SOLE BENEFIT TRUSTS

Robert A. Mason, CELA, CAP[1]

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[1] Certified by the National Elder Law Foundation as a Certified Elder Law Attorney; Council of Advanced Practitioners of National Academy of Elder Law Attorneys

Contents

I. Overview

The general transfer of assets rule says that "if an institutionalized individual or the spouse of such an individual . . . disposes of assets for less than fair market value . . . . "[2] a Medicaid transfer sanction will apply. There are a number of exceptions. Four exceptions involve "transfers to another" or to a trust "solely for the benefit of either a spouse of the Medicaid applicant, a disabled child of the applicant, or some other disabled person under age 65.

In this outline, we will focus on the "solely for the benefit of" transfers to trust. We will refer to these as "sole benefit trusts" or "SBTs."

The major benefit of an SBT is that the transferor/grantor will not be sanctioned on the trust funding and the trust assets will not be subject to estate recovery on the death of the beneficiary. Prior to the death of the beneficiary, however, there may be issues with respect to Medicaid/SSI availability (if that is even a concern to the beneficiary).

These issues will be discussed in this Outline.

II. General Statutory Scheme

Generally, 42 USC § 1396p(c) describes Medicaid transfer sanctions and provides a number of exceptions to those sanctions. Paragraph (1) of subsection (c) provides that if "an institutionalized individual or the spouse of such an individual" transfers assets for less than fair market value a penalty will apply. The provisions for calculating the penalty then follow.

42 USC § 1396p(d), on the other hand, describes how the assets in trusts settled by individual Medicaid beneficiaries and their spouses are counted for purposes of Medicaid qualification. If a trust is not settled by one of those individuals, the rules of subsection (d) do not apply.

III. Statutory Exceptions

A. (c)(1) Exceptions

The annuity exceptions contained in Paragraph (c)(1) are not of much interest in this trust-oriented-outline other than they have a couple of provisions that have administratively "bled over" into other exceptions and have caused some confusion.

Subparagraph (c)(1)(F) applies to annuities and specifies that any annuity purchased during the lookback period will be treated as a sanctionable transfer if it fails to name the state as either primary remainder beneficiary or secondary behind a community spouse.

[2] 42 U.S.C. § 1396p(c)(1)(A).

Subparagraph (c)(1)(G) provides additional requirements applicable to annuities. Among those of interest in this trust-oriented outline is the requirement that a sanction-free annuity must also be "actuarially sound" and provide an annuity stream consisting of equal payments.

Unless any of the foregoing requirements are specifically imposed by law on other exceptions to be discussed, they have no place being imposed as a matter of administrative practice. We will discuss a number of such situations below.

B. The (c)(2) Exceptions

42 USC § 1396p(c)(2) says that "[a]n individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that" any of the exceptions under subparagraphs (A) through (D) apply. The only exceptions that potentially involve the use of trusts are the (B) exceptions.

The 42 USC § 1396p(c)(2)(B) exceptions cover transfers:

1. To the individual's spouse or to another for the sole benefit of the individual's spouse. This exception will be referred to as the B1 Exception.

2. From the individual's spouse to another for the sole benefit of the individual's spouse. This exception will be referred to as the B2 Exception. This and the previous exception recognize the fact that Paragraph (c)(1) sanctions transfers by both the individual and the individual's spouse.

3. To, or to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of, the individual's disabled child. This exception will be referred to as the B3 Exception. Note the lack of any age requirement.

4. To a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of a disabled individual under age 65. This exception will be referred to as the B4 Exception. Note the age requirement.

The B3 and B4 exceptions will be treated together and are the classic SBTs. The B1 and B2 exceptions are the spousal SBTs and present some additional countability issues under 42 USC 1396p(d) that will be treated separately below.

The statute, however, does nothing to describe the meaning of "solely for the benefit of" in the context of non-D4 Trusts. In the context of the trusts under subsection (d) (what I call the D4 Trusts), the Social Security Program Operations Manual System (POMS) has extensive treatment of the meaning of "solely for the benefit of." Although we will not dwell extensively on these because we are focused on SBTs that are not D4 Trusts in this

outline, the applicable POMS provisions will be discussed briefly below because they provide helpful insight.[3]

IV. Meaning of "Solely for the Benefit Of"

A. Transmittal 64 Definition of "Solely For The Benefit Of"

The courts give great deference to HCFA Transmittal 64,[4] notably as recently as 2015.[5] The deference is given pursuant to a standard devised by the Supreme Court to "rulings, interpretations and opinions" that represent the informed judgment of the agency tasked with implementing the law.[6] This is referred to as a "Skidmore level of deference" after that Supreme Court case. Perhaps the best formulation of Skidmore deference in the Transmittal 64 setting is the recent formulation by the Court of Appeals for the Sixth Circuit that the "agency's construction is reasonable, supported by the statutory structure, and, thus due respect under Skidmore.[7]

Transmittal 64 addresses the meaning of "solely for the benefit of."

