SSI had treated the provision of shelter by the trust as “in kind” income, resulting in a reduction of SSI benefits of one-third (1/3). However, SSI has modified its policy so as to avoid this result on the basis that the beneficiary, although he/she does not hold title to the property, retains a beneficial interest in the property, which is consistent with federal law and regulations. With the foregoing in mind, a disincentive exists for the self-settled SNT, which is subject to payback, to hold title to home property, rather than the disabled individual or his/her conservator. However, if the self-settled SNT purchases the real property, AHCCCS requires that title to the real property be held in the name of the trust. *See* A.R.S. § 36-2934.01.

**B. Distributions for the “Sole Benefit” of the Beneficiary**

Both the Center for Medicare and Medicaid Services and AHCCCS require that the 42 U.S.C. § 1396p(d)(4)(A) and (C) trusts be for the *sole benefit* of the disabled beneficiary. Although no case law exists defining what is meant by these terms, AHCCCS has interpreted it strictly to mean that no person other than the disabled beneficiary can benefit, directly or indirectly, from distributions made from such a trust.<sup>iv</sup> If individuals other than the disabled beneficiary benefit from distributions made from a special needs trust, the trust will potentially lose its “special treatment” status, resulting in the trust income and assets becoming countable for eligibility purposes.<sup>v</sup>

As a matter of practice, AHCCCS will require an accounting of all cash disbursements made, particularly cash disbursements to a parent of a minor disabled child, and will only permit the self-settled SNT to make distributions for the disabled beneficiary’s pro rata share of monthly household expenses. In addition, AHCCCS takes the position that, if the disabled beneficiary is receiving

SSI benefits, then no distributions need be made from the self-settled SNT for food, shelter, or cash purposes. AHCCCS has not, however, taken issue with other family members residing with the disabled beneficiary in his/her home or home held in trust.

**C. “Allowable” Disbursements**

A.R.S. § 36-2934.01 further specifies what disbursements are allowable from a self-settled SNT for purposes of ALTCS eligibility, which are as follows:

1. Reasonable legal and professional expenses related to the Trust including:
  - (a) Trust taxes;
  - (b) Trust investment fees; and
  - (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 A.R.S. § 36-2932.
3. For trusts created pursuant to Section 1917(D)(4)(B) of the Social Security Act, that is, Income Only or “Miller” Trusts, a disbursement to the beneficiary equal to the personal needs allowance as computed pursuant to section 36-1932.
4. Health insurance premiums, medically necessary medical expenses and special medical needs of the beneficiary including:
  - (i) Expenses required to make the home accessible to the person.
  - (ii) 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.
  - (iii) Durable medical equipment.
  - (iv) Over-the-counter supplies and medications, including diapers, lotions and cleansing wipes.

(v) 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 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.<sup>vi</sup>

(1) Attached hereto as Exhibit "B" are two (2) forms that must be completed to obtain approval from ALTCS of trust disbursements to a financially responsible relative for provision of personal care services: (a) Special Treatment Trust Member Service Plan Information that the Program Contractor's case manager must complete; and (b) Physician Statement of Personal Care Service Needs that the beneficiary's physician must complete and must do so by referencing the Program Contractor's service plan.

(5) Maintenance payments for the spouse or family in accordance with 42 U.S.C. § 1396R-5(D)(1) and (2) and A.R.S. § 36-2932 (L).

(6) Guardianship and conservatorship fees for the trust beneficiary based on the fair market value of the services provided.<sup>vii</sup>

(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:

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

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

(iii) 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.

(iv) 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.

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

- Purchase of a prepaid burial plan funded by an irrevocable life insurance policy, irrevocable burial account, irrevocable trust account or irrevocable escrow account.
- 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.
- Funding a burial fund account in an amount not to exceed one thousand five hundred dollars.

