

**SSI/MEDICAID TRUSTS
FOR THE ELDERLY
AND DISABLED**

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A. INTRODUCTION

In the course of protecting our client's eligibility for important public benefits, which often make a huge difference in their quality of life, attorneys are called upon to draft and assist in administering various types of trusts. We are also expected to counsel our clients as to whether a particular trust is appropriate. Some of these trusts include the following:

- Third Party Special Needs Trusts
- Self-Settled Special Needs Trusts
- Pooled Trusts
- Income Only Trusts
- Disability Annuity Trusts
- Disability Annuity Special Needs Trusts
- 529 Plan Trusts
- Reparations Trusts

There are several important issues involved. Different trusts must be drafted to address different issues. Recurring issues are:

- Availability
- Transfer Penalty
- Payback Requirements

B. BENEFIT PROGRAMS AFFECTING THE DISABLED

Disability is defined in the Social Security Act.¹ It is "The inability to do any substantial gainful activity by reason of any medically-determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months." This means the person must have severe impairment that makes it impossible for him or her to perform his or her previous job or any other substantial gainful activity in the national economy.² For a child under 18 years of age disability is defined as a medically-determinable physical or mental impairment that results in "marked and severe functional limitations."³ Substantial gainful activity is the ability to earn \$810 per month.⁴

In order to determine when the use of a trust is appropriate and what type of trust is appropriate it is necessary to have an understanding of government benefit programs affecting the disabled. The principal programs are:

¹ 42 U.S.C. §§ 416(i)(1), 423(d)(1)(A); 20 C.F.R. § 404.1505(a).

² 42 U.S.C. § 423(d)(2)(A); 20 C.F.R. § 404.1505(a).

³ 42 U.S.C. § 1382(c)(a)(3)(H).

⁴ 68 Fed. Reg. 60441 (October 25, 2002).

- SSI
- Medicaid
- SSD
- Medicare
- Federally-assisted Housing

C. THE STATUTES AND THE POMS

Statutory authority for Miller Trusts, “Sole Benefit of” Trusts, Pooled Trusts and Self-Settled Special Needs Trusts are found at 42 U.S.C. § 1396p(a), (b), (c) and (d). This was originally part of OBRA '93. The Foster Care Independence Act of 1999 applies to Self-Settled Special Needs Trust.⁵ This applies only to Self-Settled Special Needs Trusts.

POMS §§ SI.01120.200 also govern trusts.

D. KEY ISSUES

The key issues that must be considered in drafting a trust involving SSI, Medicaid or other public benefits are availability, transfer rules and payback requirements.

1. Availability

Whether or not a trust is available depends on the discretion given to the trustee. Under the POMS trust assets are available if the individual has the legal authority to direct a distribution from the trust for his/her support and maintenance or has the right to revoke the trust.⁶ Therefore, a discretionary trust is not available. The POMS defines a discretionary trust as “a trust in which the trustee has full discretion as to the time, purpose and amount of all distributions. The trustee may pay to or for the benefit of the beneficiary all or none of the trust as he or she considers appropriate. The beneficiary has no control over the trust.”⁷ Therefore the discretion of the trustee will really determine the issue of availability. The discretion of the trustee varies with the type of trust.

a. Support Trusts

The typical trust that a parent creates for a child is known as a support trust. The trust usually contains language that the funds in the trusts are to be used by the trustee for the beneficiary's "health, education and support," "health, education and welfare," "health and support," "comfort and support," or similar language. It is clearly the intention of the settlor of such a trust that the monies be used to support the beneficiary of the trust. Support generally includes food, clothing, shelter, and medical care. Assets in such a trust are clearly "available" to the beneficiary.

⁵ H.R. 3443 Foster Care Independence Act of 1999 § 205.

⁶ POMS SI.01120.200.D.1.(a).