1. First, there is a threshold rule.

The opening clauses of 3257B.6 provide:

> A transfer is considered to be for the sole benefit of a spouse, blind or disabled child, or a disabled individual if the transfer is arranged in such a way that no individual or entity except the spouse, blind or disabled child, or disabled individual can benefit from the assets

[3] Social Security Rules may be found online as the Program Operations Manual System (POMS). Go to https://secure.ssa.gov/apps10/.

[4] In 1994, the Health Care Financing Administration ("HCFA"), the predecessor to the current Centers for Medicare and Medicaid Services ("CMS"), issued Transmittal 64, which added §§ 3257-3259 of Chap. 3 of the CMS State Medicaid Manual. The transmittal is referred to in this Article as Transmittal 64, and citations to sections of that transmittal are preceded by "SMM."

[5] Zahner v. Sect'y Penn. Dep't. of Human Svcs., 802 F.3d 497, 501 (3d Cir. 2015); Hughes v. McCarthy, 734 F.3d 473, 480 (6th Cir. 2013); Sai Kwan Wong v. Doar, 571 F.3d 247, 250 (2d Cir. 2009); Caremark, Inc. v. Goetz, 480 F.3d 779, 787 (6th Cir. 2007); SD *ex rel*. Dickson v. Hood, 391 F.3d 581, 590 (5th Cir. 2004).

[6] Skidmore v. Swift & Co., 323 U.. 134, 140 (1944).

[7] Hughes, 734 F.3d at 480. As we will see below, the courts will withhold deference when an agency opinion does not meet this standard.

> transferred in any way, whether at the time of the transfer or *at any time in the future.*
>
> Similarly, a trust is considered to be established for the sole benefit of a spouse, blind or disabled child, or disabled individual if the trust benefits no one but that individual, whether at the time the trust is established or *any time in the future*.

(Emphasis added)

2. Does "at any time in the future" mean estate inclusion?

What is not clear is the meaning of "at any time in the future." Many, if not most, states review this standard to mean that the assets may not benefit anyone other than the beneficiary while she is alive, and there is no need for the remainder beneficiary explicitly to be the beneficiary's estate (where the assets would ordinarily be exposed to creditor claims). In the D4A context, at least, SSA would agree. POMS SI 01120.201F.2.a. says to "[c]onsider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time *for the remainder of the individual's life*." (Emphasis added).

A June 27, 2005, letter from Ginni Hain, a CMS official, contradicts this position.[8] She wrote the trust

> must benefit no one but the disabled individual at any time. Therefore, there should be no contingent or remainder beneficiaries. At the death of the beneficiary any remainder could be payable to the beneficiary's estate. This would, as you suggest, permit the State Medicaid program to enforce a claim for reimbursement of amounts it has paid out to the individual, if any.

How any sort of "post death" requirement could be imposed to satisfy the need to "benefit the beneficiary only" is beyond me. The beneficiary is dead. How the assets might be expended after her death has nothing to do with how they were expended solely for her benefit while she was alive. If the central issue is the requirement that the trust be solely for her benefit and no one else's benefit while she is alive, extending this definition to favor her creditors after her death (over perhaps her family) makes no sense, particularly given that the assets funded to the trust originated from a third party.

[8] See Attachment A.

The Court of Appeals for the Sixth Circuit, in *Hughes*, agrees and has described the position that "solely for the benefit of" concerns could possibly extend beyond the life of the beneficiary as "nonsensical."[9]

Thereafter, according to Transmittal 64, there is an additional requirement to be met, which can be addressed in two ways.

3. Either a D4A Trust *or* Actuarially Sound

SMM Section 3257 B.6 of the Transmittal lays out the general requirement that a trust, to be considered "for the sole benefit of" an individual, must require distributions "on a basis that is actuarially sound based on the life expectancy of the individual involved." However, the immediately following paragraph begins:

> "An exception to this requirement exists for trusts discussed in §3259.7 [the Transmittal 64 section dealing with D4 Trusts]. Under these exceptions, the trust instrument must provide that any funds remaining in the trust upon the death of the individual must go to the State."[10]

Thus a transfer by a grantor to a trust for a spouse, a disabled child or other "under age 65" person with disabilities is not a sanctionable transfer for the grantor if the trust is *either* a D4 trust, *or* a trust that contains an actuarially sound distribution standard.