(vi) Travel expenses for a companion when a companion is required to enable the beneficiary to travel for non-medical reasons.<sup>viii</sup>

To what extent A.R.S. § 36-2945.01 is contrary to federal law insofar as it further limits disbursements from disability trusts has yet to be determined. The argument that it is contrary to and preempted by federal law is premised on the fact that Arizona is a Section 1634 or SSI state, i.e., has agreed to follow SSI methodology and, therefore, is required to use the same methodology to determine income and resource eligibility of aged, blind, and disabled AHCCCS applicants as would be employed under the SSI program. Thus, SSI states may not use any financial methodology which is more restrictive than the methodology established under the SSI program in administering their Medicaid programs.

A.R.S. § 36-2934.01 is arguably contrary to federal law in that it limits the disbursements that can be made for the benefit of the trust beneficiary, when federal law and regulation merely require that the trust be for the benefit of the trust beneficiary, and disbursements made for his or her benefit. However, AHCCCS cites two (2) cases for the proposition that the states have latitude in implementing Title XIX programs and that the state Medicaid agency's interpretation of the federal requirements of the program is entitled to deference.<sup>ix</sup> Other state Medicaid agencies also cite the SSA POMS as permitting Medicaid to independently determine Medicaid eligibility in SSI cases.<sup>x</sup> In the meantime,

self-settled SNTs must expressly reference A.R.S. Section 36-2934.01 to qualify for special treatment status, that is, to qualify as an unavailable resource.

#### **D. Specific Needs to Consider for the Individual**

Particularly challenging in the administration of a special needs trust is the provision of shelter and transportation to a beneficiary, particularly if purchase of a residence or vehicle is contemplated. The purchase of such assets often makes practical sense because, if disabled, the beneficiary will need to have accessible transportation and an accessible home environment. Such purchases also make sense in the context of public benefits planning as these assets are excluded for eligibility purposes. Thus, a special needs trust may purchase the residence or vehicle, but they need not be titled to the trust with the exception that AHCCCS requires it if the trust disburses funds for purposes of purchasing a residence or vehicle for the beneficiary. *See* A.R.S. § 36-2934.01.

##### 1. Purchase of a Residence

Assuming the beneficiary is not institutionalized, the purchase of a residence may be of benefit. The questions then becomes how should the residence be titled? Again, the residence of a beneficiary is exempt for purposes of his/her SSI and AHCCCS eligibility; thus, title could be retained by the beneficiary individually. This may not be an option if the beneficiary is AHCCCS-eligible as has already been discussed above unless AHCCCS would allow for the beneficiary to individually hold title with the trust taking back a lien or other secured interest. The foregoing may also address concerns about the beneficiary otherwise encumbering or transferring the property. The alternative would be to purchase the primary residence **prior** to funding the SNT, in which case the beneficiary can hold title individually or through a Conservator.

If title is to be retained by the beneficiary and the beneficiary is ALTCS-eligible, one must also consider AHCCCS estate recovery and lien rights, which are in addition to or independent of the payback provision in a SNT. AHCCCS has the right to recover the cost of care for services rendered to a recipient of ALTCS benefits for benefits rendered

after the age of 55; if there is no surviving spouse, disabled child, or dependent; and only against the probate estate with the caveat that AHCCCS may be able to collect against non-probate assets for which the transfer is valid at death under Arizona's creditor statute.<sup>xi</sup>

Effective September of 2004, and implemented January of 2005, ALTCS is permitted to place a lien on an individual's home property regardless of form of ownership, that is, whether owned as a joint tenant, life estate, or beneficiary deed, under the following conditions:

- If the individual is over the age of 55;
- If the individual is permanently "institutionalized," that is, the individual has continually resided in a hospital or nursing facility for 90 consecutive days;
- If none of the following individuals are residing in the home: a spouse, child under the age of 21, child who is blind or disabled, or sibling who has an equity interest in the home and who was residing in the home for at least 1 year immediately before the date of the individual's "institutionalization."

