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**AN INTRODUCTION TO SPECIAL NEEDS TRUSTS
CREATED PURSUANT 42 U.S.C. § 1396p(d)(4)(A)&(C)**

For purposes of qualifying for Supplemental Security Income (hereinafter "SSI") and Medicaid, or Arizona Health Care Cost Containment System (hereinafter "AHCCCS") as it is known in Arizona, benefits, an individual may have no more than \$2,000 in countable resources. The statute and regulations provide exemptions for certain resources, like a personal residence, a vehicle, personal and household effects and irrevocable burial plans, to name a few.¹

In addition, any assets held in a trust meeting the requirements of 42 U.S.C. § 1396p(d)(4)(A) are exempt for purposes of Medicaid eligibility, and for those trusts established on or after January 1, 2000, are exempt for purposes of SSI eligibility.² The requirements are as follows: (1) the beneficiary must be under the age of 65 when the trust is established; (2) the beneficiary must be "disabled" according to Social Security criteria; (3) the trust must be established by the beneficiary's parent, grandparent, guardian/conservator, or a court; and (4) the trust must provide that, upon termination of the trust, the state is reimbursed for all of the Medicaid or AHCCCS benefits it paid to, or for the benefit of, the beneficiary. Note, the rate at which AHCCCS is reimbursed is the capitated rate paid by AHCCCS to the contract provider regardless of the level of services actually provided.

A d(4)(C) trust or PSNT also permits an individual who is eligible for SSI and/or AHCCCS benefits to transfer his/her assets into a trust and allowing the beneficiary to have such funds available to meet his/her supplemental or special needs and remain eligible for public assistance. Under federal and state law, the following conditions must be met for the PSNT to be exempt or excluded for purposes of a beneficiary's financial eligibility for SSI and/or AHCCCS benefits:

- The trust must be established and managed by a non-profit association.
- A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of the funds, the trust pools these accounts.

¹ See 42 U.S.C. § 1382(b).

² See Section 1613 of the Social Security Act, 42 U.S.C. § 1382b(e), signed into law on December 14, 1999.

- Accounts in the trust are established **solely** for the benefit of a disabled individual **by such individual**, or by a parent, grandparent, guardian/conservator, or court.
- To the extent assets remain in the beneficiary's account upon its termination, which is typically at death,³ **and are not retained by the trust**, the trust must reimburse AHCCCS.

A PSNT is best described as a cross between a 401(k) and a d(4)(A) trust. Beneficiaries do not get their own trust agreement, but instead join the existing master trust arrangement and establish an account for their sole benefit. The account is then administered like any other special needs trust.⁴

Three of the major differences between a d(4)(A) and d(4)(C) trust, both of which are advantages, are the following: (1) A PSNT has no age limitation;⁵ (2) if mentally capable or competent, the beneficiary can join and participate in the PSNT without a parent or grandparent's "permission" or court intervention; and (3) as alluded to above, to the extent assets are retained by the PSNT on termination of the arrangement, AHCCCS has no right to reimbursement.

The Arizona Long Term Care System (hereinafter "ALTCS"), one of several medical assistance programs administered by AHCCCS, additionally requires the trust to be used for the sole benefit of the beneficiary.⁶ If individuals other than the beneficiary benefit from the trust or a disbursement therefrom, it will potentially disqualify the trust from special treatment. As a result, the trust assets become countable.

In establishing such trusts, it is also important to bear in mind the respective benefit programs' income limits and rules concerning trust distributions. For purposes of SSI, an individual's total combined income may not exceed \$674.00 per month and for purposes of ALTCS, an individual's total combined income, which amount includes SSI, if applicable, cannot exceed \$2,022.00.

Both benefit programs count as income distributions from a special needs trust for food, shelter, or anything that can be converted into such, like cash.⁷ Such distributions, although they do not disqualify the trust from special treatment, may result in a reduction or loss of benefits. Thus, 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

³ Note, states vary on whether Medicaid can seek reimbursement upon termination of the trust during an individual's lifetime versus at time of death. Unfortunately, Arizona is one of those states that will seek reimbursement under any circumstance of termination.

⁴ I'm sorry to say, but not as sorry as I used to be with the enactment of SB 1184, that distributions out of a PSNT are subject to A.R.S. § 36-2934.01 just as a d(4)(A) trust are.

⁵ However, the ALTCS Eligibility Policy and Procedures Manual MS 905.C states that transfers to a PSNT after age 65 will be treated as an uncompensated transfer. Federal law is ambiguous on this point, and states vary as to their treatment of such transfers.

⁶ See A.R.S. § 36-2934.01.

⁷ See 20 C.F.R. § 416.1100-416.1182; A.R.S. § 36-2934.01.

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.

A.R.S. § 36-2934.01 further specifies what disbursements are allowable from such trusts for purposes of ALTCS eligibility. The allowable disbursements are as follows:

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 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:
 - (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 Program Contractor and that are provided by a person who is registered by the Administration to provide the services and who is not a financially responsible relative of the beneficiary. 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 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.
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:
 - (a) Entertainment, educational or vocational 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, when a companion is required to enable the beneficiary to travel for non-medical reasons.

To what extent A.R.S. § 36-2934.01 is contrary to federal law insofar as it further limits disbursements from disability trusts has yet to be determined.

Trustees of such trusts must also be mindful of the reporting requirements of the SSI and ALTCS programs. 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. Both programs will also want initial and periodic accountings of trust disbursements so as to determine to what extent, if any, they qualify as income and potentially impact eligibility or benefits.

ALTCS also requires the trustee of such trusts 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. The trustee is also required to complete the Special Treatment Trust Anticipated Disbursements form (DE-312) initially and on an annual basis. This is a detailed description of how the trust funds will be administered and disbursed.

Additionally, the trustee is required to report to ALTCS any modifications to the manner in which the trust is administered, that is, any changes in either funding or disbursements withdrawals, not previously listed on the DE-312 form 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 the extenuating circumstances are established.