No Payback Should Be Required! First, some state Medicaid authorities insist on a payback provision. As demonstrated above, there is no legal support for such a position. The authority imposing such a requirement is simply treating a sole benefit trust as if it were a d4A trust. The only statutory imposition of a payback requirement applicable to trusts occurs within 42 U.S.C. § 1396p(d)(4)(A) and applicable to annuities under 42 USC § 1396p(c)(1)(G). With respect to the latter, the court in *Hughes* clearly held that elements of an exception under (c)(1) cannot be imposed on a (c)(2) exception: They're completely separate.[11]

4. Actuarial Soundness

[9] Hughes, 734 F.3d at 483. The state of Ohio was taking the same position as Ms. Hain, that there could be no named remainder beneficiary.

[10] Section 3259.7 tracks the statute at 42 U.S.C. § 1396p(d)(4).

[11] Hughes, 734 F.3d at 483-85.

SMM Section 3258.9B. describes "actuarial soundness" as a distribution standard that will insure complete distribution of the trust within the beneficiary's anticipated life expectancy (as determined by tables in the transmittal).[12] I meet this requirement by drafting a requirement that trust distributions must be made at least annually in an amount not less than the trust assets divided by the beneficiary's remaining life expectancy. I refer to these as "mandatory distributions." Sample distribution language is shown on Attachment B.[13]

Significantly, and as demonstrated by the example of actuarial soundness provided by HCFA at SMM Section 3258.9.B., the distributions may be made more rapidly.[14] "Actuarial soundness" provides a minimum distribution standard that may be exceeded. I provide for these in subparagraph 1.1.1.4 of my sample language in Attachment B and refer to these as "discretionary distributions."

The definition of actuarial soundness discussed above is in the context of federal regulatory guidance to state Medicaid plans and, strictly speaking, applies to annuities. In fact, 42 USC § 1396p(d)(6) specifies the term "trust" includes annuities to the extent the "Secretary specifies." SMM 3258.9.B says that provision explains "how annuities are treated under the trust/transfer provisions." What we're doing is attempting to show how the annuity provisions Trans 64 might apply to trusts (somewhat the reverse). On the other hand, not applying the language to trusts would leave no administrative guidance whatever with regard to the meaning of "solely for the benefit of" in a non-D4A Medicaid context.

Nevertheless, in the context of trusts, most states have applied the approach discussed above. Some states, however, have taken contrary positions. For example, a number of states have recently adopted an actuarial soundness standard (within the annuity context) that requires a term at or near the actuarial life expectancy of the annuitant, as opposed to *within* the actuarial life expectancy of the annuitant.[15]

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[12] Transmittal 64 does not define "actuarially soundness" in the context of trusts; the definition discussed in section 3258.9B is in the context of annuities.

[13] While Transmittal 64 provides actuarial life tables "published by the Office of the Actuary of the Social Security Administration" the tables provided are old. I prefer to use tables periodically updated by the Office of Actuary and available online. 2013 is the most current table. Go to http://www.socialsecurity.gov/OACT/STATS/index.html (look for "Life Table" under "Miscellaneous") for the most current table.

[14] In fact, SMM § 3258.9B provides an actuarial soundness example in which a 65 year-old with a 14.96 year life expectancy purchases a 10 year annuity.

[15] *See* North Dakota Medicaid Policy Manual section 510-05-70-45-30 (annuity term must be within 85% of actuarial life expectancy); Oregon Administrative Code 461-145-0020 (term must be within 3 months of life

The Court of Appeals for the Third Circuit recently held that there were no other definitions with respect to what constituted "actuarial soundness" other than the Transmittal 64 provision and "that an annuity is actuarially sound for purposes of the safe harbor if its term is less than the annuitant's reasonable life expectancy. Transmittal 64, § 3258.9(B)."[16]

There is simply no legal justification for any other definition of actuarial soundness.

B. POMS Definition of "Solely For The Benefit Of"

Arguably, SSA has no rules that apply its more stringent distribution provisions regarding "solely for the benefit of" in the non-D4A context. The SSA "sole benefit" rules are found at POMS SI 01120.201F. The Chapter at POMS SI 01120.201 applies, by its terms to "Trusts established with the assets of an individual" (referring to D4A Trusts).

Paragraph F.2.a. specifies the general rule to "[c]onsider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life."

Payments to third parties resulting in the beneficiary receiving goods and services are also included. Of interest, payments for the travel expenses of third parties are excepted as long as (i) the beneficiary lives in a long term care facility, (ii) in which other individuals are being paid to provide services, and (iii) the travel is necessary to ensure the "safety and/or medical well-being" of the beneficiary. POMS SI 01120.201F.2.b. This is a considerable narrowing of older more liberal travel allowances for third parties, which has resulted in older D4A trusts being determined by SSA to be non-qualified. Fortunately, a trust disqualification under this provision can be rectified with a trust amendment if made within 90 days of the receipt of SSA notification that a provision offends the third party travel restrictions. POMS SI 01120.201F.2.d.