According to the lien regulations, ALTCS will be required to send the individual notice of intent to file a lien at least 30 days prior, which delineates the right to request a fair hearing among other things. If a lien is filed, ALTCS may only recover the lien upon sale or transfer, and is prohibited from doing so if the individual is survived by a spouse, child under the age of 21, blind or disabled child, sibling who currently resides in the home under the circumstances described above, or a child resided in the home for at least 2 years immediately before the date of "institutionalization" and who provided care that enabled the individual to reside at home rather than in an "institution."

## 2. Purchase of a Vehicle

Like the purchase of a residence, a vehicle may be purchased by a SNT and title held in the name of the beneficiary individually with no impact on the beneficiary's SSI or AHCCCS eligibility. However, as is

the case with a residence, ALTCS requires title to be held in trust, or a lien taken back by the trust equivalent to the current market value of the vehicle. *See* A.R.S. A.R.S. § 36-2934.01.

Practically speaking, most trustees prefer to not retain title of a vehicle due to concerns about potential liability in doing so and, thus, will likely exercise the option of taking a lien back. Unlike residences, there should be no income eligibility problem in making trust distributions for purposes of paying the ancillary costs of owning a vehicle, such as gas, insurance, repairs, etc; however, ALTCS will not permit the trust to disburse funds to maintain a vehicle unless the trust has an interest in it.

### 3. Trust Provision of Indirect Benefit to Non-Beneficiary

Typically, the beneficiary and/or his/her family are not in a financial position to make large purchases, such as the purchase of a residence or vehicle, or even finance them. In the case of court-monitored special needs trusts for a minor disabled beneficiary, the probate court holds the parents financially responsible, however, for the basic support needs of the minor disabled child. The fiduciary and probate court must balance the needs of the disabled child against the parent's obligation to support his/her child.

Again, the above questions typically arise in cases where the purchase of a residence and/or vehicle are contemplated. If the SNT owns the home in which other family members will reside, should the family pay the SNT rent? Should the family be "evicted" if it fails to do so? Who should bear the cost of maintaining the home? If the parent of a disabled child is the primary caregiver and, due to the child's disability and care needs, is otherwise unable to be gainfully employed, a case can be made for providing "shelter" to the parent as compensation for providing personal care services. If at all possible, the family should have a financial stake in the maintenance or productivity of the asset, such as in the form of a limited ownership interest.

Regarding family expectations, that is, the expectations of the family of a disabled beneficiary, particularly those of the parents of a disabled minor beneficiary, one cannot stress enough with the family that the special needs trust is not for the benefit of the family but of the disabled beneficiary. The fiduciary has an obligation to view and treat it as such, and the probate court, as well as public benefit programs, will most definitely do so! In most cases, the probate court realizes that family members may tangentially benefit from the estate and, for the disabled individual to derive the benefit from the trust estate as intended, his/her family will have to benefit as well. However, the interests of the disabled individual are paramount and the probate court will monitor the estate with this in mind! AHCCCS takes a hard line on administration of the self-settled SNT solely for the benefit of the beneficiary to retain “special treatment” status or continue to be treated as exempt for purposes of resource eligibility.

#### **E. Regulations Governing Special Needs Trusts**

##### **1. Reporting of Special Needs Trust to the Public Benefit Programs**

Upon establishment and funding of a special needs trust, you generally have ten (10) days within which to report its establishment to the respective public benefit programs. The public benefit programs typically request that you provide to it a copy of the executed trust agreement and verification or proof of its funding. Do not merely send to the agency a copy of the foregoing. More often than not, particularly in the case of the Social Security Administration, benefits will be discontinued as a result of providing such information absent a cover letter citing the applicable federal law exempting such trusts from treatment as an available resource. The foregoing should be addressed to the eligibility worker assigned to the case at the local office through which the disabled beneficiary’s benefits are monitored.