⁷ POMS SI.01120.200.B.10.

b. Purely Discretionary Trusts

A trust can be drafted which gives the Trustee absolute discretion as to payment of income and/or principal to a beneficiary. This is a purely discretionary trust. In some cases, courts have held that the discretion of the trustee must be exercised in a reasonable manner to accomplish rather than thwart the purpose of the trust. These cases, again, revolve around the intention of the testator/settlor.

c. Discretionary Support Trusts

A discretionary support trust is a hybrid between a support trust and a purely discretionary trust. The trust is drawn in such a way as to give the trustee the discretion as to whether or not to use income and/or principal for the support of the beneficiary. The issue is whether or not such trust assets are available. As always, courts interpret such trust provisions based on the intention of the trust's settlor.

Pennsylvania has a series of cases that illustrate the difficulty of predicting outcomes where a discretionary support trust is used. There are five cases. In three cases, the court held the trust assets to be available,⁸ in two unavailable.⁹

2. Transfers and Trusts

A second key issue in drafting trusts is whether or not the funding of the trust constitutes a transfer subject to the transfer penalty rules of the SSI and/or Medicaid. The key to understanding the rules on trusts is to understand when the transfer has taken place.

a. Is the Asset Available After the Transfer?

If there is a transfer from an individual to a trust under conditions by which the trust assets are still available to the individual, there has been no transfer. Therefore, where the trust is revocable, the assets are still available to the individual after the trust is funded so there is no transfer at this point. The transfer is considered to have taken place on the date of payment from the trust to the third party.

If the trust is irrevocable, the transfer is considered to have been made as of the date the trust was established, or upon such later date that payment to the Settlor was foreclosed. However, if the Settlor can still benefit from the assets with which the trust is funded, those assets are still available so there is no transfer. If and when those assets are paid out to a third

⁸*Commonwealth Bank and Trust Co. v. Commonwealth of Pennsylvania Dept. of Public Welfare*, 528 Pa. 482, 598 A.2d 1279 (1991); *Rosenberg v. Dept. of Public Welfare*, 679 A.2d 767, 545 Pa. 27 (1996); *Shaak v. Dept. of Public Welfare*, 707 A.2d 1199 (Pa. Cmwlth March 2, 1998) (1999).

⁹*Lang v. Commonwealth Dept. of Public Welfare*, 528 A.2d 1335, 515 Pa. 428 (1987); *Snyder v. Commonwealth of Pennsylvania Dept. of Public Welfare*, 598 A.2d 1283, 528 Pa. 491 (1991).

party, the transfer occurs. If the Settlor places assets in an irrevocable trust and can no longer benefit from any of the trust corpus, there has been a transfer of assets when the trust is funded.¹⁰

The regulations pertaining to trusts under OBRA-93 are found in HCFA Transmittal 64.¹¹ A trust is defined as including any legal instrument or device that is similar to a trust, but not including testamentary trusts.¹² The individual is considered to have established the trust, if the individual's assets were used to fund the trust, and if the trust was established by the individual, the individual's spouse, a person, including a court or administrative body, acting on behalf of the individual or the individual's spouse, or a person, including a court or administrative body, acting at the direction of the individual or the individual's spouse.

b. Revocable Trusts¹³

The entire corpus of the trust is an available resource. Payments **to** the trust are not transfers, because the assets remain available. Payments to or for the benefit of the individual are counted as income. Payments **from** the trust to third parties are considered transfers. The lookback period is 60 months.

c. Irrevocable Retained Interest Trusts¹⁴

(1) Payments

Payments from income or from principal paid to or for the benefit of the individual are treated as income.

(2) Available income

If income could be paid for the benefit of the individual, it is treated as an available resource.

(3) Available corpus

Any portion of the corpus that could be paid to or for the benefit of the individual is treated as an available resource.

(4) Lookback and transfer

This type of trust is the most confusing in understanding the lookback and transfer rules.

¹⁰HCFA Transmittal 64 § 3258.4E; 42 U.S.C. § 1396p(c)(1)(B).

¹¹HCFA Transmittal 64 § 3259.

¹²42 U.S.C. § 1396p(d)(6); HCFA Transmittal 64 § 3259.1A1.

¹³HCFA Transmittal 64 § 3259.6A.

¹⁴HCFA Transmittal 64 § 3259.6.