V. The Beneficiary's Perspective Under the B3 and B4 Exceptions: SBT Distribution Standards

The mandatory and discretionary distributions make no difference to the beneficiary not on a needs-based public benefit program. For that reason, SBTs are a favored tactic when a grantor facing public benefits issues has an available beneficiary who is on Social Security Disability

expectancy); Washington Administrative Code 388-561-0201 (at least 5 year term if life expectancy exceeds 5 years, actuarial life expectancy term if less than 5 years). Illinois has proposed a term requirement equal to the actuarial life expectancy. Thanks to the blog of Krause Financial Services for passing this information along.

[16] Zahner, 802 F.3d at 508.

Income (not on a needs-based benefit). In that case a sanction-free transfer is available without a payback necessity.

But what of the beneficiary who *is* on SSI or Medicaid?

A. Income Treatment

As discussed above at Section IV.A.4 an SBT distribution standard requires the trustee to distribute minimum amounts annually to the trust beneficiary, and perhaps with the discretionary power in the trustee to distribute additional amounts over the minimum distribution amount. The minimum distribution amount is a mandatory distribution. The additional distribution over the minimum is, of course, a discretionary distribution.

Caution: The following discussion, based solely on an analysis of applicable POMS provisions, is speculative. I have received no feedback or validation from anyone at the Social Security Administration on the tactic described below; I welcome yours.

In fact, most practitioners will not consider an SBT if the beneficiary is on SSI or Medicaid because of the impact that the mandatory SBT distributions might have on continued SSI or Medicaid eligibility. That well-trod path calls for the use of a D4A with mandatory payback. In some cases, however, rejecting the use of an SBT may miss a planning opportunity. That rejection may be due to inadequate understanding of the impact of income on those benefits.

Income, of course, has an impact on SSI and Medicaid benefits. A trust distribution to an SSI beneficiary will be counted in one of four ways:

1. Cash disbursements are treated as income.[17]

2. In-kind distributions (I use the technical legal term "stuff") *other* than for food and shelter items that constitute assets that would be counted as resources in the month following receipt are also treated as income.[18] POMS provides the example of a beneficiary who owns an SSI-excluded auto at the time of a purchase of an auto by the trust for the beneficiary in Month 1. Because that second auto will be a countable resource in Month 2, it also will be treated as income in Month 1.

3. In-kind distributions for food or shelter expenses constitute a special kind of distribution called In-Kind Support and Maintenance (or ISM). The value or dollar amount of income attributable to the food and shelter items

[17] POMS SI 01120.200E.1.a.

[18] *Id.*

received as a trust distribution is set under the presumed maximum value (PMV) rule and will be discussed further below.[19]

POMS describes ISM as including food, mortgage (including property insurance required by the mortgage holder), real property taxes (less any tax rebate/credit), rent, heating fuel, gas, electricity, water, sewer, and garbage removal.[20]

4. Distributions that are not described above are not income. POMS uses educational expenses, therapy, medical services, phone bills, recreation, entertainment, and computer equipment as examples of distributions to (or purchase made on behalf of) the beneficiary as NOT being income.[21]

ISM is counted as income for Medicaid purposes in most (if not all) states.[22] The treatment of ISM under SSI and the impact of ISM on SSI benefits is a bit more complicated.

While there are two rules potentially applicable to an SSI beneficiary receiving a ISM – the Value of a One-third Reduction (VTR) rule and the presumed maximum value (PMV) rule – only the PMV rule applies to trust distributions.[23] Under the PMV rule the value of her ISM will be presumed to be $245, but the presumption is rebuttable.

While an SBT MUST make certain minimum distributions, the impact of those distributions on an SSI beneficiary will depend on both the NATURE and AMOUNT of the distributions.

EXAMPLE: Willy Wonka draws $400 SSI benefits (net of applicable exclusions). His mother established an SBT for him before her move to a nursing home, funding it with $100,000. Willy's life expectancy is 20 years and the Year One mandatory distribution is expected to be $5,000. Willy is living in an apartment that rents for $600 monthly. His monthly food (mostly high quality chocolate) bill runs $800 monthly. He pays $75 utilities and phone. The trust pays the rent and grocery bills (total $1,400) directly to the landlord and grocer. Because Willy is receiving ISM distributions from a trust, the PMV rule applies and the provision of the food and shelter by the SBT will result in a reduction of Willy's monthly SSI benefit by $245, leaving Willy a net SSI benefit of $155 (of which he is paying $75 towards his shelter and food costs . . . he is cutting it close, but living comfortably).

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[19] *Id.* 01120.200E.1.b.

[20] *Id.* 00835.465D.1.

[21] *Id.* 01120.200E.1.c.

[22] *See, e.g.*, Georgia Medicaid Manual at § 2430 and North Carolina Adult Medicaid Manual MA-2250 VIII.Z.

