

SPECIAL NEEDS TRUSTS IN OREGON
Disability Rights Oregon WIPA and WIN Training
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I INTRODUCTION

A. Why Special Needs Trusts? The limited benefits provided by SSI, Medicaid, and other government programs based on financial need are not sufficient to pay for things that are important for the person's quality of life, such as communication, advocacy, transportation, and recreation. Special needs trusts (sometimes called "supplemental needs trusts" or "SNTs") developed as a way for families to provide a supplemental source of funds to improve the disabled trust beneficiary's quality of life without having the trust assets be available and used for basic support. Several types of SNTs are now recognized by federal and state law.

B. Government Benefits Based on Financial Need. Many people with disabilities rely upon a combination of government benefit programs for monthly cash benefits, medical coverage, food, and housing. Some of the programs are based on financial need. It is important to identify which government benefits are involved when planning for people with disabilities and when administering trusts for disabled beneficiaries. There are frequent changes to government benefit programs, so it is necessary to check the laws, rules, and policies that are in effect when making decisions that may affect eligibility for benefits or the amount of benefits.

II BENEFITS NOT BASED ON FINANCIAL NEED

A. Social Security Retirement Benefits. Social Security retirement (and Railroad Retirement) benefits are the monthly cash payments made under a federal pension plan. A beneficiary must be at least age 65 (or age 62 for early retirement with reduced benefits) and either have done enough paid work to qualify for insured status or be entitled to benefits based on a wage earner's account. *See 42 USC §402 et seq.*

B. Social Security Disability Insurance (SSDI) Benefits. SSDI benefits are monthly cash benefits paid to people under age 65 who are unable to do any type of work due to a physical or mental disability. A beneficiary must have done enough paid work to qualify for insured status. *See 42 USC §423 et seq.*

C. Social Security Dependent Benefits. A dependent child who is under age 18 (or under age 19 if a full-time student in elementary or high school) and who is not married may receive monthly cash payments from the Social Security program based on a parent's work record if the parent is receiving Social Security retirement benefits or SSDI benefits or has died. A person who was disabled prior to age 22 may be entitled to disabled adult child (DAC) benefits based on a parent's work record.

D. Medicare. Medicare is the federal health insurance program for people who are age 65 and older, who have received SSDI benefits for at least two years, or who are disabled due to end-stage renal disease or ALS. 42 USC §1395. Medicare has two main parts: Part A, Hospital Insurance, and Part B, Medical Insurance. Part D plans cover prescription drugs. There are premiums for Part B and for Part D plans, and there are deductibles and co-payments for all three parts. A person who has Medicare coverage may also have supplemental insurance, may be part of a Medicare managed care plan, and/or may have Medicaid coverage.

E. Other Programs. Other government benefits that are not based on financial need include workers compensation, unemployment benefits, civil service pensions, PERS benefits, and military pensions.

III BENEFITS BASED ON FINANCIAL NEED

A. Supplemental Security Income (SSI). SSI is the federal program that makes monthly cash payments to people who are over age 65 or blind or disabled and who have little or no income and limited resources. The disability standard for adults is the same one used for SSDI benefits. The disability standard for children under age 18 is based on severe functional limitations. *See* 42 USC §1381 *et seq*; 20 CFR §416.101 *et seq*.

B. Medicaid. Medicaid is the joint federal-state program that provides medical assistance for people in certain categories who meet the applicable income and resource limits. A person who is eligible for SSI is automatically eligible for Medicaid (sometimes called “OHP Plus” in Oregon). The Oregon Health Plan, which added categories of eligibility, is operated by the Oregon Dept. of Human Services (DHS) under a waiver from the federal government. *See* 42 USC §1396; 42 CFR §430.0 *et seq*; ORS 414.032 *et seq*; OAR 461-101-0010 *et seq*.

C. Other Programs. Other government benefits based on financial need include OSIP (a state supplement of \$1.70 per month paid to an SSI beneficiary), food stamps, housing subsidies, and energy assistance.