## 2. Public Benefit Programs' Annual Reporting Requirements

Trustees of special needs trusts must also be mindful of the reporting requirements of the SSI and AHCCCS programs. As discussed above, both programs require that the establishment of such trusts be promptly reported to the respective programs, with a copy of the trust and verification of its funding included. To the extent the terms of a self-settled SNT do not comply with both federal and state law, specifically, A.R.S. § 36-2934.01, AHCCCS will require that the trust be amended prior to giving it “special treatment” status. Note, although the self-settled SNT must be irrevocable under federal law to be exempt for resource eligibility purposes, the trust should provide for the ability to amend the trust if it is not in compliance with federal and/or state law. However, AHCCCS will not approve an initial application for eligibility of such benefits until such time as the amendment is effective. Both programs will also want periodic accountings, typically annual accountings, of trust disbursements so as to determine to what extent, if any, they qualify as income and potentially impact eligibility or benefits.

AHCCCS also requires the trustee of self-settled SNTs to complete two forms. The Acknowledgement of Responsibilities as a Trustee for a Special Treatment Trust form (DE-522) outlines the Trustee’s responsibilities under state law, and confirms that the trustee understands and accepts those responsibilities, a copy of which is attached hereto as Exhibit “C.” The trustee is also required to complete the Special Treatment Trust Anticipated Disbursements form (DE-312) initially and on an annual basis., a copy of which is attached hereto as Exhibit “D.” This is a detailed description of how the trust funds will be administered and disbursed.

Additionally, the trustee is required to report to AHCCCS any modifications to the manner in which the trust is administered, that is, any changes in either funding or disbursements, not previously listed on the Special Treatment Trust Anticipated Disbursements form (DE-312) no less than 45 days in advance of the change. If this is not possible due to

extenuating circumstances, then notice must be provided within 30 days from the date of the emergency disbursement, along with verification of the emergency disbursement. However, notice after the fact is considered untimely by ALTCS and can result in a temporary suspension of benefits unless extenuating circumstances are established.

The Social Security Administration will require the SSI recipient to complete a Statement for Determining Continuing Eligibility, as well as a Statement of Income and Resources, on an annual basis, wherein it will request information concerning income. These forms do not expressly request information regarding trusts of which the SSI recipient is a beneficiary. However, if the Social Security Number of the SSI recipient is utilized as the taxpayer identification number of a self-settled SNT, the Social Security Administration may assume that the SSI recipient has an account which is an available resource unless otherwise notified. With respect to distributions from a SNT, unless they qualify as “income,” they arguably need not be disclosed.

### 3. Who is Responsible for Reporting SNTs to the Public Benefit Programs?

This brings us to the question as to who is required to report the existence of the SNT and account for its distributions to the respective public benefit programs. Under AHCCCS policy and regulations, the trustee of a self-settled SNT clearly has the duty to report and account for the SNT. However, in the case of third party SNTs and the Social Security Administration, the beneficiary arguably has the duty to report and account for trust distributions that qualify as income. Because the trustee is often in a better position to report and account in such a way so as not to trigger questions or, worst case scenario, a disqualification from benefits, it is advisable that the trustee assume such responsibility or provide the information to the beneficiary for forwarding on to the respective public benefit programs. To facilitate the foregoing, the SNT itself can include a provision that expressly allows for the trustee to make eligibility

applications, to intervene in them, or to retain counsel on behalf of the beneficiary to contest eligibility determinations.

#### **F. Termination of Self-Settled SNTs**

Upon termination of a trust established pursuant to 42 U.S.C. § 1396p(d)(4)(A) trust, the trustee must be immediately mindful of the payback provision requiring reimbursement to Medicaid of costs incurred for services rendered on behalf of the beneficiary. Typically, the trust is subject to termination at the time of the beneficiary's death. No further distributions should be made until the Medicaid reimbursement amount is determined. The only trust distributions which can be made before the payback is satisfied are "those that have a higher priority by law."

