The art of representing people

ADMINISTERING A SUPPLEMENTAL NEEDS TRUST
GUIDELINES FOR THE TRUSTEE

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I. DISBURSEMENTS FROM THE TRUST

The purpose of a Supplemental Needs trust is to improve the quality of one's life without impacting their eligibility for receiving public benefits. As trustee, your job is to have an understanding of the government benefits the beneficiary is receiving to ensure that the use of the trust will not impact their eligibility. Therefore it is important for you to follow these guidelines to understand how to administer the trust funds properly without risking a loss of benefits for the beneficiary.

There are two main types of Supplemental Needs trusts with different implications. A **Third-Party Supplemental Needs Trust** is funded by someone else for the benefit of the beneficiary. A **Self-Settled Supplemental Needs Trust** is funded with assets of the beneficiary. The key difference is that when the beneficiary of a Self-Settled Supplemental Needs Trust passes away, the State that administered their Medicaid benefits will be entitled to reimbursement from the trust for all Medicaid benefits paid out during the lifetime of the beneficiary. A Third-Party Supplemental Needs Trust's assets are protected from the State and any assets remaining in the trust after the death of the beneficiary may be passed on to the remainder beneficiaries. Understanding which type of Supplemental Needs Trust you are working with and the rules and limitations that apply will help you as trustee make the right decisions in the best interest of the beneficiay.

A. Specific Purchases:

1. **Food and Shelter - SSI prohibits disbursements from a trust for in-kind support and maintenance (ISM):**
   SSI counts disbursements for food and shelter as in-kind support and maintenance (ISM). ISM is recognized as countable income. The following is a list of what the Social Security Administration considers "food and shelter":

a. Food

b. Mortgage (including property insurance required by the mortgage holder)

c. Real property taxes (less any tax rebate/credit)

d. Rent

e. Heating fuel, gas, electricity, water, sewer, garbage removal

If a trustee makes a distribution for ISM, SSI may reduce the monthly benefit of the beneficiary by up to one-third of the monthly grant. If a beneficiary receives SSD, the above prohibitions do not apply.

2. **Buying a Home:**

a. The purchase of a home either in the name of the trust or the beneficiary will not result in the beneficiary losing SSI, but they may be subject to having their SSI grant reduced during the month that the home is purchased.

b. If the home is purchased in the trust's name, it will be subject to pay back Medicaid upon the beneficiary's death, whereas if the home is purchased in the name of the beneficiary, this allows for planning that could protect the home from pay back to the State for Medicaid.

3. **Making Appropriate Disbursements – Such disbursements must be made directly to the vendors of such services. Distributing cash directly to the beneficiary is prohibited!**

a. **Clothing –** SSI recognizes that a clothing purchase for the beneficiary will not affect eligibility. Clothing is always an appropriate disbursement.

b. **Utility payments (phone, cable, internet services) –** There is no limit on utility payments paid directly to the vendor.

c. **Vehicle, insurance, maintenance, gas** – Purchase and maintenance of a vehicle (including gas and insurance) is permitted. Since gas money can technically be converted to food or shelter and could therefore impact eligibility, getting a gas credit card that can only work for gas is a good option.

d. **Pre-paid burial/funeral expenses** – Permitted so long as it is paid before the death of the beneficiary.

e. **Tuition, books, tutoring –** There is no limit on disbursements for education.

f. **Travel and entertainment** – The trust may only pay for the "reasonable expenditures of the beneficiary" (and one companion if the beneficiary cannot travel alone).

g. **Household furnishings and furniture –** The trust can purchase appliances, furniture, etc., for the house/apartment.

h. **Television, computers and electronics –** Permitted so long as they are considered "ordinary household goods," meaning they are used on a regular basis and not kept for collectible value.

i. **Durable medical equipment** - Purchases might be limited if they are not determined to be "necessary"or if the equipment could also be considered a recreational item, such as a pool.

j. **Care management** – New York allows such expenditures, but may put limits if the person giving the care is a family member or parent who has an existing obligation of support to the beneficiary.

k. **Therapy, medications, alternative treatments –** Unless such treatments or therapy is prohibited under state law, the trust can pay for these items and services at no limit.

l. **Credit –** Purchases made with credit cards are considered to be "loans" and are not considered income at the time of the purchase so long as the goods purchased are not sold for cash. The trust can pay the credit card company without the payment being considered as income (unless the purchases are for food or shelter).

m. **Debit –** When a beneficiary uses a debit card through a trust-funded bank account, it will be considered as income. The full amount in the account could be considered as a countable resource. SSI rules, however, will permit the trust itself to own a debit card to be used by the beneficiary, so long as a True Link card is utilized. For more information, see www.truelinkfinancial.com.