[23] POMS SI 01120.200E.1.b.

Finally, at some point in the year, the SBT trustee purchased a spectacular gaming system for Willy for $4,000.

During the year, the trustee has distributed $20,800 to or for Willy and has more than met its obligation to distribute at least $5,000 without jeopardizing Willy's benefits.

THE END: Willy dies from an ingestion of too much chocolate in five years. The balance of the SBT is distributed to his siblings pursuant to the terms of the trust.

ALTERNATE ENDING: Willy dies in 22 years after the trust has been exhausted. Too bad. The arrangement had no real advantage.

If Willy cannot revoke or terminate the trust, direct the use of trust funds or assign or sell his beneficial interest (be sure to use specific language to that effect), then the trust is not a countable resource.[24] Further, cash reduces SSI benefits on a dollar-for-dollar basis, distributions of (or payments to third parties for) excluded items are not income for SSI purposes, and distributions (or payments to third parties for) items that are ISM have the effects outlined above.[25]

Attachment C contains sample SSI SBT distribution language as an alternate to Attachment B.

B. Treatment of Trust Assets

The assets of an SBT should not be considered a resource for either SSI or Medicaid purposes.

1. SSI

SI 01120.200D ("trusts as resources") determines when trust principal is a resource under D.1.a. and when principal is not a resource under D.2. Under D.1.a, a principal will be available if a beneficiary has the right (i) to revoke or terminate the trust and use the funds to "meet his food and shelter needs," (ii) to direct the use of trust principal for his support and maintenance under the trust terms, or (iii) assign or sell his beneficial interest absent a valid spendthrift clause.[26] Similarly, D.2. rather succinctly says:

[24] POMS SI 01120.200D.1.a. (requires a spendthrift clause – ammunition in case a client ever asks you why you put that "boilerplate" spendthrift clause in the trust).

[25] *Id.* SI 01120.200E.1.a-c.

[26] SI 01120.200D.1.a.

> If an individual does not have the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his or her own support and maintenance, the trust principal **is not** the individual's resource for SSI purposes.
>
> The revocability of a trust and the ability to direct the use of the trust principal depend on the terms of the trust agreement and/or on State law. If a trust is irrevocable by its terms and under State law and cannot be used by an individual for support and maintenance (e.g., it contains a valid spendthrift clause . . .), it **is not** a resource.

2. Medicaid

An SBT should be treated as any other third party trust under the Medicaid rules. State Medicaid plans will utilize availability rules that are comparable to, and no more restrictive than, SSI rules under Title XVI.[27]

Because Medicaid eligibility rules may be "no more restrictive than" SSI rules, POMS may provide the most useful analysis. SI 01120.200 applies to trusts established with the assets of third parties. SI 01120.200D and the analysis above is perhaps most helpful.

VI. Spousal SBTs Under the B1 and B2 Exceptions: Added Complexity

Most SBT discussion centers on the B3 and B4 Exceptions just discussed. Overlooked and misunderstood are the marital B1 and B2 Exceptions. Note the B1 Exception involves a transfer *TO* the individual's spouse or to another person or entity "for the sole benefit" of that spouse. The B2 Exception involves a transfer FROM the individual's spouse to another person or entity "for the sole benefit of" that spouse.

Because 42 USC § 1396p(c)(1)(A) sanctions transfers by either the individual or the individual's spouse, and because 42 USC § 1396p(d) has confusing references to the individual and the individual's spouse when addressing the countability of trust assets, carefully parsing through statutory and SMM "availability" provisions is essential.

In any event, if properly designed to be for the sole benefit of the individual's spouse, a trust can be used to receive assets in a sanction-free transfer from either the individual or the individual's spouse and not be deemed available to either the individual or the individual's spouse.[28]

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[27] *See* 42 USC §§1396a(17) and 1396a(r)(2).

[28] I am extremely grateful to my friend Jim Schuster, CELA, CAP. Jim is one of a group of attorneys involved in litigation against Michigan's decision to discontinue recognizing spousal SBTs. He has an interesting paper that treats this topic in much more detail and it is available on the NAELA website at

A. Do Inclusion Rules of 42 USC § 1396p(d) Apply?

Yes.

Paragraph (d)(1) says to apply the rules of Paragraph (d)(3) to determine whether trust assets are to have an effect on "an individual's eligibility" for Medicaid. Paragraph (d)(2) clarifies that for purposes of the subsection (d) trust inclusion rules, the individual will be deemed to have established a trust if either the individual or the individual's spouse established the trust and funded it with either of their assets.

B. Does the "Any Circumstances" Rule Apply to the Individual Only?

Correct. It does not apply to the individual's spouse (the sole beneficiary of the trust).