In Arizona, AHCCCS is reimbursed the capitated rate reduced by the total share of cost paid by the beneficiary during his/her lifetime. The recovery agent for AHCCCS is Public Consulting Group (PCG).<sup>xii</sup> If PCG does not hear from you, you will certainly hear from it! The trustee has a fiduciary obligation to ensure that the claim is properly calculated and paid. However, AHCCCS can only be paid from what remains in the trust. If insufficient funds remain to pay the claim, AHCCCS gets it all minus "reasonable" costs of administration. If no funds remain after payment of "reasonable" costs of administration, AHCCCS gets nothing. If anything remains after the payback, then the residual is distributed accordingly.

As previously discussed, costs of administration associated with terminating the trust, such as attorney and fiduciary fees, are subject to approval by AHCCCS or the probate court with advance notice to AHCCCS. Costs of last illness, funeral, or burial cannot be paid until after the AHCCCS is reimbursed! Thus, the trustee of a self-settled SNT may want to consider the purchase of a prepaid burial plan, which is an exempt resource for purposes of SSI and AHCCCS eligibility.

Finally, there are instances where a special needs trust may be terminated prior to the death of the beneficiary, often times because the beneficiary is no longer eligible for public benefits, it is no longer cost effective for the beneficiary

to retain his/her assets in trust and remain on public benefits, or it is determined that the beneficiary no longer requires public assistance. In such instances, particularly if the beneficiary remains permanently disabled, it is advisable to merely “defund” the trust so that the special needs trust is still intact should the need arise to again transfer assets to the trust for purposes of reinstating public benefit eligibility. Whether the trust is literally terminated or merely “defunded,” an argument can be made that AHCCCS should be notified and the payback through date of termination or defunding satisfied.

**G. The SNT Trustee’s Checklist aka Cheat Sheet (attached hereto as Exhibit “E”)**

**V. SELECTED BIBLIOGRAPHY**

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- C. “Solving the Day to Day Problems of Your Supplemental Needs Trusts Clients,” by Lawrence A. Friedman, Mary T. Schmitt Smith, and Patricia M. Tobin (National Academy of Elder Law Attorneys 1998).
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- E. “Tax Saving Drafting Techniques for SNTs,” by Robert B. Fleming, CELA and Stuart R. Morris, CELA (National Academy of Elder Law Attorneys 2000).
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- G. “SSI Eligibility and Special Needs Trusts,” by Neal A. Winston, CELA and R. Eric Solem, Esq. (National Academy of Elder Law Attorneys 2000).

H. NAELA Quarterly, The Journal of the National Academy of Elder Law Attorneys, Volume 15, number 2, Spring 2002.

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<sup>i</sup> See Trust Company of Oklahoma v. State ex rel. Department of Human Services, 890 P.2d 1342 (Okla. 1995).

<sup>ii</sup> See *id.*

<sup>iii</sup> *But see* SSA POMS SI 01730.048.E .

<sup>iv</sup> See A.R.S. § 36-2934.01.

<sup>v</sup> *Id.*

<sup>vi</sup> SB 1184, which was drafted by the Arizona Chapter of NAELA's Public Policy Committee and sponsored by Senator Barbara Leff, made this effective September of 2007.

<sup>vii</sup> Although not expressly stated, AHCCCS has stated that this is to include the attorney's fees and costs of the guardian and conservator, as well as those of court-appointed counsel for the beneficiary.

<sup>viii</sup> If travel is required for medical reasons, ALTCS, through the Program Contractor, will cover the cost of travel for a companion if the beneficiary cannot travel alone.

<sup>ix</sup> See Wisconsin v. Blumer, 122 S.Ct. 962, 975 (2002); *see also* Washington v. Bowen, 815 F.2d. 549, 554 (9<sup>th</sup> Cir. 1987).

<sup>x</sup> See endnote iii above.

<sup>xi</sup> See A.R.S. § 14-6102.

<sup>xii</sup> Currently located at P.O. Box 2711, Phoenix, AZ 85002.