IV FINANCIAL ELIGIBILITY FOR SSI

A. Income. The 2009 SSI federal benefit rates are \$674 per month for a single person and \$1,011 per month for a married couple. 20 CFR §416.401 *et seq*. Income belonging to one spouse is considered available to both spouses. Income is counted unless it is specifically excluded by a statute or rule. Countable income will reduce the amount of the SSI benefit. EXAMPLE: An SSI beneficiary who gets \$500 per month in SSDI benefits will receive \$194 per month in SSI benefits for a total income of \$694 (due to the \$20 unearned income disregard).

1. Countable Income. Countable income can be earned or unearned, in cash or in-kind. A lump sum payment such as an inheritance is counted as unearned income in the month received. Any money that remains in the following month is counted as a resource. Payments made by others to third parties for meals, or for rent or utilities for the SSI beneficiary

are counted as in-kind income. Payments made by others to third parties for expenses that are not food or shelter are not counted. This concept is central to special needs trusts.

2. In-Kind Support and Maintenance (ISM). If an SSI beneficiary lives in someone else's household and receives food and shelter from that person, his or her SSI benefit will be reduced by one-third of the federal benefit rate (20 CFR §416.1131 *et seq.*, known as the "one-third reduction rule"). If a special needs trust or another person pays for food or shelter for an SSI beneficiary, the SSI benefit will be reduced by the smaller of the actual value received or one-third of the federal benefit rate plus \$20 (20 CFR §416.1140, known as the "presumed value rule"). **EXAMPLE:** A beneficiary who receives \$500 in SSDI benefits and \$194 in SSI benefits will lose eligibility for SSI and Medicaid benefits if a relative pays the landlord \$300 per month towards the individual's rent.

3. Excluded Income. Retroactive SSDI and SSI benefits are not counted as income. However, if they can no longer be identified or if they have not been spent within six months of when they are received, they are counted as a resource. Unearned income used for an approved self-support plan is not counted. A refund of federal income tax is not counted as income. Other examples of excluded income can be found in the Appendix to 20 CFR §416.

B. Resources. An available resource is counted if it is cash or could be converted to cash, unless it is specifically excluded by a statute or rule. For a married couple, resources that belong to one spouse are deemed to be available to the other spouse (except for eligibility for Medicaid for long-term care services, discussed below). The resources that belong to parents are deemed to be available to a child under the age of 18.

1. Resource Limits. The countable resource limits for SSI are \$2,000 for a single person and \$3,000 for a married couple. The last time that the resource limits were increased was in 1989. 20 CFR §416.1205.

2. Excluded Resources. Certain resources are excluded and are not counted. These include the home, household goods, personal effects, medical and adaptive equipment, and one vehicle (within certain limits). Resources that are part of an approved PASS are also excluded. 20 CFR §416.1210 *et seq.*

3. Countable Resources. Any resources that are not specifically excluded by statute or administrative regulation are counted. Countable resources include cash, bank accounts, IRAs, the cash surrender value of whole life insurance policies and annuity contracts, stocks, bonds, real property other than the home, and additional vehicles.

V FINANCIAL ELIGIBILITY FOR MEDICAID

A. SSI Beneficiaries. Someone who is eligible for SSI benefits is automatically eligible for Medicaid assistance.

B. Income and Resource Limits for Long-Term Care.

1. Income Limit. In Oregon, a single person who meets the other SSI eligibility requirements and who needs long-term care services is eligible for Medicaid assistance if his or her gross monthly income is no more than 300% of the SSI federal benefit rate for a single person (300% x \$674 = \$2,022, for 2009). OAR 461-155-0250(1). If the person's gross income is above the limit, he or she can qualify for Medicaid assistance by creating a Medicaid income cap trust and assigning the income to that trust. If the person is married, the spouse's income is not counted.

2. Resource Limit. The countable resource limit for the person applying for or receiving Medicaid assistance for long-term care is \$2,000, regardless of whether the person is married or single. OAR 461-160-0015(4).