42 USC § 1396p(d)(3)(B)(i) says that if "there are any circumstances[29] under which payment from the trust could be made to or for the benefit of *the individual*" the portion from which the payment could be made will "be considered resources available to *the individual* . . . ." (Emphasis added). Note there is no mention of the spouse. Determining who established and funded the trust under Paragraph (d)(2) is a completely different question from determining whether assets are available to the individual under Paragraph (d)(3).

Indeed, Congressional action demonstrates that the spouse is not to be included under the Any Circumstances Test. Here is why:

1. OBRA 93 added Subsection (d).[30]

2. 42 USC § 1396a(r)(2) and SMM 3257(B)(4) instruct states to use generally the Title XVI (SSI) definition of assets for Title XIX (Medicaid) purposes.

3. Six years after OBRA 93, Congress enacted the Foster Care Independence Act of 1999 ("Foster Care Act").[31] Section 205(a) of the Foster Care Act added trust provisions to the SSI resource provisions of 42 USC § 1382b. Subsection (e)(3)(B)

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www.NAELA.org/NAELANewsOnline. From there you will be required to sign in with NAELA credentials. Look under June 2016 in the online archives. Jim's paper gave me a number of "Now I hadn't thought about that" moments, and I have borrowed (unabashedly) a number of his arguments.

[29] I refer to this as the "Any Circumstances Rule."

[30] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 § 13611(b), 107 Stat. 312, 624.

[31] Foster Care Independence Act of 1999, Pub. L. No. 106-169 § 205(a), 113 Stat. 1822, 1833.

tracks the Any Circumstances Rule OBRA 93 applied to Medicaid recipients, with one very important exception:

> In the case of an irrevocable trust established by an individual, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual *(or of the individual's spouse)*, the portion of the corpus from which payment to or for the benefit of the individual *(or of the individual's spouse)* could be made shall be considered a resource available to the individual.

(Emphasis added to highlight additions made by Foster Care Act applicable to SSI).

4. Because the Medicaid resource rules generally track the SSI rules, the 1999 addition of 42 USC § 1382b(e)(3)(B) would set up a conflict between the SSI version of the Any Circumstances Rule (spouses included) and the Medicaid version (individuals only, spouses not mentioned) unless Congress took some clarifying action.

   Congress could have simply amended the Medicaid version to comport with the new SSI version. Congress took another tack. The same section of the Foster Care Act (paragraph 205(b)(3)) added the following to the Medicaid asset provisions of 42 USC 1396a(10)(G):

   > that, in applying eligibility criteria of the supplemental security income program under subchapter XVI of this chapter for purposes of determining eligibility for medical assistance under the State plan of an individual who is not receiving supplemental security income, the State will disregard the provisions of *subsections (c) and (e) of section 1382b of this title . . . .*

   (Emphasis added).[32]

Conclusion: Congress clearly had no intention of applying the Any Circumstances Rule of 42 USC § 1396p(d)(3)(B) to the spouse of a Medicaid applicant. To do so would have completely eviscerated the B1 and B2 Exceptions.

C. Are the assets of a Spousal SBT Deemed Available to the Spouse at the Time of Application?

[32] The reference to 1382b(c) was actually added after the Deficit Reduction Act of 2005 to decouple the new 60 month lookback from the existing SSI lookback of 36 months.

No.[33] Here is why:

1. SMM 3257(B)(4) instructs the state Medicaid plans to use the same definition of resources as used in the SSI program (discussed above). Note that Transmittal 64 was issued in 1994, so it would be subject to later Congressional adjustments such as section 205 of the Foster Care Act (enacted 5 years later).

2. SSA regulations define resources as assets that an individual or spouse *own* and could "convert to cash" or liquidate for support purposes.[34]

VII. Summary

The "sole benefit" trust exclusions from the general Medicaid transfer sanction scheme present planning opportunities for the astute practitioner.

In this Outline we have examined three different, but related, SBT applications. The first is a standard SBT for the benefit of a disabled beneficiary who is not on a needs-based disability program (*e.g.*, Social Security Disability Income). The second application, a variant of the first, is for the disabled beneficiary drawing needs-based SSI benefits. Finally, we have reviewed spousal SBTs, which are bit more complex but offer some extremely valuable planning options.

[33] Were it otherwise, and the assets deemed available to the spouse/beneficiary, the individual's application would likely be rejected.

[34] 42 C.F.R. §416.1201(a). *See, also*, POMS SI § 01110.115 (same language).

