

ADMINISTRATION OF A SELF-SETTLED SPECIAL NEEDS TRUST

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Serving as Trustee or advising a Trustee of a Self-Settled Special Needs Trust is extremely complex. Typically the beneficiary of the trust is either now receiving or likely to receive Supplement Security Income (SSI) and/or Medicaid or other needs-based public benefits. Medicaid is based on SSI rules that need to be understood by the Trustee. The Trustee must make distributions without jeopardizing these important benefits. In addition, the Trustee must comply with the general rules applying to all trusts, must be familiar with the Trustee's general duties as Trustee, must understand the reporting guidelines for the Social Security Administration and State Medicaid Agency.

SECTION 1. MECHANICS OF ESTABLISHING THE TRUST, PAYING TAXES AND COMPENSATION.

- 1.1. Name of Trust. The Trustee must understand how to title trust assets. Generally a trust is titled “[Name of Disabled Person] Trust date [date of trust].”
- 1.2. Bank Account. The Trustee should open a Trust bank account using the name of the Trust. Use the Taxpayer ID number of the Trust. The Taxpayer ID number must be obtained for the Trust. A minimum deposit should be left in the bank account to satisfy bank requirements and avoid unnecessary charges.
- 1.3. Investment Income. Trust investment income should be deposited into the Trust bank account.
- 1.4. Federal 1041. The Trustee must file an IRS Form 1041 for the Trust prior to April 15 of each calendar year.
- 1.5. New Jersey Form 1041. The Trustee must file a New Jersey Form 1041 for the Trust prior to April 15 of each calendar year.
- 1.6. Federal K-1. The Trustee must file an IRS Form K-1 with the IRS and transmit a copy of the K-1 statement to the Trust Beneficiary on or before March 1 of each calendar year for the preceding calendar year. The Beneficiary will need the K-1 to complete his or her own 1040 and needs time after receiving the K-1 to do so. A K-1 to the Beneficiary is required even though income was not paid directly to the Beneficiary, if income was used for the benefit of the Beneficiary.
- 1.7. Compensation. The Trustee is entitled to reasonable compensation for its services as Trustee and for reimbursement of any reasonable expenses

incurred in carrying out its duty. In New Jersey, Trustees may annually, without court allowance, take commissions on corpus (including accumulated income which has been invested by the fiduciary) in the amount of 5/10ths of 1 percent of the first \$100,000 of the value of the corpus, 3/10ths of 1 percent of the next \$100,000 of the value of the corpus, and 2/10ths of 1 percent of the value in excess of \$200,000. The value of the corpus for purposes of computing the commissions should be revalued at the end of each year. Payment of the corpus commission should be at the end of the Trust year.

Pursuant to the Prudent Investor Act, investment advisors are paid out of regular Trustee's fees and not in addition thereto.

- 1.8. Bond. If the Trust is a Special Needs Trust, bond is required unless waived by the court if the beneficiary is a minor,¹ or if the beneficiary is an incompetent adult.²
- 1.9. Accounting. If the Trust is a Special Needs Trust, an accounting is required on an annual basis.³ The accounting is filed with the County Board of Social Services.
- 1.10. Irrevocability. If the Trust is a Special Needs Trust, the Trust is irrevocable. However, it can be amended as necessary to conform to the requirements of 42 U.S.C. 1396p and/or state law.⁴

SECTION 2. GENERAL DUTIES OF TRUSTEE.

Every Trustee is held to a high standard of performance. The Trustee is known as a fiduciary. These duties include the following:

¹N.J.A.C. 10:71-4.11(g) 1 iv (1)

²N.J.A.C. 10:71-4.11(g) 1 xi (1)

³N.J.A.C. 10:71-4.11(g) xvi.

⁴N.J.A.C. 10:71-4.11(g) viii (1).

- 2.1. Monitor Investments. Monitor Trust investments on a regular basis. This should be done no less frequently than quarterly. An individual Trustee should consider retaining an investment advisor. This could be a bank trust department or a stock broker or financial planner. An individual should not try to do any Trust investment by himself. The Trustee is responsible for Trust investments. The Trustee has a duty to make prudent investments consistent with the goals of the Grantor for the Beneficiary.
- 2.2. Carry Out Terms of Trust. The Trustee has an obligation to carry out the terms of the Trust as specified in the Trust documents.
- 2.3. Loyalty. The Trustee is a fiduciary and has a duty of loyalty to the Beneficiary. The Trustee must not self-deal.
- 2.4. Keep Accounts. The Trustee has an obligation to account for all assets received, for all income received, for all funds expended, and for all assets remaining in the Trust.
- 2.5. Render Accountings. The Trustee should render accountings whether or not required on no less than an annual basis. This satisfies everyone that the Trustee is performing his or her duties.
- 2.6. Trust Accounts. All Trust assets must be invested in Trust accounts. Trust assets must not be commingled with the personal funds of the Trustee.
- 2.7. Protect Trust Property. The Trustee has a duty to protect trust property and to provide insurance for Trust assets where appropriate.
- 2.8. Make Trust Assets Productive. If the Trustee has Trust assets which have been transferred to the Trustee, the Trustee has a general duty to invest them in such a way that they are productive for the income Beneficiary.
- 2.9. Duty of Confidentiality. The Trustee has a duty to the Grantor and Beneficiary of the Trust to keep information concerning the Trust confidential. The Trustee must not discuss the Trust with family members or friends. Trust business should be discussed only with the Grantor, the Trust Beneficiaries, legal counsel and investment counsel.
- 2.10. Allocation Between Income and Principal. The Trustee must make the proper allocation between income and principal when administering a trust. If you have questions concerning a proper allocation, consult this office.