(5) Available portion of corpus

To the extent that a portion of the trust corpus is available to the individual, there has been no transfer and there would be no applicable lookback. If assets are transferred **from** the trust to a third party from the available portion, the lookback period is three years. This is inconsistent with the theory that makes transfers from an available revocable trust subject to a five-year lookback, but it is the HCFA interpretation, nevertheless.

(6) Corpus unavailable

Where a transfer has been made **to** an irrevocable trust and the corpus of the trust is unavailable to the Settlor, the lookback period is five years. Transfers **from** the trust assets, which were unavailable to the Settlor, are not considered transfers and there is no applicable lookback period.

d. Calculation of penalty

It is important to remember that although the transfers to and from trusts are usually subject to a five-year lookback, the penalty is calculated in the normal manner. Therefore, if a person transfers \$60,000 to an irrevocable non-retained interest trust and if the average cost of a nursing home in that particular state is \$6,000 per month, the penalty is ten months ($\$60,000 \div \$6,000 = 10$).

3. Payback

The payback provisions are a creature of statute. They were established in OBRA '93. They apply only to Miller Trusts,¹⁵ Pooled Trusts,¹⁶ and Under 65 Disability Trusts or Self-Settled Special Needs Trusts.¹⁷ The Health Care Financing Administration (HCFA) has clarified and confirmed this interpretation in a letter dated January 19, 2001, to Ramon B. Harvey.¹⁸ However, New Jersey does not always follow this clarification. For example, under federal law a Disability Annuity Trust would clearly not require a payback, but the New Jersey Medicaid agency requires such a provision. This is ripe for challenge.

¹⁵ 42 U.S.C. § 1396p(d)(4)(B).

¹⁶ 42 U.S.C. § 1396p(d)(4)(C).

¹⁷ 42 U.S.C. § 1396p(d)(4)(A).

¹⁸ Representing the Elderly Client, Law & Practice, Thomas D. Begley, Jr. and Jo-Anne Herina Jeffreys, Aspen Publishing Company, Appendix 8A.

E. ANALYSIS OF TRUSTS BY TYPE

1. Special Needs Trusts

a. Purpose

The purpose of a Special Needs Trust is to enrich the life of the disabled beneficiary while maintaining the beneficiary's public benefits, especially SSI and Medicaid.

b. Statutory Authority

There is no statutory authority for a Third Party Special Needs Trust. Authority for a Self-Settled Special Needs Trust is found at 42 U.S.C. § 1396p(d)(4)(A). Additional statutory authority is found at H.R. 3443 Foster Care Independence Act of 1999 § 205. However, authority for a Third Party Special Needs Trust is found in POMS at Section POMS SI 01120.200 *et seq.*

c. POMS Considerations When Drafting a Special Needs Trust

Drafting a special needs trust requires designing it in a manner that takes into consideration the Program Operations Manual System (POMS), which is published by the Social Security Administration (SSA) and contains the operating procedures for SSI. Significant changes were made in 1999 in the sections pertaining to trusts.¹⁹ A discussion of the POMS is instructive.

(1) Trust

The POMS recognize the trust device. In fact, the POMS contain a definition of a trust. "A trust is a property interest whereby property is held by an individual (trustee) subject to a fiduciary duty to use the property for the benefit of another (the beneficiary)."²⁰

(2) Discretionary

The POMS defines a discretionary trust as "A discretionary trust is a trust in which the trustee has full discretion as to the time, purpose and amount of all distributions. The trustee may pay to or for the benefit of the beneficiary, all or none of the trust as he or she considers appropriate. The beneficiary has no control over the trust."²¹ The key to the entire issue of "availability" is the discretion of the trustee. If the beneficiary has no right to compel distribution or to revoke the trust, the trust is discretionary and the trust assets will be unavailable.

¹⁹POMS S.I. 01120.200.

²⁰POMS S.I. 01120.200.B.1.

²¹POMS S.I. 01120.200.B.10.