ATTACHMENT A - HAIN LETTER

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-14-26
Baltimore, Maryland 21244-1850

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

Center for Medicaid and State Operations
Disabled and Elderly Health Programs Group (DEHPG)

JUN 27 2005

Ms. Mary E. O'Byrne
Attorney at Law
1400 Front Avenue
Suite 101
Lutherville, MD 21093

Dear Ms. O'Byrne:

This is in response to your letter seeking clarification of Medicaid policies pertaining to transfers of assets to trusts for the sole benefit of an individual's child pursuant to Section 1917(c)(2)(B)(iii) of the Social Security Act (42 U.S.C. 1396p(c)(2)(B)(iii)), or for the sole benefit of an individual under 65 years of age who is disabled pursuant to Section 1917(c)(2)(B)(iv) of the Act (42 U.S.C. 1396p(c)(2)(B)(iv)). You ask whether there is a legal requirement that the trusts must provide for reimbursement to the State Medicaid program for the benefits provided over the beneficiary's lifetime, before any remaining trust funds are distributed to contingent beneficiaries.

The sections of the Medicaid statute to which you refer are exceptions to the overall requirement of Section 1917(c)(1) of the Act that states must impose periods of ineligibility on certain individuals making transfers of assets for less than fair market value. The statute provides that certain transfers of assets will not result in a period of ineligibility for the transferor/Medicaid applicant. These include transfers to a disabled child of the Medicaid applicant and transfers to a trust for an individual with a disability under age 65, whatever the relationship of such an individual to the applicant. You question whether these exceptions to the transfer of assets penalties are met where a trust is "actuarially sound" but still provides the potential for distributing remainder amounts after the death of the disabled child or disabled individual to contingent beneficiaries. You further ask whether there is a legal requirement that such trusts provide for reimbursement to the state Medicaid program prior to distribution of remainder amounts to contingent beneficiaries.

It is important to understand that the statutory provisions pertaining to "sole benefit" transfers recognize that the transferor has different options for conveying his or her funds. The transferor may simply give the funds directly to his or her disabled child, or may transfer them into trust. The transferor may also place funds into a trust for the sole

benefit of an individual who is under 65 and disabled. Two different types of trusts are referenced under the statute: those specifically defined under Section 1917(d)(4) of the Act, and all others.

For trusts that are *not* defined under 1917(d)(4), CMS policy provides that in order for a transfer to a trust to be considered to be for the sole benefit of the disabled child or disabled individual under 65, the trust instrument must provide for the spending of the funds for the benefit of the individual on a basis that is actuarially sound based on the individual's life expectancy, and must benefit no one but the disabled individual at any time. Therefore, there should be no contingent or remainder beneficiaries. At the death of the beneficiary any remainder could be payable to the beneficiary's estate. This would, as you suggest, permit the State Medicaid program to enforce a claim for reimbursement of amounts it has paid out to the individual, if any. We find nothing "inconsistent" in this result.

Trusts defined under subsection (d)(4) include so-called "special needs trusts," "Miller" or qualified income trusts, (which do not appear to be relevant to your questions) and "pooled trusts." The statutory exceptions to the transfer of assets rules under 1917(c)(2)(B)(iii) and 1917(c)(2)(B) (iv) permit, but do not require, "sole benefit" transfers to (d)(4) trusts. Thus, transfers to (d)(4) trusts may be thought of as a subset of "sole benefit" transfers to trusts. If the Medicaid applicant has chosen to make a sole benefit transfer into a special needs trust or pooled trust, all requirements for those particular trusts must be met, whether or not the trusts are actuarially sound. This includes the requirement that the trust instrument provide that any funds remaining in the trust upon the death of the individual, i.e. the disabled trust beneficiary, not the original transferor, must go to the State up to the amount of Medicaid benefits paid on the individual's behalf. However, in Section 3257(B(6) of the State Medicaid Manual, we have stated that for (d)(4) trusts the restrictions applicable to sole benefit transfers generally do not apply. Thus, (d)(4) trusts do not need to include provisions for the spending of the funds for the benefit of the individual on a basis that is actuarially sound based on the individual's life expectancy, and they may include provisions for disbursal of funds to other beneficiaries provided that such distributions are not made prior to satisfaction of the State's claim for reimbursement.

I hope that this information is helpful to you.

Sincerely,

Gihni Hain
Director
Division of Eligibility, Enrollment and Outreach

ATTACHMENT B - SAMPLE DISTRIBUTION LANGUAGE FOR SBT

ARTICLE 1.

1.1. During the Term of the Trust

1.1.1. Principal.

1.1.1.1. Life Expectancy Data. Beneficiary's birth date is February 2, 1956; Beneficiary is sixty (60) years old and is a female. According to the 2013 Period Life Table published by the Office of the Actuary of the Social Security Administration, which tables are updated tables to those referenced in HCFA Transmittal No. 64 § 3258.9B, the life expectancy of Beneficiary is 24.46 years.

1.1.1.2. Term; Distributions of Principal. The maximum term of this Trust shall be twenty-four (24) years, and shall in any event terminate within twenty-four (24) years if not earlier terminated pursuant to the provisions of Subsection 2.2.1. upon the death of Beneficiary.