- 2.11. Defend Trust Against Attack. If this Trust is attacked by Medicaid or by any government agency, contact this office for assistance.

SECTION 3. REVIEW OF THE SSI/MEDICAID PROGRAMS.

- 3.1. Overview of SSI/Medicaid Programs. SSI is administered by the Social Security Administration (SSA). The Medicaid program is administered by the Department of Medical Assistance and Health Services, but most of the administration is delegated to the County Boards of Social Services. SSI is a monthly cash payment for the **food, clothing and shelter** of the Beneficiary. To be eligible the Beneficiary must be aged, blind or disabled and his income and assets must be low enough to meet the SSI/Medicaid requirements. Cash income to the SSI recipient reduces his/her income dollar-for-dollar. In most cases if the SSI payment is eliminated, the accompanying Medicaid will also be eliminated. It is crucial in administering the Trust never to pay cash to the Beneficiary.

The Trust is structured in such a way that the assets are not “available” for SSI and Medicaid eligibility purposes. This means that those assets are not counted when the Beneficiary is means tested for eligibility.

SSI is governed by federal law⁵ and the Code of Federal Regulation © 2008 E39175 29003 0 7
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- Home improvements, repairs, and maintenance by outside source;
- Travel and education;
- Recreation and entertainment;
- Medical insurance;
- Telephone bills;
- Newspaper subscriptions;
- Services of a care manager;
- Vacations;
- Travel expenses of relatives;
- Movies;
- Tax payments;
- Medical treatment for which public funds are unavailable;
- Difference between a private and semi-private room in an institution;
- Installation of a burglar alarm or monitoring/response system in home;
- School tuition, books and supplies;
- Life insurance;
- Cleaning supplies and paper products;
- Dental care, physical therapy, massages, support services, and other medical costs not covered by any benefit programs;
- Home care services not covered by another program;
- Gifts to family members;
- Personal services, including lawn mowing, house cleaning,

grocery shopping and babysitting;

- Airline and other transportation tickets - used for travel by a beneficiary or spouse or parent whose income is subject to deeming is not countable income to the beneficiary if used for travel among the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, America Samoa and Northern Mariana Islands. The ticket is not considered income unless it is converted to cash;²⁰ and

- Non-domestic travel - a ticket for non-domestic travel must be non-refundable.

4.5. Distributions that will Reduce the SSI Benefit. These include:

- Shelter-related expenses (mortgage payments, real property taxes, heating and cooling bills, electricity, water, sewerage, garbage collection);

- Groceries or meals;

- Items of clothing;

- Cash for any purpose (in excess of \$20 per month); and

- Education-related expenses for housing or food, such as dorm fees.

4.6. Prepaid Funeral. Purchase a prepaid funeral for the Beneficiary out of Trust assets. If the Beneficiary dies without paying for a prepaid funeral, the Trust assets must first be used to satisfy any claims of Medicaid before a funeral can be purchased. It is important to purchase the funeral during the Beneficiary's lifetime.

4.7. Legal Counsel. Contact legal counsel if you have any questions whatsoever concerning distributions from the Trust.

4.8. Trustee Fees, Administrative Expenses and Legal Fees. These should be paid on a monthly basis. Otherwise, there may not be sufficient trust assets to

²⁰POMS SI 00830.521.

make these payments after the death of the beneficiary and repayment to the State Medicaid Agency.

- 4.9. Distributions to Parent or Spouse for Care. Distributions to a parent or spouse for care over and above what would normally be expected under a parent or spouse's obligation of support is appropriate. For example, a parent may forego outside employment to care for a child on a full-time basis. Payment to the parent based on what a third party with the same training and expertise as the family member would be permitted. However, if the child is under 18 the ²¹payment from the trust to the parent will be deemed to the child and may affect the eligibility of the child. The trust should consider paying for medical disability and life insurance for the parent/spouse caregiver. If the caregiver becomes disabled or dies, the proceeds can be used to purchase care from a third party.

SECTION 5. REPORTING GUIDELINES - SSA/MEDICAID.