(3) Residual beneficiary

When considering a Self-Settled Special Needs Trust, whether the trust has named a residual beneficiary is important in some states in determining whether or not the trust is revocable and, therefore, available. A residual beneficiary is defined as "A residual beneficiary is not a current beneficiary of a trust, but will receive the residual benefit of the trust contingent upon the occurrence of a specific event, e.g., the death of the primary beneficiary."²²

(4) Trusts as resources

SSA follows state law with respect to whether or not a trust is revocable. Most states follow the general principal that if a grantor is also the sole beneficiary of the trust the trust is revocable, but if there is a named "residual beneficiary" then the trust is irrevocable.²³

(5) Revocation

In a third party special needs trust, revocation is not usually an issue, because the grantor and the beneficiary are different and a residual beneficiary is named to take the trust assets upon the death of the beneficiary. The beneficiary, therefore, has no authority to revoke the trust. Draftsmen do not always include a residual beneficiary and, therefore, revocation becomes an issue. The POMS state "A beneficiary generally does not have the power to revoke a trust. However, the trust may be a resource of the beneficiary, in the rare instance, where he/she has the authority under the trust to direct the use of the trust principal. (The authority to control the trust principal may be either specific trust provisions allowing the beneficiary to act on his/her own or by ordering actions by the trustee.) In such a case, the beneficiary's equitable ownership in the trust principal and his/her ability to use it for support and maintenance means it is a resource."²⁴ This would apply to a support trust where the beneficiary would have the right to compel distributions from the trust to or on behalf of the beneficiary.

(6) Availability

Thus, the POMS recognize a two-pronged test for purposes of determining "availability." If the beneficiary of the trust has no right to revoke the trust or to direct the use of the trust assets for his/her own support and maintenance, then the trust principal is not the individual's resource for SSI purposes.²⁵

The revocability of a trust and the ability to direct the use of the trust principal depends on the terms of the trust agreement and/or on state law. If a trust is irrevocable by its terms and under state law cannot be used by an individual for support and maintenance, it is not a resource.

²²POMS S.I. 01120.200.B.12.

²³POMS S.I. 01120.D(3).

²⁴POMS S.I. 01120.200.D.1.b. Beneficiary.

²⁵POMS S.I. 01120.200.D.2.

This is really the legal basis for a special needs trust.

(7) Disbursements From Trust

A special needs trust must be properly drafted and funded, but it is crucial that it also be properly administered. These rules apply equally whether the trust is a third-party special needs trust or a self-settled special needs trust. Improper distributions from a properly-drafted and funded trust can cause the loss of public benefits to the beneficiary of the trust.

(a) Income

"If the trust principal is not a resource, disbursements from the trust may be income to the SSI recipient beneficiary, depending on the nature of the disbursements. Regular rules to determine when income is available apply."²⁶

"Cash paid directly from the trust to an individual is unearned income."²⁷ Therefore, it is crucial for the trustee of a special needs trust to have a clear understanding of the SSI income rules and to limit distributions to those expenditures which are appropriate.

"Disbursements from the trust by the trustee to a third party that result in the individual receiving items that are not food, clothing or shelter are not income."²⁸

(b) In-kind support and maintenance

Disbursements which result in Receipt of In-kind Support and Maintenance are defined as food, clothing or shelter received as a result of disbursements from the trust by the trustee to a third party in the form of in-kind support and maintenance and are valued under the presumed maximum value (PMV) rule.²⁹ It is often appropriate to make ISM payments and for the beneficiary to have a reduction in benefits. Therefore, a trust document might contain language authorizing the trustee to make distributions for "food, clothing and shelter" for the beneficiary. The SSI monthly payment may be inadequate to provide the appropriate level of food, clothing and shelter for the beneficiary. As long as the SSI payment is maintained, although at a reduced level, Medicaid eligibility is maintained.

²⁶POMS S.I. 01120.200.E.1.

²⁷POMS S.I. 01120.200.E.1.a.

²⁸*Id.*

²⁹POMS S.I. 01120.200E.1.b.