II. TRUST ADMINISTRATION AND ACCOUNTING

A trustee must account to beneficiaries and other interested parties. Tax returns may need to be filed. A trustee's duties are very important. A trustee should seek legal counsel, and in some cases, professional investment, tax, and accounting assistance to ensure that the trust is administered correctly.

A. No Self-Dealing

1. Self-dealing is using trust assets for the trustee's own personal gain or mingling personal assets with trust assets. This includes borrowing from the trust, purchasing items or services with trust assets for the trustee's personal use, or selling trust assets to the trustee.

B. Impartiality

1. The trust has two types of beneficiaries: the **income beneficiary** (the disabled individual for whom the trust was established) and the **remainder beneficiary** (the person or entity who will receive assets when the income beneficiary dies, whether that be the State claiming a Medicaid payback, the beneficiary's family members, or other beneficiaries they have selected to receive trust assets when they die.)
2. A trustee must remain *impartial* as to both beneficiaries. Making investments that will disproportionally benefit one class of beneficiary and not the other will violate the trustee's duty to impartiality. If a trust contains language that makes clear the interests of one beneficiary over the other, it may not be accepted by Medicaid.

C. Delegation

1. A trustee may delegate functions (to investment advisers, tax preparers etc.), but will be liable for the actions of those delegates.

D. Investment

1. Assets in the trust may be invested. However, trustees are required to understand prudent investment practices. Trustees who have expertise in these areas will be held to a higher standard.

E. Bond

1. A trustee who is supervised by a probate court may need to be bonded. A bond is a type of insurance whereby the trust pays a premium in order to ensure that the trustee adequately manages the trust. Trust assets can be used to pay the premiums; the trustee does not have to use his or her own funds.
2. If the trustee fails to exercise his or her fiduciary duty, and the trust loses money as a result, the insurance company that issued the bond will compensate the trust for the assets lost and attempt to collect that money from the trustee.

F. Titling Assets

1. It is important that assets be titled in the name of the trustee (e.g. "John Smith, trustee of the Sarah Jones Special Needs trust u/a/d January 24, 2022"). Otherwise, the assets used to fund the trust could be counted as a resource of the beneficiary by agencies that administer government benefits.

G. Accounting Requirements

1. An accounting is a record of all financial transactions. A trustee may be required to provide annual accountings to the beneficiary, to the County, to the Social Security Administration, and in some cases, the court.
2. The accounting must include the nature or amount of any payment or investment and should be thorough, especially if the trust has significant assets or investments.

H. Reporting to Social Security

1. In some cases, the trustee may have a duty to account to the Social Security Administration. In such cases, the trustee cannot withhold information.
2. If the beneficiary receives SSI but not SSDI, and the trust is a **third-party trust**, the trustee *may not be required* to provide a full accounting to Social Security. However, they may still be required to report disbursements.
3. If the beneficiary receives SSI but not SSDI and the trust is a **self-settled or first-party trust**, the trustee *will be required* to report to Social Security.
4. If the beneficiary receives SSDI, no reporting is required regardless of the type of trust.
5. If someone receives SSI, they are automatically qualified for Medicaid, so there is no need to report to Medicaid separately. Although in New York, some counties may still ask for an accounting.

I. Reporting to the Court

1. Some trusts established by the court may require an annual accounting to the court. In some cases, particularly those in which the trust is created by court order, the trustee may have to provide an annual accounting to the court.

J. Modification of Trust

1. A special needs trust must be <u>irrevocable</u> in order for it to be counted as an exempt resource, and may not be modified or amended unless by court order.

K. Death of the Beneficiary

1. Self-settled trusts require repayment to the State for all lifetime Medicaid expenditures upon the passing of the beneficiary. The trustee will need to determine how much is owed to Medicaid. The trustee will need to request a written statement of the amount due.

2. Third-party supplemental needs trusts will <u>not</u> require repayment to Medicaid.

3. It is very important that the beneficiary has a pre-paid funeral in place because SSI and Medicaid will not allow payment of funeral expenses after the death of the disabled individual.

4. Generally, termination of a third party trust will require tax preparation as well as a final accounting and distribution to the beneficiaries.

II. INCOME TAXATION

A. Income Taxation of Special Needs trusts – Grantor and Third Party trusts

1. Typically, a self-settled special needs trust will be a grantor trust if a family member is the trustee, meaning that all income should be reported on the disabled beneficiary's income tax return.
2. An EIN is not required for a grantor trust, but the trustee may prefer to obtain one for record-keeping purposes. If an EIN is not obtained, the beneficiary's social security number can be used as the tax identification number of the trust.
3. Third Party trusts will have to obtain an EIN, and the trust itself will pay taxes on income earned by trust assets.