3. Community Spouse Resource Allowance. The spouse of a Medicaid applicant who is receiving long-term care services is permitted to keep an amount equal to half of the couple's countable resources as of the date when the most recent continuous period of care began, with a minimum of \$21,912 and a maximum of \$109,560 (in 2009). OAR 461-160-0580. This is the community spouse resource allowance or CSRA.

VI GIFTS AND TRANSFERS FOR LESS THAN FAIR MARKET VALUE

A. Impact of Transfers for Less Than Fair Market Value. Gifts and transfers of assets for less than fair market value are penalized in the SSI and Medicaid programs.

1. SSI Penalties for Asset Transfers. If the person (or the person's spouse or agent) gives away money or property, or transfers assets for less than fair market value within the preceding 36 months (3 years), the person is ineligible for SSI benefits for up to 36 months, depending on the amount that was transferred. *See* 42 USC §1382b.

2. Medicaid for Long-Term Care Penalties for Asset Transfers. For gifts and transfers made on or after July 1, 2006, the "look back" period is 60 months (5 years). The period of ineligibility for Medicaid for long-term care services does not begin when the gift or transfer was made. It starts when the person meets the other Medicaid eligibility requirements. The length of the period of ineligibility is calculated by dividing the total value transferred by the state figure for the average private pay rate for nursing facility care. *See* 42 USC §1396p(c); OAR 461-140-0242. Oregon uses \$6,494 per month as the average private pay rate for applications made on or after October 1, 2008.

B. Transfers That Do Not Cause Ineligibility. Some gifts and transfers for less than fair market value do not result in a period of ineligibility for SSI or Medicaid. For instance, if the conditions described below are met, the person may transfer assets to a payback special needs trust or to a pooled special needs trust. 42 USC §1396p(d)(4); OAR 461-140-0242(2).

V DISTRIBUTION STANDARDS IN TESTAMENTARY TRUSTS

A. Testamentary Trusts. A will or a revocable living trust may provide for a gift of money or property to be given to a trustee for the benefit of a beneficiary instead of being given directly to the beneficiary. A testamentary trust is not created or funded until after the person who executed the will or the revocable living trust has died. The following are examples of distribution standards commonly used in testamentary trusts.

1. Scheduled Distributions. The testamentary trust may direct the trustee to make distributions of income or principal to the beneficiary at specific points. The amount that is or could be distributed will be counted as income if the beneficiary receives SSI or Medicaid benefits. EXAMPLE: “My trustee shall distribute all the income of the trust to or for the benefit of the beneficiary in quarterly or more frequent installments.”

2. Mandatory Support Trusts. The testamentary trust may direct the trustee to make distributions of income and/or principal for the beneficiary’s support. The full amount that could be distributed will be counted as an available resource if the beneficiary receives SSI or Medicaid benefits. EXAMPLE: “My trustee shall distribute to or for the benefit of the beneficiary those amounts of income or principal which are necessary for the beneficiary’s health, education, maintenance, and support.”

3. Discretionary Support Trusts. The testamentary trust may give the trustee the absolute discretion to make or not make payments for the benefit of the beneficiary. The payments can be for basic needs such as food, shelter, and medical care. There may be additional language about the settlor’s intent. Some Social Security regions and states count the full amount that could be distributed from a discretionary support trust as an available resource.

B. Testamentary Special Needs Trusts.

1. Distributions Limited to Special Needs. The testamentary special needs trust may limit distributions to special (or supplemental) needs only, and prohibit the trustee from making distributions for food, for shelter, and for medical expenses that are covered by Medicaid. The goal is to protect eligibility for SSI, Medicaid, and other government benefits based on financial need by only allowing the types of distributions that would not be counted as income. Examples of expenses that the trustee of a special needs trust with this restrictive standard could pay include cell phone equipment and services; computer equipment and services; transportation (bus pass, car maintenance, bicycle, etc.); case management; health care not covered by Medicaid; guardian’s fees; travel and recreation; classes; pet and service animal care; subscriptions; television and cable service; tickets to cultural or sports events; hobby supplies; hair and nail care; and clothing. Examples of prohibited distributions include payments made directly to the beneficiary; rent; mortgage (including insurance required by the mortgage holder); property taxes; water and sewer; gas and electric power; garbage service; and food. The special needs trust may authorize the trustee to purchase exempt resources (such as a home or a car) and distribute those to the disabled beneficiary.