5.1. Social Security Administration (SSA).

- 5.1.1. Basic Requirements. The Beneficiary of the Trust as an SSI recipient has an obligation to report to the Social Security Administration (SSA) the existence of the Trust. However, in many cases the Beneficiary is a minor or incompetent and this obligation falls on the Representative Payee. As a practical matter this obligation is often passed on to the Trustee. The Trustee should answer that the Beneficiary is not receiving income unless the Trustee decides to distribute income, which is in the absolute and sole discretion of the Trustee. The SSI computer system will pick up any income generated by the Trust. This comes from the K-1 issued by the Trust. Medicaid has a computer match with the I.R.S. and will learn of these income distributions. It will be incumbent upon you to show that payments were made to third party providers and not directly to the Beneficiary. SSI has a right to inquire as to the amount and purpose of distributions from the Trust. The Trustee must respond honestly and completely to any such inquiries. SSI is concerned that income NOT be used to provide food, clothing or shelter. The Trustee must keep excellent records and receipts

²¹Bernstein, Roger M. *Special Needs Trust: Administration and Compliance*, NAELA Quarterly (Summer 2001), Vol. 14, No. 3, at p. 13.

for SSI and Medicaid. The Beneficiary or his/her Representative Payee must report where the Beneficiary lives and when the Beneficiary changes residence. The Representative Payee is the person designated by SSA to receive the SSI payment on behalf of the Beneficiary. The Beneficiary must report all of the following:

- 5.1.1.1. Address. Change in Beneficiary's address.
 - 5.1.1.2. Employment. Change in employment status.
 - 5.1.1.3. Living Arrangements. Change in the arrangements (such as adding or losing a roommate).
 - 5.1.1.4. Income. All income (including the receipt of any direct income or ISM from the Trust)
 - 5.1.1.5. Resources. Any change in countable resources.
 - 5.1.1.6. Medical Insurance Coverage. Any change in the Beneficiary's medical insurance coverage.
 - 5.1.1.7. Marital Status. Any change in the Beneficiary's marital status.
 - 5.1.1.8. Physical or Medical Condition. Changes or improvements in Beneficiary's physical or mental condition (for example, the Beneficiary improves so much that he or she is no longer considered disabled).
 - 5.1.1.9. Medical Facility. Admission to or discharge from any health facility or public facility (such as a hospital or nursing home).
 - 5.1.1.10. Travel. Any trip outside the United States.
 - 5.1.1.11. Other Public Benefits. New eligibility for other public benefits.
- 5.1.2. Additional Requirements. Additional reporting requirements include:
- 5.1.2.1. Written. The report must be in writing to the Social Security Administration.

- 5.1.2.2. Name. The report must include the Beneficiary's name.
- 5.1.2.3. Social Security Number. The report must include the Beneficiary's Social Security Number.
- 5.1.2.4. Event. A description of the event that triggered the report and the date of the event. The report is due within 10 days after the month in which the event took place.

The Trustee is not required to send these reports. The representative payee is responsible for filing the reports. It is good practice for the Trustee to monitor the reporting and if the Trustee does make the report to keep a copy.

5.1.3. Penalty. If reports are not made on a timely basis, SSA may seek reimbursement for benefits incorrectly paid and assess a penalty for up to \$100 for a late filing. Failure to respond to correspondence from SSA may result in a loss of benefits.

5.1.4. Appeals. If SSA or Medicaid notifies the Beneficiary that it intends to reduce or eliminate benefits, there is a 10 day right of appeal. The appeal must be in writing. If the appeal is filed within 10 days, the benefits continue. If the appeal is not filed within 10 days, there is a 60 day window to appeal an SSI decision and a 90 day period to appeal a Medicaid notice of action or decision. However, benefits will be discontinued if the appeal is not filed within 10 days.

5.2. Medicaid. Notice must be given to the State Medicaid Agency or a division thereof under certain circumstances.

5.2.1. Establishment or Funding of Trust. When the Trust is established or funded the County Board of Social Services which provided funding must be notified of the establishment of the Trust.

5.2.2. Death of Beneficiary. The County Board of Social Services which provided medical assistance must be notified upon the death of the beneficiary.

- 5.2.3. Transfers for Less Than Fair Market Value. The Board of Social Services which provided medical assistance must be notified of any transfers from Trust principal for less than fair market value in advance of such transfers.
- 5.2.4. Substantial Depletion of Principal. The New Jersey Division of Medical Assistance and Health Services, Bureau of Administrative Control must be notified 45 days in advance of any expenditure in excess of \$5,000 or any transaction that substantially depletes the principal.
- 5.2.5. Bonding. The County Board of Social Services that provided medical assistance must be notified of proof of bonding, if the Beneficiary is a minor or is incompetent, unless the requirement has been waived by a court of competent jurisdiction.
- 5.2.6. Notification of Accounting. Trustee shall furnish the County Board of Social Services that provided medical assistance with an annual accounting.
- 5.2.7. Change of Trustee. The Division of Medical Assistance and Health Services, Bureau of Administrative Control must be notified of any change of trustee.