(c) Third party non-income payments

Since these distributions do not result in any reduction of SSI benefit, they are the most desirable types of distributions for a trustee to make. It is important that the distributions be made directly to the third party, not to the trust beneficiary. "Disbursements from the trust by the trustee to a third party that result in the individual receiving items that are not food, clothing or shelter are not income. For example, if trust funds are paid to a provider of medical services for care rendered to the individual, the disbursements are not income for SSI purposes."³⁰

These rules are the basic rules for trust administration and define what distributions can be made from a trust, and what the impact of such distributions is on the SSI benefit of the trust beneficiary. It is crucial that trustees are aware of these rules.

(d) Home ownership

If a third party special needs trust owns a house used as a home for the beneficiary, the house is not a resource to the beneficiary.³¹ SSA considers the beneficiary to have an "equitable ownership under a trust."

The beneficiary living in the home is **not** considered to be receiving in-kind support and maintenance in the form of rent-free shelter because he/she has an ownership interest.³² However, the purchase of the home by the trust results in ISM for the month in which the purchase is made. The ISM is valued at no more than the presumed maximum value (PMV).³³ If the home is purchased subject to a mortgage, each mortgage payment constitutes ISM.³⁴

Payment of household operating expenses by the trust constitute ISM. These include improvements or renovations, including those renovations needed to make the home handicapped accessible. But, improvements which increase the value of the home are not considered operating expenses and do not constitute ISM.³⁵

d. Key Issues

(1) Availability

Assets in a properly-drafted Special Needs Trust are not available. The key is the discretion of the trustee.

³⁰POMS S.I. 01120.200.E.1.c.

³¹POMS S.I. 01120.200.F.1.

³²POMS S.I. 01120.200.F.2.

³³POMS S.I. 01120.200.F.3.a.

³⁴POMS S.I. 01120.200.F.3.b.

³⁵POMS S.I. 01120.200.F.3.c.

(2) Transfer Penalties

There are no transfer penalties for transfers to a Third Party Special Needs Trust if the transfer is testamentary in nature. If the transfer is made during the lifetime of the third party, the transfer penalties apply. There are no transfer penalties for a transfer to a Self-Settled Special Needs Trust, because such transfers are exempt under 42 U.S.C. § 1396p(d)(4)(A).

(3) Payback

There is no payback requirement to the State Medicaid Agency from Third Party Special Needs Trusts. Those trusts can provide that upon the death of the disabled beneficiary assets are distributed to remaindermen. In a Self-Settled Special Needs Trust a payback provision is required.

2. Pooled trust

a. Purpose

The purpose of a Pooled Trust is to ensure that the trust assets are used to enrich the life of the disabled person while maintaining vital public benefits.

b. Trust Design

A Pool Trust must be established and managed by a non-profit organization are authorized under OBRA-93.³⁶ These trusts are funded with the assets of a disabled person. The SSI definition of "disability" is used. There must be a separate account for each beneficiary. Funds are pooled for investment and management. The account is solely for the benefit of the disabled individual. A person can be over 65 at the time of the establishment of a trust. A disabled person can establish his own trust. On death, the funds remaining in the Pooled Trust must be retained by the trust or reimburse Medicaid.

There is no expressed limit on the amount or type of payment. It may be wise to limit payments to "in-kind" payments. In-kind payments do not reduce public assistance.

An advantage of a pooled is that corpus is not counted as an asset. Also, a Community Trust already exists and does not have to be created. The Community Trust requires only a joinder agreement.

³⁶42 U.S.C. § 1396p(d)(4)(C).

c. Key Issues

(1) Availability

Assets in a properly-drafted Pooled Trust are not available. The key is the discretion of the trustee.

(2) Transfer Penalties

Transfers into a Pooled Trust by a person 65 or under are exempt from the lookback provisions and transfer penalties.³⁷ Transfers into a Pooled Trust by persons over 65 are subject to a three-year lookback.³⁸

(3) Payback

A payback from a Pooled Trust is required to the extent that the remaining funds are not retained by the non-profit trustee.