2. Hybrid or Spigot Special Needs Trusts. The testamentary trust may state that the purpose of the trust is to preserve the beneficiary's eligibility for government benefit programs and to provide for special needs, while allowing the trustee to pay for food and shelter under certain circumstances. This flexibility means that the trustee of a hybrid special needs trust has to weigh the impact of actual distributions for basic needs on the government benefits received by the beneficiary. This approach may not protect the beneficiary's eligibility for government benefits, depending on local policies.

3. No Payback Requirements. There are no payback requirements for a testamentary special needs trust because it is funded with assets that were owned by someone other than the disabled beneficiary.

VI SPECIAL NEEDS TRUSTS FUNDED WITH THE ASSETS OF THE DISABLED BENEFICIARY

A. Payback Trusts, Under 65 Disability Trusts, (d)(4)(A) Trusts. These names all refer to one of the two types of special needs trusts authorized by Congress - first in the Omnibus Budget Reconciliation Act of 1993, 42 USC §1396p(d)(4)(A), for Medicaid beneficiaries and later in the Foster Care Independence Act of 1999, 42 USC §1382(e), for SSI beneficiaries. The laws create exceptions to the transfer penalties that allow special needs trusts to be created and funded with assets that are owned by the disabled beneficiary if certain conditions are met. The assets may be an inheritance, proceeds from selling a home, a settlement for a personal injury claim, property awarded by the court in a divorce, or other resources.

B. Required Elements for Payback Trusts

1. Beneficiary. The life beneficiary must be disabled according to the SSI and SSDI standard for disability and must be under the age of 65 when the trust is established and when the trust is funded.

2. Settlor or Trustor. The disabled beneficiary cannot create the payback trust. Instead, the settlor or trustor must be a parent or grandparent who has the legal authority to establish the trust, or a legal guardian (or, in Oregon, a legal conservator) authorized by the court, or the court itself. The beneficiary must be "financially incapable" within the meaning of ORS 125.005(3) in order for the court to appoint a conservator.

3. State Gets Remaining Trust Assets to Pay Back Medicaid. The trust must provide that the money or property remaining in the trust at the death of the beneficiary will be paid to the state(s), up to the amount of Medicaid benefits paid for the beneficiary. SSI benefits do not have to be paid back from the trust. If there is money or property left after paying back the Medicaid benefits, the balance will go to the remainder beneficiaries named in the trust agreement. This right to repayment from a payback special needs trust is separate from the Medicaid estate recovery provisions in 42 USC §1396p(b) and ORS 414.105.

4. Distribution Standard. Distributions are usually limited to special needs.

C. Pooled Trusts. Pooled trusts are the second type of special needs trusts that can be funded with assets that belong to Medicaid and SSI beneficiaries. 42 USC §1396p(d)(4)(C); 42 USC §1382 (e); OAR 461-145-0540(10).

1. Nonprofit Associations as Trustees. Pooled trusts are managed by nonprofit associations and can be used for beneficiaries who became disabled before age 65. The nonprofit association acting as trustee pools the funds for investment and management purposes but maintains a separate sub-account for each beneficiary. The Arc of Oregon administers a pooled trust named the Oregon Special Needs Trust. Information about the Oregon Special Needs Trust is available at www.arc.oregon.org/osnt.htm.

2. Joinder Agreement. The joinder agreement may be executed by an adult disabled beneficiary under the age 65, or by a parent or grandparent with legal authority to act, by a legal guardian (or in Oregon, legal conservator), or by a court. Upon the beneficiary's death, any balance remaining in the sub-account can be used to pay back the state(s) for the Medicaid benefits paid for the beneficiary.

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