1.1.1.3. Minimum Distribution Frequency and Amount. Trustee shall distribute principal to Beneficiary in installments that are no less frequent than annual and in annual amounts that total no less than an amount determined by dividing the trust balance at the end of the preceding calendar year (or nearest other practicable administrative valuation date in the case of the first term year of this Trust) by the then remaining term of this Trust (the "Minimum Distribution Amount"). The total amount of the annual distributions with respect to any term year must equal or exceed the Minimum Distribution Amount determined for the applicable term year. The first distribution shall be made no later than the first anniversary of this Trust, and with respect to subsequent annual distributions no later than the annual anniversary date of this Trust.

1.1.1.4. Other Distributions. Trustee may, but need not, make other distributions of principal that exceed, or result in exceeding, the Minimum Distribution Amount if Trustee determines, within the sole and unfettered discretion of Trustee, that such distribution or distributions are in the best interests of Beneficiary. All distributions, other than the required annual Minimum Distribution Amount, shall be completely and totally within the sole and unfettered discretion of the Trustee, and neither the Beneficiary nor any other person shall have the authority in any way to require the Trustee to make any distributions for the general support and maintenance of the Beneficiary.

ATTACHMENT C -- SAMPLE DISTRIBUTION LANGUAGE FOR SSI SBT

1.1. During the Term of the Trust

1.1.1. General Distribution Provisions.

1.1.1.1. Life Expectancy Data. Beneficiary's birth date is _____, ____; Beneficiary is _____ (__) years old and is a [male/female]. According to the 2007 Period Life Table published by the Office of the Actuary of the Social Security Administration, which tables are updated tables to those referenced in HCFA Transmittal No. 64 § 3258.9B, the life expectancy of Beneficiary is __.__ years.

1.1.1.2. Term; Distributions of Principal. The maximum term of this Trust shall be _____ (__) years, and shall in any event terminate within _____ (__) years if not earlier terminated pursuant to the provisions of Subsection 2.2.1. upon the death of Beneficiary.

1.1.1.3. Minimum Distribution Frequency and Amount. Subject to the provisions of Subsection 1.1.2 regarding the nature of distributions, Trustee shall distribute principal to Beneficiary in installments that are no less frequent than annual and in annual amounts that total no less than an amount determined by dividing the trust balance at the end of the preceding calendar year (or nearest other practicable administrative valuation date in the case of the first term year of this Trust) by the then remaining term of this Trust (the "Minimum Distribution Amount"). The total amount of the annual distributions with respect to any term year must equal or exceed the Minimum Distribution Amount determined for the applicable term year. The first distribution shall be made no later than the first anniversary of this Trust, and with respect to subsequent annual distributions no later than the annual anniversary date of this Trust.

1.1.1.4. Other Distributions. Subject to the provisions of Subsection 1.1.2 regarding the nature of distributions, Trustee may, but need not, make other distributions of principal that exceed, or result in exceeding, the Minimum Distribution Amount if Trustee determines, within the sole and unfettered discretion of Trustee, that such distribution or distributions are in the best interests of Beneficiary. All distributions, other than the required annual Minimum Distribution Amount, shall be completely and totally within the sole and unfettered discretion of the Trustee, and neither the Beneficiary nor any other person shall have the authority in any way to require the Trustee to make any distributions for the general support and

maintenance of the Beneficiary.

1.1.2. Instructions to Trustee Regarding Nature of Distributions. In meeting the mandatory distribution requirements of Paragraph 2.1.1.3 and permissible distribution requirements of Paragraph 2.1.1.4, Trustee should limit distributions to distributions that:

1.1.2.1. Are not in-kind income under POMS SI 00815.550 because the distribution constitutes assets that would be, in the month following receipt, partially or wholly excluded from SSI resource definitions under POMS SI01110.210, or

1.1.2.2. Are excluded from income pursuant to other specific exclusions under federal statute, regulation on POMS; including, for example and not limited to, travel tickets under POMS SI 00830.521, medical, social and caregiver expenses as defined in POMS SI 00815.050, and certain educational expenses under POMS SI 00830.455, or

1.1.2.3. Do constitute in-kind support and maintenance as defined in POMS SI 00835.310 during the month of receipt which would with respect to the Beneficiary result in a reduction, but not a total loss, of SSI benefits under, as applicable to the Beneficiary, the Value of the One-Third Reduction rule of POMS SI 00835.200 or the Presumed Maximum Value rule of POMS SI 00835.300, or

1.1.2.4. Are cash distributions or distributions that constitute other in-kind income as defined in POMS SI 00835.310, in amounts that when considered with distributions during the month that constitute in-kind support and maintenance as provided in Paragraph 1.1.2.3, would result in a reduction, but not total loss, of SSI benefits.