3. Income Only Trusts

a. Purpose

Income only trusts are a means by which persons may transfer assets to a trust rather than to their children. Seniors tend to view transfers to trusts as protection while they tend to view transfers to children as gifts. Trusts provide them with a sense of dignity and security. Income only trusts are permitted by OBRA-93.³⁹ Income only trusts must be irrevocable.

b. Authority

The requirements for Income Only Trusts were spelled out in letters from Sally K. Richardson, Director Medicaid Bureau, Health Care Financing Administration, Department of Health and Human Services to Elice Fatoullah, dated December 23, 1993, the Elder Law Report, Volume V, Number 7, Page 2 and from Robert A. Streimer, Director, Disabled and Elderly Health Programs Group at HCFA's Center for Medicaid and State Operations to Dana E. Rozansky, dated February 25, 1998, The ElderLaw Report, Vol. IX, Number 9, April 1998, page 9.

³⁷42 U.S.C. § 1396(p)(d)(4).

³⁸"Set Up Pooled Disability Trust," The Elder Law Report, Vol. V, No. 5, 8 (December 1993).

³⁹42 U.S.C. § 1396p(d)(3)(B).

c. Trust Design

(1) Income

The trust may provide that income shall be distributed to the grantor or may be distributed to the grantor at the discretion of the trustee. From a Medicaid standpoint, it is better to permit the trustee to use discretion in distributing income. From an income tax standpoint, it is usually better to distribute the income to the grantor to avoid income tax at the trust's highly-compressed tax rates.

(2) Principal

There can be absolutely no access to principal by either the grantor or the grantor's spouse. If either the grantor or his spouse has access to principal, the assets in the trust would be "available" for Medicaid eligibility purposes.

(3) Principal distribution provisions

The trust should be designed to permit the trustee to make distributions to third parties. Through this mechanism, the trustee can stop income payments to a grantor who will be requiring Medicaid and can avoid estate recovery in those states that use a broad definition of "estate." The disadvantage to distributing the assets from the income only trust is that the opportunity for a "step up" in basis will be lost.

Care must be taken in considering whether to authorize the trustee to make distributions of trust principal to himself. Authorization of such distributions would be considered a general power of appointment held by the trustee. If the trustee predeceases the grantor, the value of the trust assets could be included in the estate of the trustee for federal estate tax purposes.

d. Key Issues

(1) Availability

The assets in an Income Only Trust are unavailable to the grantor if the trust is properly drafted so as to limit the trustee's discretion to distributions of principal to persons other than the grantor or the grantor's spouse.

(2) Transfer Penalties

The transfer of assets to the Income Only Trust are subject to a five-year lookback and normal transfer penalties. Distributions from the Income Only Trust are not considered transfers.

(3) Payback

No payback is required to the State Medicaid Agency from an Income Only Trust.

4. Disability Annuity Trusts

a. Purpose

A Disability Annuity Trust can be established for a disabled child or any disabled individual.⁴⁰ However, in considering the use of an annuity trust for a disabled person, care must be taken to examine the other government benefits currently being received, or which may in the future be received, by the person with disabilities.

If the person is receiving SSI, that person also receives Medicaid. SSI is a means-based program. Both resources and income are considered in determining eligibility. If the person with disabilities receives distributions from the annuity trust, this may well disqualify that person from receiving SSI and cause a loss of Medicaid. If a Disability Annuity Trust is designed as a Special Needs Trust, public benefits may be preserved.

If the person with disabilities is receiving SSD, this is usually accompanied by Medicare. SSD and Medicare are insurance-based programs, rather than means-based programs. Receipt of income from the annuity trust would not cause a loss of SSD or Medicare. However, consideration should be given to other benefits, which the person with disabilities may receive in the future. For example, will the person with disabilities be a candidate for group housing in the future? If so, the existence of the annuity trust may cause them to lose that benefit.

b. Trust Design

(1) The concept

A Disability Annuity Trust is a “sole benefit of” trust. A “sole benefit of” trust is a creature of HCFA Transmittal 64.⁴¹ These trusts have traditionally been used in crisis planning. They can be established for the benefit of a disabled person. Under federal law the assets in the trust are then paid out to the beneficiary on an actuarially sound basis using the actuarial tables contained in HCFA Transmittal 64.⁴² Unfortunately, New Jersey does not follow federal law and requires a payback provision so that the State Medicaid Agency is repaid upon the death of the disabled beneficiary.

⁴⁰HCFA Transmittal 64 § 3257(B)(6).

⁴¹HCFA Transmittal 64 § 3257.

⁴²*Id.*

(2) **Definition of "sole benefit of"**

HCFA Transmittal 64 deals with transfers of assets and treatment of trusts.⁴³ "For the sole benefit of" is defined.⁴⁴ "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 for the spouse, blind or disabled child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future. For a transfer or trust to be considered for the sole benefit of one of these individuals, the instrument or document must provide for the spending of funds involved for the benefit of the individual on a basis that is actuarially sound based on the life expectancy of the individual involved." The individual does not necessarily have to be a disabled child.

(3) **Key Issues**

(a) **Availability**

The key issue concerning trusts "for the sole benefit of" is availability. In a recent private letter, the Health Care Financing Administration has taken the position that a trust established for the sole benefit of a community spouse under HCFA Transmittal 64 is an available resource.⁴⁵ It should be noted that the letter from HCFA is not law. There has been no letter from HCFA, CMS or other governmental agency suggesting that assets in a Disability Annuity Trust are "available." However, this remains an open question.

(b) **Transfer penalty**

HCFA Transmittal 64 states that transfers for the sole benefit of a disabled person are exempt transfers.

(c) **Payback**

Under federal law there is no payback requirement for a Disability Annuity Trust. However, New Jersey does not follow federal law and its regulations require that a payback provision be included in the trust instrument.

⁴³HCFA Transmittal 64 § 3257.

⁴⁴HCFA Transmittal 64 § 3257(B)(6).

⁴⁵Letter dated April 16, 1998 from Robert A. Streimer, Disabled and Elderly Health Programs Group, Center for Medicaid and State Operations, Health Care Financing Administration, to Jean Galloway Ball.

5. Disability Annuity Special Needs Trusts

a. Purpose

The purpose of a Disability Annuity Special Needs Trust is to qualify the grantor for Medicaid immediately while preserving the public benefits of the beneficiary.

b. Key Issues

(1) Availability

Because of the special needs language, the assets in the trust should not be considered an available resource.

(2) Transfer Penalty

Since the transfer is for the sole benefit of the disabled person, there is no transfer penalty.

(3) Payback

Under federal law there is no payback requirement for a Disability Annuity Trust. However, New Jersey does not follow federal law and its regulations require that a payback provision be included in the trust instrument.

6. 529 Plan Trusts

a. Purpose

The purpose of a 529 Plan Trust is to make the assets in the trust unavailable to the person contributing to the trust.

b. Authority

There is no statutory authority authorizing a 529 Plan Trust in New Jersey, but the state agency has indicated that it will review these trusts on a case-by-case basis.

c. Trust Design

The trust is designed to meet all of the requirements of a 529 Plan except that the right of the contributor to take back the assets contributed to the plan is eliminated.

d. Key Issues

(1) Availability

Since the contributor no longer has a right to regain control of the assets contributed to the trust, the assets should not be available for Medicaid eligibility purposes.

(2) Transfer Penalty

The transfer to the trust does not meet any of the tests for an exempt transfer and therefore the contribution would be considered subject to the Medicaid transfer rules.

(3) Payback

There is no requirement for any payback from a 529 Plan Trust.

7. Reparations Trusts

a. Purpose

The purpose of a Reparations Trust is to avoid commingling of reparations. Reparations to Holocaust victims are not counted as income. They are also not counted as resources unless the reparations funds are commingled with other funds. In order to avoid commingling funds a Reparations Trust might be considered. This is not the only way to avoid commingling, but it is a simple way to accomplish this objective.

b. Key Issues

(1) Availability

The assets are non-countable and, therefore, will not be considered available for Medicaid eligibility purposes.

(2) Transfer Penalty

Since the income and assets are non-countable it could be argued that they are not subject to the Medicaid transfer rules. As a practical matter the amounts are so small that they would be less than the divisor used to calculate the penalty.

(3) Payback

There is no payback requirement for a Reparations Trust.